



August 3, 2018

VIA ELECTRONIC MAIL

Records, FOIA, and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

On April 30, 2018, the Environmental Protection Agency (EPA) granted a financial hardship waiver to CVR Energy, Inc, an oil refining company owned by billionaire investor and former advisor to President Donald Trump Carl Icahn.¹ The waiver exempted CVR's refinery in Wynnewood, Oklahoma from complying with renewable energy regulations under the U.S. Renewable Fuel Standard (RFS) program.² As a result, the Wynnewood refinery is no longer obligated to produce gasoline mixed with renewable biofuels. It is concerning that Mr. Icahn, a longtime opponent of the RFS program, stands to earn tens of millions of dollars as a result of the waiver.³ Indeed, Icahn has long opposed RFS' ethanol mandate, reportedly lobbying hard against

¹ Jarrett Renshaw & Chris Prentice, *Exclusive: U.S. EPA Grants Biofuels Waiver to Billionaire Icahn's Oil Refinery - Sources*, REUTERS (Apr. 30, 2018, 7:03 AM), <https://www.reuters.com/article/us-usa-biofuels-epa-icahn/exclusive-u-s-epa-grants-biofuels-waiver-to-billionaire-icahns-oil-refinery-sources-idUSKBN1I10YB>.

² *Id.*

³ See, e.g., Steve Benen, *The EPA Does a Lucrative Favor for Carl Icahn, a Key Trump Ally*, MSNBC (Apr. 30, 2018, 12:53 PM) <http://www.msnbc.com/rachel-maddow-show/the-epa-does-lucrative-favor-carl-icahn-key-trump-ally>; Luis Sanchez & Miranda Green, *EPA Grants Waiver to Oil Refinery Owned by Billionaire Ex-Trump Adviser: Report*, THE HILL (April 30, 2018, 8:37 AM); Mythili Sampathkumar, *US Environment Agency Grants Waiver to Oil Refinery Owned by Billionaire Ex-Trump Adviser*, THE INDEPENDENT (Apr. 30, 2018, 9:24 PM), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-carl-icahn-scott-pruitt-epa-oil-refinery-fuel-standards-ethanol-a8330196.html>.



the program before and during his time as an adviser to President Trump.⁴ After being asked by President Trump to interview candidates to lead EPA in early 2017, Mr. Icahn reportedly questioned Oklahoma Attorney General Scott Pruitt—who was ultimately nominated for the post—about his views on the RFS program.⁵

And Mr. Icahn was not alone in his advocacy efforts: Valero Energy Corp., the largest oil refiner in the United States, engaged in an “extensive behind-the-scenes- lobbying campaign” to bring Icahn and others together in opposition to biofuel initiatives.⁶ Like Icahn, Valero hoped to change RFS requirement that oil refiners blend biofuels into their gasoline.⁷

Though Mr. Icahn stepped down from his role as advisor to the president on August 18, 2017, questions remain about the legality of his advocacy.⁸ Indeed, because he stood to earn windfall profits from an RFS rule change, federal prosecutors subpoenaed Icahn last fall to learn more about the nature and scope of his advising.⁹ More recently, in May 2018, Congressman John Sarbanes sent a letter to Administrator Pruitt requesting information about the waiver given to CVR, noting that it would “help CVR Energy avoid millions of dollars in compliance costs and increase Icahn’s personal net worth.”¹⁰ Though CVR was ostensibly granted the waiver because of “financial hardship,” Sarbanes’ letter called attention to the fact that “[p]ress reports and CVR’s own reporting do not indicate the company is experiencing “disproportionate hardship,” suggesting that foul play may have been afoot. Since then, senators have continued to pressure EPA to turn over information about the RFS program and Icahn’s “self-dealing.”¹¹

American Oversight is seeking information to determine whether Mr. Icahn or other private interests improperly influenced EPA actions.

⁴ Eric Lipton, *Icahn Raises Ethics Flags With Dual Roles as Investor and Trump Adviser*, N.Y. TIMES (Mar. 26, 2017), <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html?mcubz=1>.

