



April 3, 2017

BY FOIA ONLINE

BY EMAIL: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

RE: FOIA Request Regarding Contacts from Carl Icahn

Dear Freedom of Information Officer:

It has been widely reported that Carl Icahn is serving as a “special advisor to the President” on regulatory matters. The *New York Times* recently reported that, in his capacity as a special advisor, Mr. Icahn has pressed for regulatory changes at the Environmental Protection Agency (EPA) that would provide a direct financial benefit to a company, CVR Energy, in which Mr. Icahn is the majority investor. The article further notes that Mr. Icahn “quizzed” Scott Pruitt about this regulatory matter when Mr. Icahn interviewed Mr. Pruitt prior to his appointment as EPA Administrator.

This report and others raise grave questions about potential conflicts of interest held by Mr. Icahn and other persons playing unprecedented roles in federal policy-making that will impact the lives of millions of Americans. They also present serious concerns as to whether the oil industry and other fossil fuel interests are being given special influence over EPA decisions on clean air, clean water, climate pollution, and other matters crucial to people’s health and well-being. These concerns are heightened by the Administration’s recent executive actions that seek to weaken federal rules protecting the environment and addressing climate change.

Accordingly, pursuant to the Freedom of Information Act (FOIA), we request copies of the following records<sup>1</sup> in EPA's possession:

1. Any and all records of communications subsequent to November 7, 2016, between Carl Icahn, his personal staff, or staff of CVR Energy or a subsidiary and: a) any person at the Assistant Administrator level or higher at the EPA; b) Scott Pruitt or any direct advisers thereto; c) President or President-Elect Donald Trump or advisers or staff thereto; d) any member of, or adviser to, President-elect Trump's or President Trump's transition , landing, or beachhead teams.
2. Any and all records of communications subsequent to November 7, 2016, between (a) the President or President-Elect Donald Trump or advisers or staff thereto; or (b) any member of, or adviser to, President-elect or President Trump's transition , landing, or beachhead teams to the EPA and any staff or political appointees at the EPA regarding Carl Icahn.<sup>2</sup>
3. Any and all records of communications subsequent to November 7, 2016, between other representatives of, or persons advocating for the interests of, companies that extract, process, refine, or transport fossil fuels, or generate energy from such fuels and a) any person at the Assistant Administrator level or higher at EPA; b) Scott Pruitt or any direct advisers thereto; c) President or President-Elect Donald Trump or advisers or staff thereto; d) any member of, or adviser to, President-elect or President Trump's transition , landing, or beachhead teams to the EPA.

It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

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<sup>1</sup> As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, tapes, photos, videos, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

<sup>2</sup> Although we recognize that these may be inter-agency communications, these communications are not exempt under FOIA exemption 5 because they do nothing to promote the "quality of agency decisions" by protecting "frank discussion of legal or policy matters" between agencies. *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). As the Supreme Court has explained at length, "[t]he point is not to protect Government secrecy pure and simple." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001).

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the nation's environmental laws, including, but not limited to, the Clean Air Act and Clean Water Act.

We also request that responsive records be released as soon as they are available, but in no event later than 20 days as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

### REQUEST FOR FEE WAIVER

This FOIA request is submitted by Earthjustice, a nonprofit environmental law organization. Earthjustice uses legal advocacy and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change.

Earthjustice requests that you waive all fees in connection with this matter. As shown below, Earthjustice meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

#### I. THE SUBJECT OF THE REQUESTED RECORDS CONCERNS "THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT."

The subject matter of this request relates to the adoption and implementation of environmental regulations and policies affecting the extraction, processing, refining, and transportation of fossil fuels, and energy generation from such fuels. It is clear that such actions, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("[R]easonable specificity" is "all that FOIA requires" with regard to this factor). Thus, this FOIA request plainly concerns the operations or activities of the government.

#### A. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).

There is no question that the records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public domain. The requested records will provide important information regarding input to EPA's decisionmaking by parties that have a potential financial interest in the outcome of that decisionmaking. Such information will allow better understanding of government operations, and in particular, who is attempting to influence EPA action, and responses by EPA to such attempts. The records are likely to also disclose what reasons EPA might have for taking or not

taking certain actions in regard to the environmental and human health impacts that it oversees. These records are not publicly available as a general matter. Thus, production of the requested records is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation*, the court made clear that “[FOIA] [l]egislative history suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.” 835 F.2d 1282, 1286 (9th Cir. 1987). In this instance, the requested records will likely provide new information about the input that fossil fuel industries are providing to EPA decision-makers and the effects of that input. See *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 n.2 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also *Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”) (citing *Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005))

