



GUIDANCE

DESIGNATION OF CONFIDENTIAL INFORMATION IN YESAA ASSESSMENTS - TRADITIONAL KNOWLEDGE -

October 2024



Confidential Information Designation under Section 121(a) – Yukon Environmental and Socio-economic Assessment Act (YESAA)

Traditional Knowledge

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PREFACE

The purpose of this public guide is to:

- Provide an overview of what types of information qualify as confidential information, what is required in the application to submit, and the process for designation for Executive Committee Screenings and Designated Office Evaluations.
- Provide specific information relating to the designation of Traditional Knowledge as confidential information.

As a result of the legislated definitions of “first nation” and “traditional knowledge”, s.121(a) applications may be made in respect of traditional knowledge of the Tetlit Gwich’in, or a Yukon First Nation, within the meaning of the Umbrella Final Agreement. This guide applies to Traditional Knowledge applications as confidential under Section 121(a) of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). Information related to Confidential Information Designation under Section 121(b) – YESAA Access to Information Act Exemption is available [here](#).

Disclaimer

This document is not intended to provide legal advice or direction. It is for information purposes only, and should not be used as a substitute for YESAA or its associated regulations and rules. In the event of a discrepancy, YESAA, regulations, and rules prevail. YESAB retains the discretion to deviate from the procedures described in this Bulletin where appropriate.

INTRODUCTION

YESAA provides legislative provisions for the designation and management of confidential information. Designated Office evaluations and Executive Committee screenings applications are submitted to the Executive Committee. Confidential information applications can be submitted by the proponent with a proposal, or from an assessment participant.

The Executive Committee will meet to review the application and make the determination as soon as possible. All information designated as confidential under YESAA will be given full and fair consideration in an assessment. There are benefits to having information designated confidential included in an assessment such as greater knowledge and understanding of the environment in which a project is proposed, the potential impacts of the project, or determining significance of likely adverse effects.

TYPES OF CONFIDENTIAL INFORMATION

There are two categories of information that fall within the confidential information designation in YESAA. The information will either be:

1. Traditional Knowledge, or
2. Information that is protected from disclosure under the Government of Canada [Access to Information Act \(ATIA\)](#)

CONFIDENTIALITY AGREEMENTS

Traditional Knowledge designated under s.121(a) is legally protected by YESAA. Consequently, non-disclosure agreements (also known as confidentiality agreements) are not required to prevent disclosure. However, if your First Nation has an information sharing protocol and wishes to enter into an agreement with YESAB with respect to the management of your Traditional Knowledge, please contact the Executive Committee Manager prior to submitting. YESAB recognizes the First Nations principles of OCAP (Ownership, Control, Access and Possession), and may enter into a confidentiality agreement at the request of a First Nation.

APPLICATION FORMS

Application forms are available on yesab.ca. The application form lays out the necessary information that must be provided in the package and how to submit the information to the Executive Committee. Note that different application forms and requirements apply between applications to designate Traditional Knowledge as confidential, and applications to designate ATIA exempt information as confidential.

FILE FORMATS

The application form is submitted in writing but for this purpose, the actual content of the confidential information can be written, video, audio, photos, GIS shapefiles, or maps.

Different file formats may be accepted, and for further instruction about file format standards for the confidential submission, contact the Executive Committee Manager.

INFORMATION REQUIREMENTS

This section explains how to complete the application and what must be provided for the Executive Committee to make their decision about whether to designate the information as confidential under s.121(a).

- Fill out all sections of the applicable application form.
- If submitting written confidential information, separate the confidential information from the application form in another envelope. Mark the sealed application envelope with "Confidential".
- Submit the application to the Executive Committee Manager at Head Office.

TRADITIONAL KNOWLEDGE SUBMISSIONS

Submission of Traditional Knowledge under s.121 guarantees the information remains confidential during the application review. YESAB will not disclose this information to anyone including decision bodies during the assessment if designated confidential. Moreover, confidential information will be given full and fair consideration in the assessment.

