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August 31, 2020

Office of the Information and Privacy Commissioner
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Sent via email to registrar@oipc.ab.ca and regular mail

Attention: Mr. John Gabriele
Adjudicator

Justice and Solicitor General (the 'Public Body')
9th Floor, John E. Brownlee Building
10365 - 97 Street NW
Edmonton, AB T5J 3W7

Sent via email to jsg.foip@gov.ab.ca and regular mail

Attention: Ms. Jennifer Stanton and Ms. Jennifer Bruce
FOIP Coordinators

Re: Notice of Inquiry Case File Number 007391
Applicant's Submission

This constitutes the Applicant's written submission to the Commissioner in the written inquiry for case number 007391 (the 'Inquiry'). This submission is filed in accordance with the instructions set out in the Notice of Inquiry dated June 11, 2020.

Part I: Background and the Public Interest in Creative Environmental Sentencing

1. The relevant facts in this matter are as set out in the Notice of Inquiry under the heading 'Background' on pages 1 and 2 of the Notice. In addition, the Applicant directs your attention to the summary of issues and concerns set out in the Applicant's Request for Inquiry dated October 5, 2018.

2. The records in question pertain to a creative environmental sentence order issued by the Provincial Court on or about June 2, 2017 under section 234 of the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (EPEA). The purpose of the Applicant's request for records was to investigate the rationale for the quantum of sentence, the process by which the beneficiary of the creative sentence was selected,

why the beneficiary was selected, and how the stated project objectives serve the objectives of the sentence.

3. An environmental offence is characterized by Canadian courts as a contravention of the public welfare. The impugned conduct is considered to be wrong because it offends our collective interest in maintaining the health or integrity of our environment. Accordingly, the principle underlying this request for records is that a creative sentence developed and proposed to the Court by the Attorney General for a regulatory offence under EPEA is a matter of the public interest and the process by which this sentence was developed and implemented should be transparent to the public.

4. The environment is a recognized as a matter of public interest in sections 32(1)(a) and 93(4)(b) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (FOIP Act).

5. The Public Body acknowledges on its website that all prosecutions must serve the public interest.[1]

6. A creative environmental sentence can include orders such as prohibiting the offender from certain activities, revoking a license, requiring the offender to publish an apology, or directing the remediation of environmental harm caused by the offence. The 'creative' aspect of an environmental sentence is generally considered to be the imposition of additional sanctions beyond a fine. The specific origin of creative environmental sentencing in Canada is unknown, but it is generally understood that Canadian legislators turned to these 'non-fine' measures in the late 1980s in an attempt to improve the effectiveness of environmental enforcement. All of the provinces and territories, as well as the federal government, have statutory provisions which provide a sentencing court with authority to order some form of creative environmental sentence. In Alberta, this authority is provided by section 234 of EPEA.

7. The particular form of creative environmental sentence which is the focus of this request for records is an order which requires the offender to provide funds to a third party to pay for the conduct of an environmental remedial project. This is the most common type of creative environmental sentencing order because this type of order leads to remedial projects which best serve the instrumental purpose of an environmental sanction and align closely with the regulatory character of an environmental offence.

8. Creative sentences have been a regular feature of environmental prosecutions in Alberta since EPEA was enacted in 1993. A policy workshop in 2002 produced a set of principles to guide decisions by a prosecutor on the development of a creative environmental sentence for proposal to the sentencing Court.[2] The guidance on creative sentencing produced at the workshop addressed matters such as pre-requisites to be met before a creative order would be considered and developed by the prosecutor, limitations on eligible projects and recipients of funds, and post-sentence accountability on how the

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[1] Alberta Justice, *Decision to Prosecute*, 2006, online: <https://open.alberta.ca/dataset/8fa0bd3b-2bbe-400d-85d2-3ba8101d83e2/resource/70bbab1d-9c31-4649-8b9a-dc9d2c3f73b8/download/guid-decision-to-prosecute-2006-11-28.pdf>

[2] Environmental Law Centre News Brief, 2003, online: <https://elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.18No.22003.pdf> and <https://elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.18No.32003.pdf>.

funds are spent. The principles most relevant to the issues of transparency were as follows:

- there must be a nexus between the nature of the offence and the project;
- the project must benefit the citizens of Alberta;
- the project must result in a concrete, tangible and measurable result;
- all recipients must be not-for-profit organizations;
- the terms of the order should be specific and include accountability mechanisms with respect to the expenditure of funds and the completion of the project.

