



1411 K Street NW, Suite 1400
Washington, DC 20005

tel: 202-736-2200 fax: 202-736-2222

March 3, 2017

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

RE: Freedom of Information Act Request

To whom it may concern:

The Campaign Legal Center submits this request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, for records pertaining to the Environmental Protection Agency's communications with Carl Icahn and related correspondence pertaining to certain Renewable Fuel Standard rules.

I. Background

On February 27, 2017, *Bloomberg News* reported that “Billionaire investor Carl Icahn and the leading U.S. biofuel trade group provided a deal to the Trump administration for revamping the Renewable Fuel Standard that would give both parties a long-sought change to the regulation, according to people familiar with the agreement.”¹

The parties, including representatives of refiner Valero Energy Corp., presented the White House with a memorandum containing draft language it could use to direct the Environmental Protection Agency to make the adjustments, according to the people, who declined to be identified discussing ongoing negotiations. Prices for biofuel credits plunged on the news while futures contracts for corn, the raw material used to manufacture ethanol, surged.

....

As majority owner of refiner CVR Energy Inc., Icahn has pushed to shift the burden for complying with the biofuel quotas from refiners to fuel blenders. Icahn, who is also a

¹ Jennifer A. Dlouhy and Mario Parker, Trump Said to Consider Biofuel Plan Between Icahn, Ethanol Group, BLOOMBERG (Feb. 28, 2017), <https://www.bloomberg.com/news/articles/2017-02-28/trump-said-to-consider-biofuel-plan-between-icahn-ethanol-group>.

special regulatory adviser to President Donald Trump, and other refiners have now won agreement from a major ethanol trade group to support shifting the point of obligation, as it's known within the industry.

The Renewable Fuels Association had just this month filed comments with the EPA opposing the move. But now it has agreed to back the change in return for a pledge for a waiver allowing gasoline blends containing 15 percent ethanol -- called E15 -- to be sold year-round in U.S. markets.²

On March 1, 2017, *Bloomberg News* reported that "White House officials have spent the past two days in deliberations with billionaire refinery owner Carl Icahn about his proposal to modify federal policy on renewable fuels and with ethanol producers who oppose it, according to three people familiar with the talks."³

The flurry of meetings and phone calls came after *Bloomberg News* reported Monday that Icahn had helped broker a compromise with a leading biofuel group on reworking the program. The report led to a surge of more than \$100 million in the value of Icahn's refinery investments.

Icahn, who is also an unpaid adviser on regulations to President Donald Trump, predicted the modifications he is seeking would be made soon. He described it as "a matter of extreme urgency" that must be addressed "to avoid potential bankruptcies."

.....

Senior administration officials spoke with Icahn at length about his plan on Tuesday and held in-person meetings Wednesday with representatives of the Fuels America coalition of biofuel producers that opposes the proposed restructuring. Representatives of the American Petroleum Institute, which is lobbying against changes, also discussed the issue with White House and Environmental Protection Agency officials.⁴

On March 2, 2017 *The Intercept* reported "that billionaire investor Carl Icahn has used his position as Donald Trump's deregulatory czar to strong-arm the ethanol lobby into agreeing to a change that will save one of Icahn's companies \$200 million a year. If so, this would be the most obvious example yet of crony capitalism in the Trump era."⁵

The backdrop for this drama is the government's renewable fuel standard, which requires all gasoline sold in America to contain a minimum volume of renewable sources — generally corn-based ethanol.

² *Id.*

³ Jennifer A. Dlouhy, *White House Debates Icahn Plan Revamping Ethanol Rule*, BLOOMBERG (Mar. 1, 2017), <https://www.bloomberg.com/news/articles/2017-03-02/white-house-said-to-debate-icahn-plan-revamping-ethanol-rules>.

⁴ *Id.*

⁵ David Dayen, *Crony Capitalism at Work? Trump Adviser Carl Icahn Strong-Arms Ethanol Lobby to Save His Company Millions*, THE INTERCEPT (Mar. 2, 2017), <https://theintercept.com/2017/03/02/crony-capitalism-at-work-trump-adviser-carl-icahn-strong-arms-ethanol-lobby-to-save-his-company-millions/>.

One of the more arcane elements of the current rule is that oil refiners are responsible to make sure the rule is followed – not the gasoline wholesalers (or “blenders”).

Icahn is the majority owner of CVR Energy, a refiner which does not have the infrastructure to blend ethanol. As a result, CVR must buy renewable fuel credits to comply with their obligation.

In its most recent SEC filing, CVR stated it spent \$205.9 million last year on renewable fuel credits. Shifting the point of obligation to blenders would relieve CVR of that expense. “That’s big money, even to a billionaire,” Slocum told The Intercept.

