



April 5, 2017

**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](mailto:hq.foia@epa.gov)

**Re: Expedited Freedom of Information Act Request**

Dear Freedom of Information Officer:

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

During his tenure as Oklahoma's Attorney General, Scott Pruitt reportedly used his official office as a conduit for industry interests to provide input into government decisionmaking, regularly consulting directly with fossil fuel firms regarding regulations affecting that industry.<sup>1</sup> Recent reports indicate that the Trump administration may be giving similar favored access and consideration to the fossil fuel industry: In recent months billionaire Carl Icahn has been serving as a special adviser to President Trump on regulatory matters,<sup>2</sup> and has reportedly provided input on certain environmental regulations that would significantly benefit his own company, CVR Energy Inc.<sup>3</sup> Mr. Icahn reportedly has special access to the EPA on these matters.

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<sup>1</sup> See, e.g., Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm with Industry*, N.Y. TIMES, Feb. 22, 2017, <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html>; Brady Dennis & Steven Mufson, *Thousands of Emails Detail EPA Head's Close Ties to Fossil Fuel Industry*, WASH. POST, Feb. 22, 2017, [https://www.washingtonpost.com/news/energy-environment/wp/2017/02/22/oklahoma-attorney-generals-office-releases-7500-pages-of-emails-between-scott-pruitt-and-fossil-fuel-industry/?utm\\_term=.187c5a8084fb](https://www.washingtonpost.com/news/energy-environment/wp/2017/02/22/oklahoma-attorney-generals-office-releases-7500-pages-of-emails-between-scott-pruitt-and-fossil-fuel-industry/?utm_term=.187c5a8084fb); Natasha Geiling, *Scott Pruitt's Record Reveals a Long History of Industry Favoritism*, THINKPROGRESS, Jan. 18, 2017, <https://thinkprogress.org/scott-pruitt-epa-oklahoma-record-386f13c8cc1d#.kfhqkxuwc>.

<sup>2</sup> Chris Isidore, *Trump Taps Carl Icahn for Regulations Busting Post*, CNNMONEY (Dec. 21, 2016, 5:36 PM), <http://money.cnn.com/2016/12/21/news/economy/donald-trump-carl-icahn/?iid=EL>.

<sup>3</sup> See, e.g., Jennifer Dlouhy & Mario Parker, *Trump Said to Consider Biofuel Plan Between Icahn, Ethanol Group*, BLOOMBERG (Feb. 27, 2017, 8:50 PM),



American Oversight is seeking information to determine the scope of access Mr. Pruitt and the EPA have provided to industry groups and others with a stake in environmental regulation.

### Requested Records

American Oversight requests that EPA produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All communications between (1) any political or SES appointee in the Office of the Administrator (including but not limited to Scott Pruitt, Acting Deputy Administrator Mike Flynn, the Acting Chief of Staff John Reeder) or the Office of Air and Radiation (including but not limited to Acting Assistant Administrator Sarah Dunham), as well as anyone acting on behalf of those individuals, and (2) Carl Icahn; any individual acting on behalf of Mr. Icahn; any officer, director, or employee of Icahn Enterprises or CVR Energy, Inc.; or any individual acting on behalf of Icahn Enterprises or CVR Energy.
2. All communications between (1) any political or SES appointee in the Office of the Administrator (including but not limited to Scott Pruitt, Acting Deputy Administrator Mike Flynn, and Acting Chief of Staff John Reeder) or the Office of Air and Radiation (including but not limited to Acting Assistant Administrator Sarah Dunham), as well as anyone acting on behalf of those individuals, and (2) and any officer, director, or employee of Valero Energy or anyone acting on behalf of Valero Energy.

Please provide all responsive records from February 17, 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 your agency 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.**

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<https://www.bloomberg.com/news/articles/2017-02-28/trump-said-to-consider-biofuel-plan-between-icahn-ethanol-group>.

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.<sup>4</sup> **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.**<sup>5</sup>

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.**<sup>6</sup> 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 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”

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<sup>4</sup> 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).

<sup>5</sup> 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)).

<sup>6</sup> 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>.

or “disclosure is prohibited by law.”<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup> 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.’”<sup>10</sup>

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.<sup>11</sup> 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 15<sup>th</sup> Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

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<sup>7</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>8</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>9</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>10</sup> *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)).

<sup>11</sup> *Mead Data Central*, 566 F.2d at 261.

## 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.<sup>12</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>13</sup>

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.”<sup>14</sup> The public interest in Mr. Icahn’s activities is evidenced by the Trump administration’s public announcement of his appointment, as well as the significant public attention since that time.<sup>15</sup> The interest in how Mr. Pruitt is running the EPA given his conduct as Oklahoma Attorney General is plentiful.<sup>16</sup> The American people deserve to know which outside individuals and groups are communicating with our nation’s top regulators. This request seeks information that will shed light on which interests are shaping our environmental policy.

This request is primarily and fundamentally for non-commercial purposes.<sup>17</sup> 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 will use 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.<sup>18</sup> One example of American Oversight’s demonstrated public disclosure of documents and creation of editorial content is in its recently launched “Audit the Wall” effort, 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.<sup>19</sup>

Accordingly, American Oversight qualifies for a fee waiver.

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<sup>12</sup> 40 C.F.R. § 2.107(l)(1).

<sup>13</sup> 40 C.F.R. § 2.107(l)(1).

<sup>14</sup> 40 C.F.R. § 2.107(l)(2)(i)-(iv).

<sup>15</sup> See, e.g., Isadore, *supra* note 2; 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>.

<sup>16</sup> See *supra* note 1.

<sup>17</sup> 40 C.F.R. § 2.107(l)(3)(i)-(ii).

<sup>18</sup> American Oversight currently has over 10,400 page likes on Facebook, and over 9,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 3, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 3, 2017).

<sup>19</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org) (last visited Apr. 3, 2017).

## Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 40 C.F.R. § 2.104(e), American Oversight requests that EPA expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request. President Trump just announced plans to dismantle many environmental regulations passed under the Obama administration.<sup>20</sup> There will therefore be extensive (de)regulatory activity at the EPA in the months to come, and the public deserves to know which interests will be involved in shaping that process.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,<sup>21</sup> American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”<sup>22</sup> American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.<sup>23</sup> One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its recently launched “Audit the Wall” effort, 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.<sup>24</sup>

Accordingly, American Oversight's request satisfies the criteria for expedition.

## Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency 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 Sara Creighton at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 869-5246. Also, if American

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<sup>20</sup> See, e.g., Jacqueline Alemany, *Trump Executive Order Will Dismantle Obama Environmental Regulations*, CBSNEWS (Mar. 27, 2017, 11:40PM), <http://www.cbsnews.com/news/trump-executive-order-will-dismantle-obama-environmental-regulations/>.

<sup>21</sup> See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>22</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>23</sup> American Oversight currently has over 10,400 page likes on Facebook, and over 9,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 3, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 3, 2017).

<sup>24</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org) (last visited Apr. 3, 2017).

Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Austin R. Evers  
Executive Director  
American Oversight