9. The Applicant has been unable to locate in public sources more recent policy guidance in relation to the development of a creative environmental sentence by a prosecutor in Alberta. Unredacted records produced in this matter include records which confirm additional policy workshops on creative environmental sentencing were held in 2006, 2007, 2013 and 2015, but the Public Body disclosed little substance on the results from these more recent sessions other than meeting agendas.

10. It is the Applicant's understanding that in cases where a creative sentence is being considered, the prosecutor works with a liaison at either Alberta Environment and Parks (AEP) or the Alberta Energy Regulator (AER) to develop a proposal for a creative sentencing order and, in the case of an order which will direct funds be paid to a third party for environmental remedial work, to identify a proposed recipient of the funds. AEP serves as the liaison for all environmental offences other than for an offence committed by an energy company, in which case the sentencing liaison is the AER.

11. The AEP creative sentencing webpage provides brief comments on creative sentencing policy, and the department's annual report on creative sentencing is little more than a cursory overview of the development process for a creative sentence. The AEP website publishes a record of environmental sentences issued by Alberta courts since 2009. The record for each sentence includes a description of the offence and, in cases where a creative sentence was issued, a copy of the creative sentencing order. In some but not all cases, the public record includes a copy of the final report on the outcomes of a project funded by the order. Aside from this, there is no public information available to assess the extent to which creative sentences accord with the guidance developed in 2002.

12. The sentence which is the subject of this request for records is the result of a guilty plea by the Canadian National Railway Company (CN Rail) with respect to a release of hydrocarbons into the North Saskatchewan river that occurred in April 2015. The penalty imposed on CN Rail under EPEA was a total of $125,000, consisting of $15,000 in fines and a creative funding order directing CN Rail to make a $110,000 payment to the Edmonton and Area Land Trust to support conservation in the Edmonton region with a focus on aquatic and riparian habitat. An unsigned agreement between the Crown and the Land Trust was appended to the sentencing order, with no specific terms on the project objective or details on how or why the Land Trust was chosen as the recipient for the fund and no third party monitoring or reporting requirements on how the funds are spent by the Land Trust. The final report on project outcomes is available on the AEP website, and the report discloses conservation work conducted with the sentencing funds however, of note, it appears from this final report that little or none of the funds were used for conservation in aquatic habitat.

13. The Applicant submits that an environmental offence is a contravention of the public interest, and remediation of the harm caused, or efforts undertaken to help prevent similar infractions in the future, is inherently a matter of public concern. The Public Body states on its own website that "[t]he existence of published criteria helps to create consistency and transparency".[3] The Applicant submits that the development and implementation of a creative sentence for an environmental offence ought to ascribe to the same principles that inform the decision to prosecute: fairness, consistency, flexibility, and transparency. For justice to not only be done, but to be seen to be done, the public needs to have access to information to allow for scrutiny on the suitability of the sentence imposed for an environmental offence and accountability to ensure the objectives of the sentencing order were met.

14. The Applicant submits that consideration should have been given by the Public Body to the factors of accountability and transparency in deciding whether to disclose records in response to the Applicant's request.

15. With respect to the creative sentencing order in this matter, the Applicant submits that transparency would allow the public to better understand how and why the Edmonton and Area Land Trust was selected as the beneficiary of sentencing funds, as well as how or why the particular project or type of remedial work was decided upon. Moreover, the absence of a transparent nexus between the sentence and the offence also raises concerns over how the outcome is ultimately perceived; for example, in the absence of full transparency there is a risk that funding for remedial work may be improperly construed as an act of generosity or corporate social responsibility on the part of the offender. Transparency can also help to facilitate more consistency in sentencing, which in turn inspires confidence and legitimacy in the administration of environmental justice.

16. The Applicant submits the foregoing establishes that full disclosure of records requested in this matter is clearly in the public interest.

Part II: Grounds for Review

17. The Applicant submits that the Public Body erred in law by withholdings pages 1 – 357, 360 – 364, 376 – 497, 499 – 787, 790, 793 – 803, 805 – 813, 830 – 838, and 846 – 857 from the Applicant pursuant to section 27(1) of the FOIP Act.

18. The Applicant further submits that to the extent that section 27(1) does apply to the records in question, the Public Body erred in law by erroneously exercising its discretion under section 27(1) to redact information about the creative environmental sentencing procedure.

19. The Applicant further submits that the Public Body erred in law by not releasing information under section 32(1)(b) of the FOIP Act pertaining to how, why, and the process by which, the Edmonton and Area Land Trust was selected as the beneficiary of sentencing funds in this matter.

