

Law Office of Daniel M Galpern

May 3, 2024

Environmental Protection Agency
National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (2310A)
Washington, DC 20460

Regarding: FOIA Request for Information Submitted Pursuant to TSCA § 8(e)

Wherein fossil fuels reasonably present a substantial risk of injury to health or the environment.

Dear FOIA Officer:

Please accept this Freedom of Information Act (“FOIA”) request, submitted on behalf of Climate Protection and Restoration Initiative (CPR Initiative), Dr. James E. Hansen, and Donn J. Viviani (collectively, “Requesters”).

As used herein, the term “fossil fuels” includes oil, gas, coal, and any fuel derived from or produced during their manufacture, processing, refinement, distribution in commerce, use or disposal.¹ The term “disposal” herein refers to but is not limited to emissions² releases generated at any part of the lifecycle of fossil fuels.

Many of the public informational, educational, and advocacy activities undertaken by Requesters are time sensitive. Accordingly, please provide a prompt response. For any request taking longer than ten days to process, please inform the undersigned Daniel Galpern of “(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B).

TSCA § 8(e)

Pursuant to Toxic Substances Control Act (“TSCA”) § 8(e), [15 U.S.C. § 2607\(e\)](#) provides that:

Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

¹ In addition, the terms “manufacture,” “process,” or “distributes in commerce,” “chemical substance or mixture,” “environment” and “Administrator,” as used herein carry the definitions of [15 USC 1602](#) and [40 CFR § 712.3](#).

² These include direct or indirect releases into the ambient atmosphere, including but not limited to smokestack and tailpipe emissions, fugitive emissions, leaks, emissions from flaring, and emissions lost or generated during carbon capture, storage or sequestration efforts, among others. Emissions include greenhouse gases (CO₂, CH₄, N₂O, and fluorinated gases) and releases of other air pollutants.

FOIA REQUEST

Please produce responsive documents in electronic format to the extent possible, from the period of January 1, 1976, through the date of search, as follows:

- Information in EPA's possession or control submitted by or on behalf of any person, including any corporation, pursuant to TSCA, § 8(e), 15 U.S.C. § 2607(e), which information reasonably supports the conclusion that the manufacture, processing, distribution in commerce, use, or disposal of fossil fuels presents a substantial risk of injury to health or the environment.
- Information as reasonably supports the same conclusion about any greenhouse gas or other pollutant emitted during the manufacture, processing, refinement, distribution in commerce, use, or disposal of fossil fuels.
- Submissions seeking EPA's opinion as to the applicability of the TSCA § 8(e) reporting requirement to any fossil fuel or any emission stemming its manufacture, processing, refinement, distribution in commerce, use, or disposal.

We request all parts and versions of records responsive to this request, including entire email threads and attachments. Additionally, no non-exempt information contained within otherwise responsive records should be withheld as "non-responsive." *See, e.g., Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 676-79 (D.C. Cir. 2016) (notwithstanding FOIA's nine exceptions, if a record contains information responsive to a FOIA request, the government must disclose the entire record); *see also Institute for Policy Studies v. U.S. Cent. Intelligence Agency*, 388 F. Supp. 3d 51, 53 (D.D.C. 2019) ("If any of the [non-exempt] information on a page of the document falls within the subject matter of a FOIA request, then that entire page should be included as within the scope of the request." (citation omitted)). If we can be of assistance in your development of search query terms, please do not hesitate to contact us.

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you, or your office, have destroyed or decide to withhold any documents that could be construed reasonably to be responsive, please indicate this fact and the reasons therefore in your response.

EXEMPT RECORDS

In 2016, Congress added an additional requirement by amending FOIA to codify a “foreseeable harm” standard into the Act. *See* FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538; *Rosenberg v. Dep’t of Def.*, No. 17-CV-00437, 2018 WL 4637363, at *2 (D.D.C. Sept. 27, 2018). FOIA now provides that an agency shall withhold information “*only if* . . . the agency reasonably foresees that disclosure would harm an interest protected by” a FOIA exemption or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A) (emphasis added). As a result, EPA must “release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.” *Rosenberg*, 2018 WL 4637363 at *2.

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Requesters to appeal that denial. To comply with legal requirements, the following information must be included:

- (1) Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
- (2) Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to Requesters as required by 5 U.S.C. § 552(b).

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Agency’s powers of discretionary release under the FOIA. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require “some balancing and accommodation,” and noting that “Congress did not design the FOIA exemptions to be mandatory bars to disclosure”); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (observing that “FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information”). In this regard, it is well settled that agencies may make “discretionary disclosures” of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited by law from doing so. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that agency’s FOIA disclosure decision can “be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.”); *see also FOLA Update, Vol. VI, No. 3*, at 3 (“OIP Guidance: Discretionary Disclosure and Exemption 4”) (“[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.”).

Discretionary disclosure in this instance would serve the public interest in educating citizens regarding (a) the long-standing nature of known risks imposed on human health and the environment by fossil fuels and their associated emissions, (b) the potential for their regulation, and (c) the operations and activities of EPA with respect to those risks and that potential.

