For Indigenous Peoples, the forced removal from ancestral lands coupled with the Western commodification of human remains and ceremonial objects has resulted in a devastating and ongoing loss of cultural resources. This loss includes both tangible resources and landscapes as well as intangible traditional knowledge. During the pursuit of cultural resource protection, tribes are compelled to reveal an extraordinary amount of sensitive information. The UCLA Law Tribal Legal Development Clinic published a white paper on the need for confidentiality within tribal cultural resource protection, which was recently highlighted in a panel held by the UCLA Native Nations Law & Policy Center. The paper discusses problems in confidentiality of sensitive information during tribal cultural resource protection, current confidentiality protections that tribes can leverage, and potential legislative solutions that can better minimize the harm of confidentiality breaches.

The goals of this post are to summarize the points made in the white paper, provide insight into the ardent, scrupulous work of cultural resource protectors across tribal nations, and shed light on what is left to be done.

Background: What Do Tribes Seek to Protect and Why?

As previously stated, tribal cultural resources include intangible traditional knowledge as well as tangible resources and landscapes. Traditional knowledge consists of know-how, skills, and practices developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural identity. It is the source for the traditional use and management of lands, territories, and resources.

Indigenous Peoples have a sovereign right to promote, maintain, and safeguard their traditional knowledge alongside other cultural resources. Sensitive tribal information, including traditional knowledge, are resources that tribes also value and seek to protect much like other cultural resources. Tribes have a multitude of reasons to safeguard their knowledge. Once such information is released, it becomes public and will remain so forever. Leaked information can be inaccurate, such as local or county maps of Indigenous sacred places that inaccurately locate tribally significant areas and thereby deny protection for resources located outside of those areas. Moreover, some tribal information is considered sensitive because of internal tribal considerations. Contemporary tribal religious, cultural, and societal norms can strictly control the flow of traditional knowledge both within and outside

the tribe. For some tribes, centuries of forced assimilation and criminalization of their religious practices mandated the adoption of internal confidentiality protocols.

Confidentiality Problems

Tribes' compulsion to reveal a staggering amount of sensitive information to trigger protection for their cultural resources fails to respect important rights of Indigenous Peoples under the United Nations Declaration on the Rights of Indigenous Peoples, such as the right to maintain, protect and develop their cultural, intellectual, religious, and spiritual property; the right to privacy; and the right to access and re-access their culture.

There are various problems that make it so that the confidentiality of traditional knowledge and cultural resources is not sufficiently protected:

- **Limited Statutory Confidentiality Protections.** Statutes that offer confidentiality protections offer only limited protection when it concerns traditional knowledge. Under U.S. law, the cultural resource protection framework is scattered across numerous statutes, only some of which have specific confidentiality provisions, including: the American Indian Religious Freedom Act; the Archaeological Resources Protection Act; the Cultural and Heritage Cooperation Authority; the National Environmental Policy Act; the National Historic Preservation Act; and the Indian Self-Determination and Education Assistance Act. No cultural resource protection statute includes an explicit, mandatory confidentiality protection for tribal information at the tribe's request. Instead, confidentiality protections tend to extend to narrow categories of information, such as the location of a cultural resource.
- **Agency Discretion.** Although tribes require deference as a matter of self-determination, they instead bear the burden of proving their cultural resource exists, is theirs, and is of value. Critically, agencies retain the decision-making authority to determine what constitutes a cultural resource, which can further narrow the scope for tribes seeking to protect cultural resources that may not be considered archaeological or a historic property.
- **Mistrusted, Misinterpreted, or Omitted Traditional Knowledge.** Tribal information, including traditional knowledge, is extremely vulnerable to limited confidentiality protections because it is devalued compared to other types of information. Metaphorically rich commentaries offered by tribal elders on the sacredness of a place or object have been omitted from agency deliberations

because decision-makers do not understand the information. In other instances, information is misinterpreted and used to reach false conclusions.

- **Statutory Third-Party Access to Information.** There are significant routine disclosures to third parties built into cultural resource protection statutes. Generally, information exchanged during cultural resource protection becomes part of the government "record," which, under different statutory frameworks, the governmental agency is mandated to turn over pursuant to a valid legal request, such as the Freedom of Information Act (FOIA) or an audit. While FOIA does not apply to state and local governments, most states have implemented public records acts that mirror FOIA to varying degrees, leaving tribal information exchanged in either federal or state consultations susceptible to a public records request. Virtually anyone can make a FOIA request for materials within the federal government's possession unless the information fits into one of nine exemption categories. FOIA Exemptions 3, 4, 5, 6, and 9 have the potential to prove useful to tribes. However, there are limitations to each of these exemptions, such as the failure of most cultural resource protection statutes to qualify as "withholding statutes" for FOIA purposes under Exemption 3 or the minimal, narrow judicial interpretations of Exemption 9, that impede them from meaningfully protecting tribes' confidential information.
- **Lack of Notice to Tribes That Information Will Be Disclosed.** When federal or state agencies disclose tribal information to third parties, there is no statutory requirement to notify tribes that the disclosure is taking place.
- **Lack of Tribal Consent.** Like notice, most cultural resource protection statutes fail to recognize tribes as owners of their information with the accompanying decision-making authority regarding the use of their information. Tribes are simply never asked. The closest federal gesture to consent is found in Secretarial Order 3206, providing that the BIA "when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act." Consultation, however, even in its most robust and meaningful iteration, is not consent.
- **Judicial Deference to Agencies.** U.S. courts have typically provided minimal deference to Indigenous interests and instead tend to defer to agencies on confidentiality matters. While tribes may challenge abuses of agency discretion in federal court under the Administrative Procedures Act, judges have been reluctant to second-guess agency officials' findings regarding what is "practical" or "appropriate." Meanwhile, the Supreme Court has upheld federal agencies' authority to place their own proprietary interests in federal land

above Indigenous Peoples' religious interests.

