

March 6, 2023

The Alberta Energy Regulator and the Disclosure Without Delay Rule in *FOIP*

Commented On: [Alberta Energy Regulator Announcement - March 02, 2023](#); [Alberta Energy Regulator Actively Investigating and Responding to Imperial Oil Kearl Site Incident](#); and [Letter to the Office of the Information and Privacy Commissioner Requesting an Investigation of AER Emergency Disclosure Policy](#)

By: Drew Yewchuk

The Alberta Energy Regulator (AER) has been aware that industrial effluent has been seeping from a tailings pit at Imperial’s Kearl oilsands mine since May 2022. (They should not be called tailings ‘ponds’ – they may be pits or lakes, but ‘pond’ implies they are small, which they absolutely are not). The AER chose to make this information public on February 4, 2023, when an estimated 5,300 cubic meters of “[s]torage pond overflowed off lease” and the AER began investigating Imperial for “[f]ailure to comply with conditions of an approval and release of industrial wastewater [*sic*] from an unapproved location” (AER [compliance dashboard](#), incident number 20230311 and investigation number 2023-009).

Quite understandably, the Indigenous communities downstream are [not happy](#) about the leaking industrial pollutants or the AER’s delay in informing them about it. Neither is [the government of the Northwest Territories](#).

If you think there ought to be a law against the AER keeping this sort of thing quiet, I have good news: there is! The bad news is that it does not appear to have been followed. The *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*FOIP*) includes section 32(1)(a), a section with a purpose distinct from the rest of the *FOIP* that places an obligation on public bodies to disclose information about risks of significant harms to the environment or human health and safety to the public and any affected groups. All of those requirements appear to have been met in this case. Section 32(2) also specifies that section 32 operates to override the exceptions to disclosure created by *FOIP*. In an environmental or health emergency, the public body is meant to overlook whether the information disclosed might be harmful to business interests of a third party (at s 16), intergovernmental relations (at s 21), or the economic and other interests of the public body (at s 25) and disclose information to the public without delay.

Section 32 of *FOIP* reads as follows:

Division 4
Public Health and Safety

Information must be disclosed if in the public interest

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,

(a) notify any third party to whom the information relates,

(b) give the third party an opportunity to make representations relating to the disclosure, and

(c) notify the Commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure

(a) to the third party, and

(b) to the Commissioner.

So why did the AER not warn the affected communities and the public until the problem literally overflowed, and even then chose to provide [very little information](#)? That is a question so good someone with “all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*” (*FOIP* at s 56(1)) should look into it. I sent the attached letter to the Office of the Information and Privacy Commissioner asking for the Commissioner to investigate the AER’s failures to provide information to the public under section 32 of *FOIP*. I hope that the Commissioner will conduct a thorough investigation into how decisions were made within the AER about what and when to disclose information to the public.

I also note that section 82(1)(a) of *FOIP* enables employees of public bodies to provide information they suspect ought to be disclosed under section 32 to the Commissioner to investigate whether the information ought to be disclosed, and protects the employee from prosecution or adverse employment actions:

Division 3

Disclosure to Commissioner

Disclosure to Commissioner

82(1) An employee of a public body may disclose to the Commissioner any information that the employee is required to keep confidential and that the employee, acting in good faith, believes

- (a) ought to be disclosed by a head under [section 32](#), or
 - (b) is being collected, used or disclosed in contravention of Part 2.
- (2) The Commissioner must investigate and review any disclosure made under subsection (1).
- (3) If an employee makes a disclosure under subsection (1), the Commissioner must not disclose the identity of the employee to any person without the employee's consent.
- (4) An employee is not liable to a prosecution for an offence under any Act
- (a) for copying a record or disclosing it to the Commissioner, or
 - (b) for disclosing information to the Commissioner
- unless the employee acted in bad faith.
- (5) A public body or person acting on behalf of a public body must not take any adverse employment action against an employee because the employee, acting in good faith,
- (a) has disclosed information to the Commissioner under this section, or
 - (b) has exercised or may exercise a right under this section.
- (6) A person who contravenes subsection (5) is guilty of an offence and liable to a fine of not more than \$10 000.
- (7) In carrying out an investigation and review under this section, the Commissioner has all of the powers and duties set out in [sections 56, 59, 68, 69](#) and [72\(1\) to \(5\)](#), and [sections 57, 58, 60](#) and [62](#) apply.

If anyone at the AER reads ABlawg and has access to information on the leaking industrial effluent - it is not too late to make use of section 82.

Although I believe an investigation by the Information and Privacy Commissioner is critically important, I note this only addresses the AER's failures to disclose information about this ongoing environmental disaster to the public. Other, even larger issues about the human and environmental costs of this incident and the long-term engineering and regulatory mistakes that led up to [oilsands tailings pits leaking](#) will be necessary as well. I certainly do not consider [claims that this incident will not affect human health or wildlife](#) remotely plausible.

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