

March 6, 2023

Office of the Information and Privacy Commissioner
SENT BY E-MAIL: generalinfo@OIPC.ab.ca
Cc: Inquiries@aer.ca

Dear Commissioner McLoed,

1. This is a request for you, the Information and Privacy Commissioner (the Commissioner) to investigate the failures of the Alberta Energy Regulator (AER) to comply with their obligations under section 32(1)(a) of the *Freedom of Information and Protection of Privacy Act (FOIP)*.¹
2. Section 32(1)(a) of *FOIP* is the emergency information release provision of *FOIP*. It creates a statutory duty for public bodies to provide information to affected groups and the public where there is a risk of significant harm to human health or safety or to the environment.
3. During a recent oilsands tailings pond leak the AER provided no information to the public for eight months, very limited information to some effected communities, and did not inform some effected communities for eight months.

THE KEARL OILSANDS LEAK

4. Since May 19, 2022, the AER became gradually more certain that industrial pollutants were leaking from the Kearl oilsands mine tailings pond into muskeg and forest containing wildlife.²
5. On September 2, 2022, the AER issued a Notice of Noncompliance to Imperial under the *Environmental Protection and Enhancement Act*.³
6. By September 29, 2022, the AER was aware that industrial pollutants had escaped into groundwater and surface water off-site of the Kearl mine.⁴

¹ RSA 2000, c F-25.

² https://www1.aer.ca/compliancedashboard/enforcement/202302-02_Imperial%20Oil%20Resources%20Limited_Kearl_Order.pdf, at 1 and 3.

³ RSA 2000, c E-12.

⁴ https://www1.aer.ca/compliancedashboard/enforcement/202302-02_Imperial%20Oil%20Resources%20Limited_Kearl_Order.pdf, at 2.

7. Since May 19, 2022, the AER became gradually more certain that industrial pollutants were leaking from the Kearl oilsands site.⁵
8. Between May and June 2022, Imperial informed some impacted communities of “discoloured water” was off the mine site, providing few details or discussion of severity.
9. From February 4-6, the AER became aware of a related leak of industrial pollutants from the Kearl oilsands site.⁶
10. On February 7, the AER provided information about the leak to communities downstream from the industrial pollutant leak (the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, the Fort McMurray First Nation, Chipewyan Prairie Dene First Nation) by letters to their counsel, and to the general public by notice on the AER website.⁷
11. These surrounding communities have begun taken precautionary measures in the absence specific or reliable information: the Athabasca Chipewyan First Nation has instructed not eat any wild foods that may have been harvested in the impacted area and Fort Chipewyan has shut off their water intake.

SECTION 32(1)(a): THE EMERGENCY INFORMATION RELEASE

12. Section 32 of *FOIP* reads:

32 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

⁵ Ibid.

⁶ Ibid, at 3.

⁷ Alberta Energy Regulator, Announcement - March 02, 2023 “Alberta Energy Regulator Actively Investigating and Responding to Imperial Oil Kearl Site Incident” on-line: <https://www.aer.ca/providing-information/news-and-resources/news-and-announcements/announcements/announcement-march-02-2023>

(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.

13. Section 53(1)(a)(b) and (c) of *FOIP* reads:

General powers of Commissioner

53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

- (a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records
 - (i) set out in any other enactment of Alberta, or
 - (ii) set out in a bylaw, resolution or other legal instrument by which a local public body acts or, if a local public body does not have a bylaw, resolution or other legal instrument setting out rules related to the destruction of records, as authorized by the governing body of a local public body,
- (b) make an order described in section 72(3) whether or not a review is requested,
- (c) inform the public about this Act,
- (d) receive comments from the public concerning the administration of this Act,

14. Section 72(3) of *FOIP* reads:

72 ...

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- (a) require that a duty imposed by this Act or the regulations be performed;

...

15. Decisions from prior Commissioners have acknowledged that the OIPC has the power to investigate complaints under section 31.⁸

⁸ *Alberta Environmental Protection (Re)*, Order 96-011, 1996 CanLII 11519 (AB OIPC), <<https://canlii.ca/t/fvh9t>>

16. The OIPC has determined that an applicant has the burden of proof for showing one of three pre-conditions has been met. The pre-conditions are:

- risk of significant harm to the environment
- risk of significant harm to the health or safety of the public
- release is clearly in the public interest.

17. Under section 62 of *FOIP*, the Ombudsman is precluded from investigating unless the Commissioner consents. Section 62 reads:

Role of Ombudsman

62 The Ombudsman may not investigate any matter that the Commissioner has the power to investigate or review under this Act, unless the Commissioner agrees.

DETAILS OF REQUEST

18. This request was prompted by the AER's recent failures to provide information to the public and to the communities placed at risk by the leaking of industrial pollutants from the tailings pits at Imperial's Kearl oilsands mine. The situation created a new and imminent risk of harm to human health and caused significant harm to the environment. There was a clear and compelling reason to disclose sufficient information for the public and affected communities to assess and understand the risk and the AER failed to make any disclosures for months and continues to provide limited disclosure of information on the health and environmental risks of the leaking of industrial pollutants.

19. The AER chose to leave the task of informing the public and impacted communities to Imperial. This approach is part of the AER's policy of assigning the responsibility to provide information to the public to the operators of the facilities.⁹ The AER's statutory obligations under section 32(1)(a) of *FOIP* cannot be delegated to private operators, who are not a credible source of information on environmental emergencies for which they may be liable for regulatory offences.

20. Despite the specific leak at Kearl prompting this request, the Commissioner ought to exercise their general powers under sections 53 and 56 of *FOIP* to conduct an investigation into the AER's apparent failures to comply with *FOIP* section 32(1)(a) and to ensure the AER complies with section 32(1)(a) during future environmental disasters. This task is distinctly within the statutory role of the Commissioner.

21. The impact of environmental disasters tends to be greatly worsened by delayed responses and failures to warn residents of the surrounding areas. *FOIP* section 32(1)(a) is meant to address that problem and prevent those delays.

22. The AER regulates and monitors Alberta's extensive oil, gas, coal, and other mineral projects. These projects, notably tailings dams and sour gas facilities carry enormous environmental and public health risks.

23. The AER may be the Alberta public body most likely to very quickly be required to consider and fulfill their obligations under section 32(1)(a). The AER ought to have a

⁹ Directive 071: Emergency Preparedness and Response (February 2023), 43(a) and (d).

robust internal process for rapidly applying section 32(1)(a) of *FOIP* and it is equally clear that process does not exist.

24. I also ask you to consider exercising your authority under section 53(1)(d) to receive comments from those communities affected by the AER's failures under section 32(1)(d).

Respectfully,

A handwritten signature in black ink, appearing to read "Drew Yewchuk". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping tail.

Drew Yewchuk
Staff Lawyer, Public Interest Law Clinic