Not surprisingly, Icahn has long wanted the renewable-fuels industry to agree that the obligation should belong to the wholesalers, not the refiners.

And all of a sudden this week, the top renewable-fuels trade organization reversed its previous position and announced that it had reached an agreement with Icahn, on his terms.

....

Jeff Broin, CEO of Poet, the nation’s largest ethanol producer, said in a statement, “It’s a bailout. This was a back-room ‘deal’ made by people who want out of their obligations under the Clean Air Act.”

The Fuels America coalition, another industry player, went so far as to sever ties with [the Renewable Fuels Association], saying they were “no longer aligned with America’s biofuel industry.” Emily Skor of Growth Energy, a biofuels advocate, was more blunt: “I assure you this is no deal for anyone but Carl Icahn.”⁶

Records likely to be disclosed in response to this request will contribute significantly to the public’s understanding of the nature of conversations between the agency and individuals and industries that stand to profit from changing the RFS rules, such as Carl Icahn, among other matters of public interest.

II. Requested Records

CLC is requesting copies of all following records:

- All records of meetings and phone calls with Carl Icahn, including logs, minutes, agendas, and related records;
- All correspondence with Carl Icahn.

This request encompasses both digital and physical records.

⁶ *Id.*

Please note that this request applies to all emails, sent and received, on governmental email addresses, as well as to all emails, sent and received, on all other email addresses and accounts used to conduct official business.

The timeframe for this request is November 9, 2016 to March 3, 2017.

If some portions of the requested records are exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. 5 U.S.C. § 552(b). If any portion of the requested records is exempt from disclosure, please provide an index of the withheld materials as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972).

III. Application for Fee Waiver or Limitation of Fees

A. The request is made for non-commercial purposes and will contribute significantly to public understanding of the operations or activities of government.

FOIA provides that the agency shall furnish requested records without or at reduced charge if “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.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l).

As described above in Part I, the requested materials involve matters of significant public interest. Records likely to be disclosed in response to this request will contribute significantly to the public’s understanding of the nature of conversations between the agency and individuals and industries that stand to profit from changing the RFS rules, such as Carl Icahn. These details are not already publicly available and the records would provide a more thorough public understanding of the operations of the agency.

CLC will use records responsive to this request in the creation of widely disseminated materials and analysis that will educate the public about these matters and the operations of the government. CLC anticipates analyzing the materials gathered through this FOIA request to develop reports,⁷ write blogs,⁸ and author op-eds.⁹ CLC’s research and reports are widely

⁷ See, e.g. Lawrence M. Noble and Brendan M. Fischer, *Funding the Presidential Nominating Conventions: How a Trickle of Money Turned Into a Flood*, Campaign Legal Center (July 26, 2016), <http://www.campaignlegalcenter.org/sites/default/files/Funding%20the%20Presidential%20Nominating%20Conventions%20Report.pdf>.

⁸ See, e.g., Brendan M. Fischer, *How Trump’s Plan to Repeal the Johnson Amendment Could Unleash ‘Super Dark Money’ Into Our Elections*, Campaign Legal Center blog (Feb. 3, 2017), <http://www.campaignlegalcenter.org/news/blog/how-trump-s-plan-repeal-johnson-amendment-could-unleash-super-dark-money-our-elections>; *Filling the Swamp: Inauguration and Transition Funding*, Campaign Legal Center blog (Jan. 19, 2017), <http://www.campaignlegalcenter.org/news/blog/filling-swamp-inauguration-and-transition-funding>;

disseminated on its blog,¹⁰ through its own website,¹¹ through social media platforms like Facebook¹² and Twitter,¹³ and regular emails to its supporters, among other communications outlets.¹⁴

CLC staff have significant knowledge in ethics and government accountability, and news media regularly rely upon CLC's analysis and expertise.¹⁵ In addition to its own blogs and reports, CLC anticipates analyzing the requested records and disseminating the materials among traditional news outlets.

Requester CLC is a non-profit public interest organization organized under Section 501(c)(3) of the Internal Revenue Code and this request is made for non-commercial purposes.

As such, we request that any applicable fees associated with this request be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). A fee waiver in this instance would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

B. CLC qualifies for a fee waiver as a "representative of the news media."

CLC additionally requests that it not be charged search or review fees for this request because the organization meets the definition of a "representative of the news media" for purposes of the FOIA, since CLC "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(II)-(III); *see also* 40 C.F.R. § 2.107(b)(6).

As the D.C. Circuit has held, the "representative of the news media" test is focused on the requestor rather than the specific FOIA request. *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121

⁹ *See e.g.* Trevor Potter, *Donald Trump Hasn't Solved Any of His Conflicts of Interest*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/posteverything/wp/2017/01/11/donald-trump-hasnt-solved-any-of-his-conflicts-of-interest/?utm_term=.0e80b538fb8f.