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[3] Alberta Justice, *Decision to Prosecute*, 2006, online: https://open.alberta.ca/dataset/8fa0bd3b-2bbe-400d-85d2-3ba8101d83e2/resource/70bbab1d-9c31-4649-8b9a-dc9d2c3f73b8/download/guid-decision-to-prosecute-2006-11-28.pdf.

20. The Applicant is not making further submissions on the redactions by the Public Body made under sections 17(1), 20(1)(g), and 24(1) of the FOIP Act.

Part III: Argument

21. The purpose of section 27(1)(a) of the FOIP Act is to protect privileged information.[4] More generally, section 27(1) protects the zone of privacy necessary for public bodies to conduct their legal affairs. In accordance with the purpose of the FOIP Act, this zone of privacy should be limited and specific.[5]

22. Section 27(1) is a discretionary exception requiring a two-step process. First, does the discretionary provision apply? Second, if the section applies, should disclosure be made? In exercising its discretion to withhold records, a public body should consider whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.[6]

Solicitor-Client Privilege and Prosecutors

23. The test for a document to be subject to solicitor-client privilege is set out in *Solosky v The Queen*[7]:

    - It must be a communication between a solicitor and a client;
    - which entails the giving or seeking of legal advice; and
    - is intended to be confidential by the parties.

24. A public body claiming solicitor-client privilege must comply with the provincial civil litigation standards for proving solicitor-client privilege.[8]

25. There is a presumption that a public body reasonably exercises its discretion when withholding information subject to solicitor-client privilege. A public body does not need to give reasons for withholding documents protected by solicitor-client privilege unless there is a compelling public interest in the release. Where the adjudicator determines there is a compelling public interest in the release, the head of the Public Body should give reasons for why it exercised its discretion to withhold the records.[9]

26. The Applicant submits there is a compelling public interest in the release of the records at issue here, and that the Public Body should be required to justify their exercise of discretion in withholding any records subject to solicitor-client privilege.

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[4] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at para 56 [**APPLICANT'S AUTHORITIES, TAB 1**].
[5] *FOIP Act,* section 2.
[6] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, at para 66 [**APPLICANT'S AUTHORITIES, TAB 2**].
[7] *Solosky v The Queen* [1980] 1 SCR 821 (not reproduced).
[8] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at para 103 [**APPLICANT'S AUTHORITIES, TAB 1**].
[9] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at para 114-118 [**APPLICANT'S AUTHORITIES, TAB 1**].

27. Two factors make it likely that the Public Body erred in applying the requirements from *Solosky* to many of the records withheld under section 27(1) in this matter.

28. First, the records at issue in this request were created in the context of lawyers of the Public Body acting in their role as a Crown prosecutor, a role in which they act as a public servant and as an officer of the Court. These lawyers are acting on behalf of the Attorney General. Accordingly, the Applicant submits there is no solicitor-client relationship applicable in the context of this matter and therefore no solicitor-client privilege

29. The Applicant notes that where records created by lawyers with the Public Body have been previously found to be subject to solicitor-client privilege, it is because those lawyers were providing legal advice to public bodies other than the Attorney General, such as a police service.[10]

30. Second, the Applicant's request for records in this matter was seeking guidelines, policies, and notices. In order for solicitor-client privilege to apply, a document must have the appropriate legal content. Legal advice must be sought or offered. Solicitor client privilege does not extend to communications where a lawyer gives business advice, policy advice, or other non-legal advice, rather than legal advice.[11]

31. When developing policies and procedures in relation to the development of a creative environmental sentence, the Applicant submits that lawyers with the Public Body are developing or implementing policy. These lawyers are not providing legal advice. Accordingly, the Applicant submits the records associated with this task are not subject to solicitor-client privilege.

32. Based on what can reasonably be expected to be in the records given the wording of the request, the Public Body erred in withholding such a high volume of records under section 27(1) by invoking solicitor-client privilege. Many of the records would have been produced in contexts where there is no client, would have contained policy advice and directions rather than legal advice, and would have been communications with third parties including the potential recipients of environmental sentencing funds that would not have had a solicitor-client relationship with the Public Body. These records would include communication between the lawyers with the Public Body and representatives of the Edmonton and Area Land Trust, records of communication between lawyers with the Public Body and counsel for CN Rail, and policies developed by the Public Body or AEP relating to creative environmental sentencing.