For the reasons set forth above, Requesters anticipate that the EPA will release the requested information.

FEE WAIVER REQUEST

In accordance with 5 U.S.C. § 552(a)(4)(A), and EPA's implementing regulations, Requesters hereby request a waiver of all fees associated with providing information responsive to the above FOIA request. CPR Initiative is a nonprofit organization, Dr. James E. Hansen is a climate scientist and Director of the Columbia University program in [Climate Science, Awareness and Solutions](#), and Dr. Viviani is a 30-year veteran EPA policymaker (retired) and Chair of the Board of Directors of CPR Initiative. Requesters have non-commercial interests in the sought-after information. As noted by the D.C. Circuit, "Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal quotation marks and citations omitted). Fees for all of CPR Initiative's FOIA requests to date have been waived.

Criteria under FOIA and EPA's implementing regulations favor disclosure

Under the FOIA, a fee waiver or reduction applies where (1) "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 (2) disclosure "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's implementing regulations codify the statutory factors. 40 CFR § 2.107(n)(4)-(6).

For the reasons explained further below, Requesters meet both of these requirements.

I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations and activities of the government.

According to EPA's implementing regulations for FOIA, EPA will consider the following four criteria in weighing whether disclosure of the information sought by a FOIA request is in the public interest:

- (i) The subject of the request. Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

- (ii) The informative value of the information to be disclosed. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.
- (iii) The contribution to an understanding of the subject by the public is likely to result from the disclosure. Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The Agency will consider a requester's expertise in the subject area and ability and intention to effectively convey information to the public. The Agency presumes that a representative of the news media will satisfy this consideration.
- (iv) The significance of the contribution to public understanding. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The Agency will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

40 CFR § 2.107(n)(5)(i)-(iv).

All four criteria weigh heavily in Requesters' favor.

First, the records concern the operations and activities of the federal government.

The requested records pertain to the question when private parties understood the substantial risk of injury to health and the environment stemming from the fossil fuels and associated emissions. The information also will assist the public in understanding EPA's historic and current response to that risk, whether that response has taken the form of no action, slow action under other law that it administers, and its inaction to date under TSCA. Thus, the subject matter of this FOIA request implicates operations and activities of the federal government, with profound significance to both Requesters and the general public.

Second, disclosure of the records requested is likely to contribute to public understanding of the operations and activities of the federal government.

Disclosure of the records requested will contribute significantly to public understanding of the operations and activities of the federal government. Records regarding the receipt or non-receipt by EPA under TSCA § 8(e) of information pertaining to impacts on health and the environment from fossil fuels and associated GHGs, as well as records pertaining to EPA's deliberation with respect to any such information, will shed light on EPA's decision-making process concerning its restrictions, *vel non*, of such fuels and emissions. It is axiomatic that such data and information are the foundations of sound public-policy decision-making.

Further, to the extent that any of the records requested contain scientific information not already available to the general public, disclosure should improve public and scientific understanding concerning the risks of the continued manufacture, processing, distribution, use and disposal of fossil fuels.

There is a high degree of interest in climate change and U.S. Government policy related to. Moreover, there is distinct interest in EPA's decisions regarding whether to regulate fossil fuels and associated GHGs under TSCA, as evidenced by CPR Initiative's newsletters and blogs, which reach a wide variety of members of the public, stakeholders, and policymakers. As discussed further below, CPR Initiative has the capacity to disseminate information regarding the records sought to a wide range of interested persons, so that disclosure of the records sought will contribute substantially to public understanding of the underlying scientific, legal, and policy issues.

Third, disclosure will significantly enhance public understanding, as and the material and analysis based upon it will be distributed widely.

"FOIA does not require that a requester be able to reach a 'wide audience,'" *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116 (D.C. Cir. 2015), but it is noteworthy that Requesters regularly communicate to wider audiences through blogs, testimony, and media interviews, press releases, public hearings, and other content such as scientific and academic papers and opinion essays. *See* for instance, [A real methane fee \(not\)](#) (March 2024, Dan Galpern of CPR Initiative, blog posting concerning EPA recent action), [Major Questions on Climate and the Environment](#) (June 2023 Galpern post regarding *West Virginia v EPA*) [A View from Glasgow](#) (Jan. 2022 Galpern post about COP 26), [Global Warming Acceleration: Hope and Hopium](#) (Dr. Hansen's post of March 29, 2024), [How We Know that Global Warming is Accelerating and that the Goal of the Paris Agreement is Dead](#) (Hansen post of November 10, 2023: [Global warming in the pipeline Oxford Open Climate Change, Volume 3, Issue 1, 2023, kgad008](#) (Hansen post of Nov. 2, 2023); [Earth's Energy Imbalance and Climate Response Time](#) (Hansen post of Dec. 22, 2022); CPR Initiative's archived [public hearings](#) from Nov. 2022, Sept. 2023, and Jan. 2024.