Confidentiality Protection Strategies

Indigenous Peoples should be able to both access culture and determine how cultural information is handled. In light of statutory limitations, the most effective solutions for preventing the disclosure of sensitive tribal knowledge are the ones that involve tribal retention, ownership, and control of that information. The white paper outlines the following practical measures that tribes have used on the ground to help mitigate or prevent confidentiality breaches:

- **Reveal as Little Information as Possible.** In his book *Places That Count*, Thomas King recommends that tribes not follow the preferences of the National Register for "lots and lots" of documentation. Instead, agencies ought to collect only what is absolutely necessary for the cultural resource protection decision to be made. Where possible, tribes should deny an agency's request for creation or disclosure of written records regarding tribal knowledge.
- **Engage in Consultation.** Consultation is the nation-to-nation acknowledgement and engagement required between sovereigns, necessitating recognition on a meaningful governmental level. It can and frequently should go beyond holding individual meetings. Consultation can include the nurturing of trust and reliance over time as well as the building of relationships. Trust between sovereigns can elevate the probative value of traditional knowledge, make the reasons for confidentiality appear more reasonable and justified, and increase the willingness to partner for the mutual benefits in protecting current and future cultural resources.
- **Exchange Information Informally and Return Original Notes.** Where the collection of detailed information is unavoidable, the information should be returned to the community, including copies and original notes.
- **Label Information Confidential.** For tribes willing and able, sensitive cultural information can be protected through storage and labeling within an internal and confidential database. Different types of information can be given different levels of confidentiality, quickly signaling to agencies the expected degree of care for the information based on its tier.
- **Codify Confidentiality Protections Under Tribal Law.** Tribal law can be used to set the parameters for what information the tribe expects to remain confidential. A tribal code can articulate that traditional knowledge is held in high regard to the tribe and be referenced in future memoranda of

understanding, letters, and negotiations. A code can be as simple as asserting the value of traditional knowledge and as complex as establishing a framework of liability. Several tribes have codified consultation procedures, which cover tribal expectations for the entire nation-to-nation consultation process and can include confidentiality expectations.

- **Draft Memoranda of Understanding (MOUs)**. MOUs can effectively facilitate tribal retention of traditional knowledge by outlining the parameters for agency access to this knowledge. In their MOUs with agencies, tribes should consider including: (a) confidentiality clauses; (b) prior informed consent clauses; (c) alternative dispute resolution clauses incorporating tribal code; (d) information outlining relevant federal law and relevant FOIA exemptions; and (e) remedies for breach. An MOU may articulate a preference for an agency to review original eligibility documentation, but without retaining copies of tribal knowledge for its own records. Language in an MOU or programmatic agreement can help remind the agency of the relevant law, including relevant FOIA or state public records act exemptions. Such language can put the agency on notice and shift the burden from the tribe to the federal agency to defend why confidential protection should not be provided.

Potential Legal and Administrative Solutions

The white paper discusses attempts to enact legislation to protect tribal information as well as recommendations for legislative and administrative fixes moving forward to improve confidentiality protections. The following are some of the proposed recommendations in the paper:

- In line with S. 2652, “cultural items” could be added to the definition of “trust resources” in 25 § 1000.352 (b)(1) to extend protection for information related to cultural items pursuant to the trust responsibility.
- Free, prior, and informed consent should be built into cultural resource protection statutes to mitigate against the disclosure of tribal information without the tribe’s knowledge and consent.
- Tribes should have access to agency-held information regarding the tribe.
- Beyond the addition of a tenth FOIA exemption, the existing exemptions could be leveraged. Legislation could modify each cultural resource protection statute making the statute exempt from FOIA and state public records act requests.
- Agencies—vital in the process of preventing unsolicited access to sensitive tribal knowledge—should increase fees and minimize fee waivers for access to

tribal knowledge to minimize amateur curiosity and other extraneous exposure of this knowledge.

The cultural resource protection field is expanding, providing more, though still insufficient, opportunities for acknowledging and protecting tribal cultural resources. Ultimately, tribes must be afforded the autonomy to control their information and access and re-access their culture. Protecting their confidentiality is an integral component to this work. Current confidentiality protection statutes, confidentiality protection tools like memorandum of understanding provisions, and potential legislative fixes that reinforce statutes as well as other tools all serve to enhance tribal self-determination and encourage free, prior, and informed consent.

Dr. Wendy Teeter, Curator of Archaeology for the Fowler Museum and UCLA NAGPRA Coordinator, initiated and significantly contributed to this project. Dr. Teeter now serves as the Cultural Director for the Santa Ynez Band of Chumash Indians. She has long been an advocate and leader for cultural resource protection, helping to lead the repatriation efforts at UCLA, and contributing greatly to the UC-wide Native American Grave Repatriation Act (NAGPRA) regulations.