¹⁰ *See* Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

¹¹ *See* Campaign Legal Center "Reference Materials" library, <http://www.campaignlegalcenter.org/research/reference-materials>.

¹² <https://www.facebook.com/CampaignLegalCenter/>

¹³ <https://twitter.com/CampaignLegal>

¹⁴ *See* Campaign Legal Center blog at MEDIUM, <https://medium.com/clc-blog>.

¹⁵ *See e.g.* Manu Raju, *Trump's Cabinet Pick Invested in Company, Then Introduced a Bill to Help It*, CNN (Jan. 17, 2017), <http://www.cnn.com/2017/01/16/politics/tom-price-bill-aiding-company/>; Christina Wilkie and Paul Blumenthal, *Trump Just Completely Entangled His Business and the U.S. Government* HUFFINGTON POST (Jan. 11, 2017), http://www.huffingtonpost.com/entry/trump-business-conflicts-of-interests-treasury_us_5876928de4b092a6cae4ec7b; Emma Brown and Danielle Douglas-Gabriel, *Betsy DeVos's ethics review raises further questions for Democrats and watchdogs*, WASH. POST (Jan. 24, 2016)

(D.C. Cir. 2015). CLC satisfies this test because (as noted in Part III(A)) CLC applies its expertise and editorial skills to turn raw materials into reports, articles, and op-eds that are widely disseminated on its blog,¹⁶ through its own website,¹⁷ through social media platforms and regular emails to its supporters, and through other communications outlets.¹⁸ CLC additionally applies editorial skill to analyze and disseminate materials to other news media outlets, which regularly cite and rely upon CLC's work. The D.C. Circuit has held that an requester may qualify as a news media entity if it "distribute[] [its] work' by issuing press releases to media outlets in order to reach the public indirectly" 799 F.3d. at 1125-26.

Courts have found that other organizations with functionally similar missions and engaged in similar public education activities qualify as "representatives of the news media," even if engaged in litigation or other advocacy beyond educating the public about the operations of government. *See e.g. Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121-25 (D.C. Cir. 2015) (finding a public interest advocacy organization that comments to other media outlets about documents it obtains under FOIA a news media requester); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding "public interest law firm" Judicial Watch a news media requester); *Elec. Privacy Info. Ctr. V. DOD*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding nonprofit public interest group that published a biweekly email newsletter a news media requester).

"It is critical that the phrase 'representative of the news media' be interpreted broadly if the act is work as expected, . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986), cited in *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989).

In the event the fee waiver is not granted, I may not be charged for the first two hours of search time, or for the first hundred pages of duplication. Please contact me and advise me of the cost of this request if processing costs exceed \$100.

IV. Application for Fee Waiver or Limitation of Fees

I request that the processing of this request be expedited pursuant to 40 C.F.R. § 2.107. As described in Part I, the subject of the request involves a matter of exceptional media interest,¹⁹ and the nature of conversations between the agency and individuals and industries that stand to

¹⁶ See Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

¹⁷ See Campaign Legal Center "Reference Materials" library, <http://www.campaignlegalcenter.org/research/reference-materials>.

¹⁸ See Campaign Legal Center, MEDIUM, <https://medium.com/clc-blog>.

¹⁹ See sources cited *supra* nn. 1-5.

profit from changing the RFS rules raise questions about the government's integrity which can affect public confidence.²⁰

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

* * *

In order to expedite delivery of these requested documents and in order to reduce possible fees incurred, I am requesting that these documents be delivered to me either digitally via email (in PDF format), or on a data disk via the U.S. Postal Service.

Please email copies of responsive documents to:

Bfischer@campaignlegalcenter.org

Or, please mail copies of responsive documents to:

Brendan Fischer
Campaign Legal Center
1411 K St NW, Suite 1400
Washington D.C. 20005

Should you elect, for any reason, to withhold, redact, or deny the release of any record responsive to this request, I request that you provide me with an explanation for each withholding/redaction, along with pertinent legal citations.

Please confirm the receipt of this request and provide me with an estimate of processing time.

Thank you,

/s/

Brendan Fischer
Associate Counsel
Campaign Legal Center
bfischer@campaignlegalcenter.org

²⁰ See e.g. sources cited at *supra* at n.6 (“billionaire investor Carl Icahn has used his position as Donald Trump’s deregulatory czar to strong-arm the ethanol lobby into agreeing to a change that will save one of Icahn’s companies \$200 million a year. If so, this would be the most obvious example yet of crony capitalism in the Trump era”).