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Investigating the Orphan Fund Levy Using Freedom of Information Requests

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Decision Commented on: [Freedom of Information Request to the Alberta Energy Regulator 2021-G-0025](#)

This is a follow-up on an earlier ABlawg post from March 2022: “[How is the Orphan Fund Levy Set? Alberta’s Oil and Gas Clean-up Costs in 2022](#)”. That post was the result of work by the [Public Interest Law Clinic](#) on how Alberta’s oil and gas clean-up liabilities were being managed. That post tried to answer the question of how the Alberta Energy Regulator (AER) was setting the amount of the Orphan Fund Levy.

This follow-up post comes sixteen months after the first one because the complaint process for the Freedom of Information (FOI) request filed for records used in the first post was just recently completed, with the AER releasing 13 un-redacted pages of records. This post discusses the information that the AER previously chose to improperly withhold under the original *FOIP* request and has now released. This coincides with recent [media coverage of the sorry state of access to information in Canada](#).

Freedom of Information Request 2021-G-0025

The clinics’ freedom of information request was received by AER on April 12, 2021. It asked for:

All records relating to the setting of the amount of the 2021/2022 Orphan Fund Levy, including all communications with third parties including the Orphan Well Association. (Timeframe: January 1, 2021 to April 7, 2021)

The AER returned a first package of records that did not require third-party consultation on June 11, 2021, and a second package that required third-party consultation on July 15, 2021. After some discussion and negotiation with the AER’s FOI office on whether the redactions improperly withheld information that was already public, the records consisted of 57 responsive pages and one spreadsheet. Twelve pages were fully redacted, and two blocks of text were partially redacted under section 24 of the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*FOIP*), which allows the withholding of ‘Advice from Officials’.

The clinic filed a complaint with the [Office of the Information and Privacy Commissioner](#) (OIPC) on August 17, 2021. The OIPC adjudicator contacted the AER on June 6, 2023 to seek submissions explaining the redactions, noting that the information was conveying facts or identifying the status of a program, and it was unclear how the exception to disclosure for advice and redactions could possibly apply. On June 16, 2023, the AER reconsidered and released the pages without redactions,

rather than arguing their use of the exceptions to disclosure for advice was justified. The information behind the redactions makes it clear the AER had improperly applied the exceptions to disclosure.

What is in the New Records

The initial records release said:

As of January 1, 2021, the OWA inventory contained 2,110 wells, 289 facilities and 2,571 pipelines for decommissioning, and an additional 4,014 sites for reclamation. (at 12)

A block of text beneath was initially redacted, but the newly unredacted version now shows:

As of December 31, 2020, approximately 12,300 wellsites (in addition to 8,700 facilities and pipeline segments) remain associated with licensees in active insolvency proceedings representing approximately \$1 Billion in deemed liabilities. (at 12)

This was a complete misuse of the exception for advice. This was a statement of pure fact that the AER knew made them look bad. The AER approved an orphan levy of just a \$70 million while they knew they should have been planning for at least \$1 billion of new orphans. The AER improperly withheld this information under *FOIP* to avoid public scrutiny of its handling of the orphan well problem.

The large block of fully redacted documents was a filled-out form called a “Questionnaire for AER Rules Development” meant to show justification for the amount of the levy, it describes the AER’s practice of consulting with the Canadian Association of Petroleum Producers (CAPP) and the Explorers and Producers Association of Canada (EPAC). Two answers are worth reading. The first shows which oil and gas corporations pay the orphan well levy, and in roughly what amounts:

h) Who will pay the costs of complying with the proposed rule, and what is the group’s relative population and entity size?

All of the approximately 700 oil and gas licensees and approval holders in the liability management programs will be issued an invoice for the levy based on their deemed liabilities on April 3, 2021. Small companies that are not members of CAPP or EPAC typically pay a lower levy amount, from \$100s to \$1000s of dollars, whereas the 250-300 CAPP and EPAC members will pay higher levy amounts (many \$1,000s to millions) as they hold the majority of the total industry deemed liability. (at 31)

The second shows the AER’s failure to appreciate who is impacted by the Orphan Levy:

j) Who will be impacted by the change?

Each of the approximately 700 oil and gas licensees included in the liability management programs that hold licences or approvals on April 3, 2021. (at 31)

The AER appears to have completely forgotten that the amount of the orphan well levy determines how fast Alberta's orphan wells are cleaned, how large an ongoing financial risk they present to Albertan citizens, and most crucially, how long rural Albertans have to live with rusting oil wells on their land. Had the AER thought harder about who is impacted by the orphan levy, the AER would have realized consulting only with CAPP and EPAC was not an appropriate way to proceed.

The following six sub-questions ask how and when the impacted parties will be consulted, and how the AER will address what the impacted parties tell the AER. The AER did not consider those questions in relation to anyone but the corporations holding oil and gas licenses.

What is missing, even from the unredacted documents, is any calculation or explanation of the levy amount. The questionnaire was filled out only to justify the existence of the levy, but without any discussion of the amount of the levy, so no calculation or review of the suitability of the amount of the levy was being done. The records show the AER conducted no review of the amount of the orphan levy proposed by the CAPP, EPAC, and the Orphan Well Association. This matches the conclusions of the Auditor General in 2023 (see [here](#), at 25).

What Does This Change for the Orphan Fund Levy?

The initial post found that oil and gas industry lobby groups had too much influence on the setting of the Levy, that the Levy had been chronically set too low, and that this was defeating the purpose of the Orphan Fund Levy. The new information shows the situation was worse than we realized – the AER was concealing \$1 billion in deemed liabilities that the AER knew were likely to end up being orphaned.

The auditor general recently reported that by “2022, AER began implementing a process to review the levy” ([here](#), at 25) but the AER's approach to setting the orphan levy in secret has not changed. The 2022/2023 levy was [set higher, at \\$135 million](#), but the AER provided no information or explanation to show whether the levy reflects any plan for when the OWA will complete the closure of the existing orphan inventory or the foreseeable future orphans, in addition to repaying their government loans. The AER continued to consult with only the oil and gas lobby groups about the amount of the Orphan Fund Levy.

Some Thoughts on FOI in Alberta

First, the involvement of the OIPC quickly brought a useful resolution to the complaint. But the wait to get a review started at the OIPC was around 22 months. The OIPC needs a larger staff (and therefore a larger budget) to manage their processing times if Albertans want timely access to government records.

Second, despite the delays and the completely unfounded use of an exception to disclosure, the AER is not even close to the worst public body in Alberta at processing FOI requests. The AER processed the initial request in a reasonable timeframe, did not employ any of [the pseudo-legal tactics](#) public bodies sometimes use to employ FOI, and conceded early in the OIPC process rather

than pushing through the process and proceeding to appeal at public expense. Other requests I have filed show at least three Albertan public bodies more heavily resist transparency: Alberta Health, Alberta Justice, and Alberta Environment and Protected Areas.

Finally, Alberta needs a system to make completed FOI requests for non-personal information accessible to the public. The federal government already does this through [an online portal](#). FOI results are public information and should be treated as such, rather than gathering dust in the files of the original requester.

This post may be cited as: Drew Yewchuk, “Investigating the Orphan Fund Levy Using Freedom of Information Requests” (June 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/062018/07/Blog_DY_Orphan_Levy_Fund_FOI_Request.pdf

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