Traditional Knowledge applications should be made by the applicable First Nations, individual First Nation citizens or their authorized representatives. As a result of the legislated definitions of “first nation” and “traditional knowledge”, s.121(a) applications may be made in respect of traditional knowledge of the Tetlit Gwich’in, or a Yukon First Nation, within the meaning of the Umbrella Final Agreement. If the application to designated Traditional Knowledge as confidential is submitted by an entity other than the First Nation, the application should include written confirmation from the applicable First Nation indicating that:

1. the First Nation has reviewed the application;
2. the information contained in the application accurately represents their Traditional Knowledge; and
3. that the First Nation has authorized the applicant to make this s.121 application.

TRADITIONAL KNOWLEDGE DEFINITION

Traditional Knowledge is defined in s.2 of YESAA: *...the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and the environment, that is rooted in the traditional way of life of first nations*

YESAB understands that Traditional Knowledge is often orally transmitted, “collectively owned” and can be expressed through many different methods (i.e. stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language). When determining whether particular information could, potentially, be designated as confidential under s.121(a), the Executive Committee is bound to, and will be, applying the definition of Traditional Knowledge as set out above. The Executive Committee will be making their determination based on the definition set out in the Act.

TRADITIONAL KNOWLEDGE DETERMINATION

In addition to determining that the information comes within the scope of the definition of Traditional Knowledge in YESAA, the Executive Committee must be satisfied that the four different criteria set out in the applicable *Rules for Evaluations Conducted by Designated Offices* (DO Rules 38a, 42) and *the Rules for Screenings Conducted by Executive Committee* (EC Rules 81, 83) are met. In the sections below, details are provided for each of the criteria to help the applicant complete the application form:

Criteria #1: Relevance of Information to the Assessment

The Executive Committee must determine the information provided is relevant to proposal the assessment. The applicant should consider how the Traditional Knowledge relates to the assessment, the intention of its use or how it supports your position. This could mean that the information is important to the assessors’ understanding, consideration, or determination of any of the following:

- project scope and activities
- baseline effects
- identification and analysis of potential effects
- effects mitigation
- significance of project effects

Criteria #2: Availability of Information

The Executive Committee must determine that the information is not generally available from a source that is not confidential. The information can be communally or widely shared through the applicable First Nation and will still qualify for being designated as confidential pursuant to s.121(a), so long it can be demonstrated that the First Nation has consistently held this information in confidence.

Criteria #3: Disclosure of Information

In order for information to be designated as confidential under s.121(a), it must be demonstrated that disclosure of the information would cause probable harm to the First Nation or violates the cultural value system. To help the Executive Committee make a fair determination and understand your position, provide sufficient detail in the application.

Generally speaking, harm refers to injury, loss, or damage. In this context, the reference is to damage to a person, place, or thing. This could be physical or other damage. If the harm is to a person, it could relate to matters including the individual's rights or property, as well as their physical, mental, emotional or spiritual health or well-being.

Violation relates to the act of doing something that is not allowed by a law or rule. In this context, this means that disclosing the Traditional Knowledge would be contrary to your First Nation cultural value system. The First Nation is best placed to identify whether disclosure of TK would be contrary to the First Nations' cultural value system.

Criteria #4: Sufficient Non-Confidential Summary

All applications must include a non-confidential summary of the information. The summary is provided for assessment participants to understand, generally, what the information is without revealing details. The summary will be available on YESAB's online registry and will be relied upon by assessment participants including the Decision Body. If the Executive Committee determines that the non-confidential summary does not meet the requirements, the applicant will be notified in writing of this and is given an opportunity to resubmit the summary.

APPLICATION SUBMISSION

To submit electronically, contact the [Executive Committee Manager at Head Office](#) for Secured File Transfer details.