33. In the alternative, the Applicant further submits that if the records withheld by the Public Body under section 27(1) were properly subject of solicitor-client privilege, the Public Body erred in law by exercising its discretion to withhold nearly all records response to the request in this matter. No information was released that explained how the creative sentence in this case was developed, or how and why the beneficiary of the environmental sentence was selected, either in general or specifically in relation to the prosecution in this matter. A level of withholding records that completely defeats an access request is

[10] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at paras 223-226 [**APPLICANT'S AUTHORITIES, TAB 1**].
[11] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at para 67 [**APPLICANT'S AUTHORITIES, TAB 1**].

inconsistent with the recognition in the FOIP Act of the public interest in the right of access to government records relating to the environment.[12]

Litigation Privilege and Section 27(1)(b)

34. Litigation privilege ends at the end of the litigation in question. As the litigation related to this request is complete, litigation privilege does not apply.[13]

35. Records a public body exempts from disclosure under *FOIP* section 27 for reasons other than solicitor-client privilege do need to be produced to the Commissioner.[14]

36. Information can be withheld under section 27(1)(b) if a lawyer or agent has prepared the information for use in the provision of advice or legal services. In order to rely on section 27(1)(b), the Public Body "must provide clear evidence that the information was prepared by or on behalf of one of the persons enumerated in the provision, and that the purpose for which the information was prepared was used in the provision of legal services".[15]

37. When applying section 27(1)(b), the Public Body must justify its exercise of discretion by explaining how it weighed the considerations for and against disclosure, and how withholding the records meets the purposes of section 27(1)(b). Unlike solicitor-client privilege circumstances, there is no presumption the nature of the information and relationships protected provide a sufficient reason not to disclose.[16]

38. The Applicant's position is that the records withheld under section 27(1)(a) in this case were not properly subject to solicitor-client privilege, and that in relation to records subject to section 27(1)(b) the Public Body did not reasonably exercise its discretion in withholding those records given the subject matter of the records at issue.

Section 32(1)(b)

39. The Applicant submits the records subject to this request fall within the category of information which the Public Body is required to disclose in the public interest pursuant to section 32(1)(b) of the FOIP Act.

40. In order for section 32(1)(b) to apply, there must be circumstances that compel disclosure, or disclosure must be clearly in the public interest, as opposed to a matter that may just be of interest to the public.[17]

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[12] *FOIP Act,* sections 93(4)(b) and 32(1)(a).
[13] *Blank v. Canada (Minister of Justice),* 2006 SCC 39 at paras 8-9 [**APPLICANT'S AUTHORITIES, TAB 3**].
[14] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 43-45 [**APPLICANT'S AUTHORITIES, TAB 4**]; *Re Children's Services (Re)*, F2017-28 at paras 130-131 [**APPLICANT'S AUTHORITIES, TAB 5**].
[15] *Re Order F2018-36*, F2018-36 at para 292 [**APPLICANT'S AUTHORITIES, TAB 6**].
[16] *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 at paras 405-422 [**APPLICANT'S AUTHORITIES, TAB 1**].
[17] *Re Lethbridge (City),* F2013-23 at para 75 [**APPLICANT'S AUTHORITIES, TAB 7**].

41. Section 32 is not a 'public interest over-ride' in relation to discretionary exemptions requiring a public body to consider the public interest in releasing information. This would add nothing to a public body's requirement to consider the public interest in disclosure when exercising their discretion.[18]

42. Given the clear public interest in the development and implementation of a creative environmental sentence, the Applicant submits the Public Body had an obligation to proactively release information explaining how and why the Edmonton and Area Land Trust was selected as the beneficiary of sentencing funds, as well as how or why the particular project or type of remedial work was decided upon.

43. The Applicant submits the Public Body also has a continuing obligation to disclose information concerning the development and implementation of creative environmental sentences imposed for regulatory offences committed under EPEA. A proper reading of section 32(1)(b) of the FOIP Act requires that this information be made available to the public, irrespective of whether an access to information request has been made under the Act.

Sincerely,

Shaun Fluker
Associate Professor of Law

[18] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 45-56 [**APPLICANT'S BOOK OF AUTHORITIES, TAB 2**].

Table of Authorities

TAB	DOCUMENT	Paragraphs Reproduced
1	*Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10	56, 67, 103, 114-118, 223-226, 405-422
2	*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23	45-56, 66
3	*Blank v. Canada (Minister of Justice),* 2006 SCC 39	8-9
4	*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53	43-45
5	*Re Children's Services (Re)*, F2017-28	130-131
6	*Re Order F2018-36*, F2018-36	292
7	*Re Lethbridge (City),* F2013-23	75