B. The disclosure of the requested information will contribute to “public understanding.”

The information requested will contribute to public understanding of the involvement of Carl Icahn and other representatives of, or persons advocating for the interests of, companies that extract, process, refine, or transport fossil fuels, or generate energy from such fuels (collectively herein, “fossil fuel industries”) in regulatory matters in which they have potential financial interests. The information requested will also help provide Earthjustice, its members, and the public that Earthjustice disseminates information to with insight into the kinds of input EPA policymakers are or may be receiving directly or indirectly from fossil fuel industries and EPA’s responses thereto. The request will likely result in disclosure of records not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government as described above. 5 U.S.C. §552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In this instance, the requested records will likely provide new information about communications by and input from fossil fuel industries regarding EPA’s actions to implement the nation’s key environmental laws. See *McClellan*, 835 F.2d at 1286 (FOIA’s legislative history “suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.”). Accordingly, the records sought by this request will provide important oversight of EPA operations by revealing the extent to which such interests are attempting to influence EPA policy, and EPA’s response to those attempts. See *Community Legal Services*, 405 F. Supp. 2d at 560 (“[T]he CLS request would likely shed light on information that is new to the interested public.”).

Public understanding of the new information will be achieved because Earthjustice intends to use the new information that it receives to educate the public by informing the public about the above-described communications by fossil fuel industries and EPA's reaction thereto.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). Earthjustice need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law requir[es] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Earthjustice to show how it distributes information to the public generally. *Id.*

Earthjustice is a non-profit organization that informs, and educates the public regarding issues, policies, and laws relating to the environment. Earthjustice has been substantially involved in such activities for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

Earthjustice possesses the expertise to explain the requested information to the public and the ability to disseminate the requested information to the general public (*e.g.*, Earthjustice has attorneys and other professionals who have the ability to assess and digest the requested information, and Earthjustice has the capacity to publish reports regarding that information). In addition, Earthjustice's informational publications are disseminated to the media and are available on Earthjustice's website to the general public.

The records sought in this FOIA request will be used to assess the input from and influence of fossil fuel industries to EPA actions that affect those industries. The records will also be used to determine whether and how the EPA is complying with and implementing its obligations to implement environmental laws that affect fossil fuel industries.

Concurrent with any action which Earthjustice may take after obtaining the requested records, Earthjustice intends to publicize the significance of the matters that are the subject of the communications disclosed, the nature of the concerns and positions expressed in those communications, and EPA's reaction thereto. This is certain to result in a significant increase in public understanding of government agency activity. Earthjustice has publicized agency activities with respect to implementation of various environmental laws many times through information gained from FOIA requests like this one. Earthjustice intends to use the records sought in this request in a similar manner. Information such as that presently requested is often disseminated through Earthjustice's newsletter, which is sent to approximately 1.2 million people monthly, Earthjustice's website, news releases, and social media outlets including Facebook, Twitter and Instagram. Earthjustice's informational publications continue to contribute information to public media outlets, as well. Information concerning communications between fossil fuel industries and the persons described in this request will likely be disseminated through all of these means. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians*, 416 F.3d at 1180 (“Among other things, Forest Guardians ‘publishes an online newsletter, which is e-mailed to more than 2,500 people’ and stated that it

‘intend[s] to establish an interactive grazing web site’ with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.”).

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Earthjustice’s track record of active participation in oversight of governmental agency activities and its consistent contribution to the public’s understanding of agency activities, as compared to the level of public understanding prior to disclosure, is well established.

The requested information is likely to shed light on attempts by fossil fuel industries to influence EPA’s implementation of the nation’s environmental laws and EPA’s response to those attempts. The records sought are likely to provide information not already in the public domain. The records in question will, among other things, help illuminate the extent to which fossil fuel industries with a financial stake in EPA’s regulatory actions are seeking to influence those actions, and the effectiveness of their attempts to do so. The public’s understanding of these matters, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Earthjustice is not requesting these records merely for their intrinsic informational value.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. Earthjustice need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Earthjustice to show how it distributes information to the public generally. *Id.*

Earthjustice is a non-profit organization that informs, educates, and counsels the public regarding issues, policies, and laws relating to the environment. As previously stated, information such as that presently requested is often disseminated through Earthjustice’s newsletter, which is sent to approximately 1.2 million people monthly, Earthjustice’s website, news releases, and social media outlets including Facebook, Twitter and Instagram. Earthjustice’s informational publications contribute information to public media outlets, as well. Earthjustice has consistently displayed its ability to disseminate information granted to it through FOIA.

II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO EARTHJUSTICE.

Access to government records and similar materials through FOIA requests is essential to Earthjustice's role of educating the general public. Earthjustice, a non-profit, 501(c)(3) organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection with this request pursuant to 5 U.S.C. §552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

**CONCLUSION**

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at 202-797-5257. You can also reach me by email at: [gsommers@earthjustice.org](mailto:gsommers@earthjustice.org).

Thank you for your assistance.

Sincerely,

/s/ Gordon Sommers

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