Or to submit a hardcopy application, drop off at the Whitehorse Head Office:

Suite 200-309 Strickland Street
Whitehorse, Yukon Y1A 2J9



Yukon Environmental and
Socio-economic Assessment Board

PROCESS INFORMATION

A senior assessment officer at Whitehorse Head Office will confirm your application has been received and will remain the point of contact throughout the process. The Executive Committee are responsible for making the determination as to whether to designate the information as confidential under s.121(a). The applicant may be contacted for clarifications by the Executive Committee or if the non-confidential summary is insufficient before proceeding with the designation.

The rules provide for the Executive Committee to seek additional views or information from any person before making their decision. If the Executive Committee seeks such views or information, the confidential information itself will not be disclosed. The Executive Committee may share some or all of the other information in the application, such as the non-confidential summary, for this purposes. Once the Executive Committee has determined whether or not they will designate the information as confidential under YESAA, they will prepare a decision letter and send this to the applicant.

NO DISCLOSURE OF INFORMATION AFTER DESIGNATION

YESAB will not disclose Traditional Knowledge designated as confidential under s.121(a) to anyone, including the decision body(ies) for the project under assessment. During the assessment process, only the necessary YESAB staff will have access to this confidential information. If the application pertains to an evaluation, and it has been designated confidential, the information will be disclosed to the Designated Office, specifically the staff associated with the assessment.

INFORMATION MANAGEMENT

YESAB has strict protocols in place to ensure the application and contents are secure during and following the s.121 application process.

Note that if information is submitted for consideration of an assessment, and has been designated as confidential under s.121(a), that determination is project specific. In other words: if you would like the information to be considered in more than one assessment, or in a subsequent assessment, a separate and additional application must be submitted for those other projects.

At the Designated Office level, if a project is referred to the Executive Committee under 56(1)(d), and confidential information was considered in the assessment, the confidential information will be provided to the Executive Committee along with the other documents relating to the project.

PUBLIC REGISTRY INFORMATION

The Executive Committee will provide the applicant with a letter setting out their decision as to whether to designate the information as confidential, and reasons for this decision. The letter will be publicly available on YESAB's online registry in both circumstances. The non-confidential summary will also be publicly available if the information is designated as confidential



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INFORMATION NOT DESIGNATED CONFIDENTIAL

If the Executive Committee concludes the information does not meet the test to designated it as confidential under YESAA, it will not be considered in the assessment. The application and information will be returned to the applicant. In the result, the information can only be considered in the assessment if the applicant provides the information on a non-confidential basis, or if the assessor receives the information from someone else.

For more information about the designation of confidential information under s.121(a) Traditional Knowledge, contact the Executive Committee Manager at **Head Office:**

Telephone: 867-668-6420

Toll Free: 1-866-322-4040

Email: yesab@yesab.ca



Yukon Environmental and
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UFA CONNECTION TO INFORMATION HELD IN CONFIDENCE BY YESAA

YESAA was enacted to meet a commitment in the Umbrella Final Agreement between the Government of Canada, the Council of Yukon First Nations and the Government of Yukon

The Umbrella Final Agreement (“UFA”), and Chapter 12 in particular, sets out an over-arching framework for a development assessment process in Yukon. The agreement required and contemplated that elements of this process would be further developed through legislation enacted by Canada or Yukon.

In 2003, ten years after the UFA was signed, YESAA was given Royal Assent. YESAA specifies that in the event of an inconsistency or conflict between a final agreement and YESAA, the agreement prevails to the extent of the inconsistency or conflict.

YESAB has a special relationship with the UFA and the unique environmental and socio-economic assessment legislation that it created. We recognize that we are one of many organizations with a role to play in meeting its spirit, intent and purpose.

As the Government of Canada works towards the implementation of the United Nations Declaration of the Rights of Indigenous Peoples Act, YESAB will continue to incorporate many of the principles underlying UNDRIP and the Truth and Reconciliation Commission’s calls to action via YESAB rules and organizational initiatives.

Provisions in the [Umbrella Final Agreement](#) relevant to the process set out in s.121 of YESAA include, but are not limited to:

- 12.1.1.2
- 12.4.2.10
- 12.6.2
- 12.8.3
- 12.19.2