⁵ *Id.*

⁶ Chris Prentice, *Special Report: Refiner Valero’s Secret Campaign Against U.S. Biofuels Mandates*, REUTERS (Aug. 21, 2017, 7:07 AM), <https://www.reuters.com/article/us-usa-biofuels-valero-specialreport/special-report-refiner-valeros-secret-campaign-against-u-s-biofuels-mandates-idUSKCN1B115D>.

⁷ *Id.*

⁸ Matthew Goldstein & Alexandra Stevenson, *Carl Icahn Quits as a Special Adviser to President Trump*, N.Y. TIMES (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/business/dealbook/carl-icahn-trump-adviser.html?_r=0.

⁹ Matthew Goldstein, *Prosecutors Are Examining Carl Icahn’s Role as Trump Adviser*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/carl-icahn-trump-ethanol-subpoena.html>.

¹⁰ Letter from Rep. John Sarbanes to Scott Pruitt, Administrator, Environmental Protection Agency (May 16, 2018), https://sarbanes.house.gov/sites/sarbanes.house.gov/files/LETTER_Sarbanes_Pruitt_CVR_Energy.pdf.

¹¹ Reuters Staff, *Democratic Lawmakers Raise Pressure on EPA Over Icahn’s Biofuels Role*, REUTERS (June 21, 2017, 10:50 AM), <https://www.reuters.com/article/us-usa-biofuels-icahn-idUSKBN19C1ZS>.

Requested Records

American Oversight requests that EPA produce the following within twenty business days:

1. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar entries/invitations, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between any political appointee* in the Office of the Administrator or the Office of Air and Radiation and:
 - a. Carl Icahn, or any individual acting on behalf of Mr. Icahn;
 - b. Any employee or other representative of Icahn Enterprises; or
 - c. Any employee or other representative of CVR Energy or any of its affiliates or subsidiaries (including but not limited to CVR Refining Holdings, LLC and Coffeyville Resources, LLC).

2. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar entries/invitations, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (1) any political appointee* in the Office of the Administrator or the Office of Air and Radiation and (2) any employee or other representative of Valero Energy Corp. or any of its affiliates or subsidiaries.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

Please provide all responsive records from May 1, 2017, to the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If EPA uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.¹² **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**¹³

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered EPA prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**¹⁴ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but EPA’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that EPA use the most up-to-date technologies to search for responsive information and take steps to ensure

¹² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹³ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹⁴ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹⁵ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹⁶ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹⁷ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁸

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, EPA is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and EPA can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release

¹⁵ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁸ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁹ *Mead Data Central*, 566 F.2d at 261.

of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.²⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.²¹

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government.²² The public interest in Mr. Icahn’s influence on EPA actions is evidenced by the administration’s public announcement of his appointment, resignation, and significant news coverage of his potential ethics violations while in office.²³ Moreover, federal law enforcement officials and Congress have taken an interest in Mr. Icahn’s work as an advisor to the president, which also indicates that the public has a significant interest in the release of these records.²⁴ The American people deserve to know if outside individuals and groups are communicating with the nation’s regulators and what effect these communications have on public policy. This request seeks information that will shed light on the private interests that may be shaping EPA policy.

This request is primarily and fundamentally for non-commercial purposes.²⁵ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.²⁶ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver

²⁰ 40 C.F.R. § 2.107(l)(1).

²¹ 40 C.F.R. § 2.107(l)(1).

²² 40 C.F.R. § 2.107(l)(2)(i)-(iv).

²³ See, e.g., Renshaw & Prentice, *supra* note 1; Benen, *supra* note 3; Goldstein & Stevenson, *supra* note 8.

²⁴ See, e.g., Sarbanes, *supra* note 10.

²⁵ 40 C.F.R. § 2.107(l)(3)(i)-(ii).

²⁶ American Oversight currently has over 11,900 page likes on Facebook, and over 44,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Aug. 1, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited Aug. 1, 2018).

received by a senior DOJ attorney,²⁷ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁸ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁹

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with EPA on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Dan McGrath at foia@americanoversight.org or (202) 897-4213. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

²⁷ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁸ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

²⁹ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.