Having (collectively) worked on, and disseminated information about, climate change issues including regulation of GHGs under TSCA, for nearly a century, Requesters are well positioned to distribute the information to the public that cares most about those issues.

Disclosure of the records sought may also advance the development of domestic and international law governing the major causes and solutions to the climate crisis. In this regard, Requesters note that CPR Initiative, Dr. Hansen, and Dr. Viviani were among named plaintiffs in *Climate Protection and*

Restoration Initiative et. al v. Michael Regan et. al (Dist Oregon, *Case No.: 6:22-cv-1772* (Nov. 12, 2022) (seeking to compel EPA to commence rulemaking aimed at an orderly phase out of fossil fuels and removal of excess legacy GHG emissions, under the standard of “unreasonable risk of harm to health and the environment.” TSCA § 6(a)). EPA’s disclosure of the records sought by this Request will inform further decision-making regarding the appropriate legal and regulatory pathways to address climate change under TSCA and other law.

Requesters will analyze and disseminate the information obtained through this request for public purposes. Specifically, Requesters intend to use the requested information to inform the public, so that members of the public can meaningfully understand U.S. government activities and operations surrounding the regulation or non-regulation of GHGs under TSCA. Documents obtained via this FOIA request will be published on [CPR Initiative’s website](#). The information obtained will be analyzed and summarized in one or more blog posts by the undersigned Dan Galpern and, as warranted, that analysis will be communicated to the broader media.

Through CPR Initiative, Dr. Hansen, and Dr. Viviani, the disclosures, at a minimum, can reasonably be expected to reach groups such as the general public; concerned policymakers; concerned scientists and regulators; and environmental advocates.

In this regard, Requesters emphasize that they share EPA’s mission “to promote public understanding of potential risks” by the provision of “understandable, accessible and complete information” about dangerous chemicals. 75 FR 3462.³

Finally, the public’s understanding of EPA’s decision-making process regarding the regulation or non-regulation of fossil fuels and associated GHGs will be enhanced to a significant extent.

Disclosure of the records sought will enhance public understanding of EPA’s decision-making with respect to the regulation of fossil fuels and GHGs. Currently, the public and Requesters have little to no knowledge, with respect to any information or reports that private parties may have provided to EPA under TSCA § 8(e) regarding the risk imposed by fossil fuels and their associated GHGs on health or the environment.

Further, neither requesters nor the public possess knowledge regarding the extent to which EPA received information under TSCA § 8(e) regarding the same, nor the nature and scope of EPA’s response to such information, nor the extent to which EPA historically evaluated any such information in reaching a determination on whether or not to restrict the production, importation, processing, distribution in commerce, use, and disposal of fossil fuels and the associated GHGs.

Thus, disclosure of the records sought would help fill the current void in the public’s understanding of EPA’s operations and activities regarding fossil fuels and their associated GHG’s. Disclosure of

³ EPA Notice, *Claims of Confidentiality of Certain Chemical Identities Submitted under Section 8(e) of the Toxic Substances Control Act* (January 21, 2010).

the records sought here will enable the reviewer and the public to understand the extent to which relevant fossil fuel interests complied responsibly with a key reporting requirement implicating what is perhaps the most significant challenge confronting humanity.

II. The requesters have no commercial interest in making this request.

EPA's implementing regulations for FOIA provide that EPA will consider two criteria in weighing whether disclosure is not primarily in the commercial interest of the requester:

- (i) The existence and magnitude of a commercial interest. Whether the requester has a commercial interest that would be furthered by the requested disclosure. The Agency will consider any commercial interest of the requester . . . or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. The Agency will give the requester an opportunity in the administrative process to provide explanatory information regarding this consideration.
- (ii) The primary interest in disclosure. Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Agency ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. The Agency will not presume that disclosure to data brokers or others who merely compile and market government information for direct economic return is to primarily serve the public interest.

First, Requesters have no commercial interest in the disclosure of the records sought.

Requesters have no commercial interest in disclosure of the records sought by this Request. Requesters are either non-profit organizations or individuals. CPR Initiative is a 501(c)(3) nonprofit organization and derives its revenue exclusively through donations from foundations and members of the public. Dr. Hansen and Dr. Viviani also have no commercial interest in the records sought.

Second, and finally, the primary interest of Requesters resides in its disclosure.

Requesters have no commercial interest to weigh against the public interest in disclosure. As individuals and a non-profit organization, Requesters seek to obtain relevant records from EPA to advance public understanding of EPA's decision-making processes under TSCA and to help develop policy solutions to the climate crisis.⁴

⁴ In addition, Requesters are entitled to a fee waiver because they are representatives of the news media. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR § 2.107(e)(4)(i)-(ii). *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir.

CONCLUSION

For the foregoing reasons, we seek your prompt and affirmative responses.

Please let the undersigned Dan Galpern know if we should clarify this request to aid your efforts to locate and release the requested information.

Respectfully submitted,

/s/ Daniel Galpern

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1989) (holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).