

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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May 17, 2018

Mr. Michael A. Sullivan
Counsel to the Monitor
Volkswagen AG Independent Compliance Monitor & Auditor
22 Peachtree Street NE, Suite 1700
Atlanta, GA 30303

Dear Mr. Sullivan,

We write in response to your May 4, 2018 letter. On April 24, 2018, we wrote to Larry D. Thompson, Independent Compliance Monitor for Volkswagen AG (VW), requesting a copy of the reports he prepared (“Monitor’s report(s)”) pursuant to the January 11, 2017, Plea Agreement between the U.S. and VW (“the Plea Agreement”).¹ On May 4, 2018, you responded to our request citing confidentiality requirements in the Plea Agreement as the basis for not providing the requested materials (“the Sullivan letter”).² For the reasons explained below, the Plea Agreement does not apply to the provision of information to Congress. For that reason, we ask that you provide the requested materials by May 24, 2018, or the Committee will issue a subpoena to the Monitor to compel production.

I. Background on the Science Committee’s Investigation

On April 12, 2018, the Science Committee launched an investigation into ongoing allegations that VW “continues to circumvent global emissions requirements.”³ The Committee obtained information calling into question VW’s efforts to comply with emissions requirements.

¹ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. and Hon. Dana Rohrabacher, Member, H. Comm. on Sci., Space, & Tech. to Mr. Larry D. Thompson, Indep. Compliance Monitor for Volkswagen AG (Apr. 24, 2018).

² Letter from Mr. Michael A. Sullivan, Counsel to the Indep. Compliance Monitor for Volkswagen AG to Hon. Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (May 4, 2018).

³ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. and Hon. Dana Rohrabacher, Member, H. Comm. on Sci., Space, & Tech. Comm. to Mr. Herbert Deiss, Chief Exec. Officer, Volkswagen AG (Apr. 12, 2018) [hereinafter Smith, Apr. 12 Letter].

Congress has broad oversight and investigatory power derived from the Constitution.⁴ This authority has been repeatedly affirmed by the courts.⁵ The U.S. Supreme Court has “firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.”⁶ Hand in hand with Congress’ legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress’ investigative power, the Court stated that the “scope of [its] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁷

Additionally, pursuant to House Rule X, the Science Committee has jurisdiction over all non-military research and development (R&D), as well as environmental research and development, and “shall review and study on a continuing basis laws, programs, and Governmental activities” as set forth in House Rule X.⁸ House Rule X delegates to the Committee broad authority to investigate and understand any R&D efforts and the resulting technology. In this case, the Committee is seeking information related to technologies used to circumvent environmental regulations. Under this broad jurisdiction, the Committee has a responsibility to understand and identify “any emerging or secret technologies used to circumvent U.S. regulations.”⁹ Information contained in the Monitor’s report(s) will shed light on R&D activities, including software development, to comply with or defeat environmental regulations imposed by the U.S.

II. Specific Concerns Raised Regarding the Confidentiality of the Monitor’s Report(s)

As a basis for refusing to provide the Committee with copies of the Monitor’s report(s), you cited Exhibit 3-14 of the Plea Agreement. The relevant portion reads:

Contemplated Confidentiality of Monitor’s Reports

23. The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the Monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Offices determine in their sole discretion that disclosure would be in

⁴ See generally U.S. CONST. art. I.

⁵ See generally *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Cong. investigating the U.S. Dep’t of Justice’s handling of the Teapot Dome scandal); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of the U.S. Servicemen’s Fund and their effect on the morale of members of the Armed Services).

⁶ ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL, RL30240, at 23 (2014).

⁷ *Eastland*, 421 U.S. at 504, n.15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

⁸ H. Rule X, cl. 1(p), 115th Cong. (2017).

⁹ Smith, Apr. 12 Letter, *supra* note 3.

furtherance of the Offices' discharge of their duties and responsibilities as required by law.¹⁰

Under a plain reading of this paragraph, the Monitor may provide the requested materials to Congress.

The Committee is not “the public,” and disclosure of the reports to the Committee is not “public disclosure” as that term is used in the agreement. Courts repeatedly have held that disclosure of information to a congressional committee is not a “public disclosure.”¹¹ In *Federal Trade Commission v. Owens-Corning Fiberglass Corp.*, the D.C. Circuit held that an executive agency “may not deny Congress access to confidential documents, including those that contain trade secrets,” because “[r]elease to a congressional requestor is *not* a public disclosure forbidden by section 6(f) of the [Federal Trade Commission] Act.”¹² Similarly, in *Ashland Oil, Inc. v. FTC* and *Exxon Corp. v. FTC*, the courts rejected the private parties' efforts to use various statutes to block the FTC from providing information to Congress.¹³ Notably, the court in each case did not require a subpoena – a written request from Congress was sufficient. In *Ashland Oil*, the court provided the following rationale: “the courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of the affected parties.”¹⁴

The Committee routinely receives privileged information, trade secret information, proprietary information, as well as classified information. The House is well positioned to safeguard information covered by numerous categorical protections. Courts also trust Congress to handle sensitive information. In *Jaymar-Ruby, Inc. v. FTC*, the court plainly stated: “Courts have held that as a matter of law, it cannot be presumed that private persons will honor commitments not to disclose information, Courts do presume that government officials will honor similar commitments.”¹⁵

Courts have also refused to impose delays on congressional investigations merely because disclosure to Congress could implicate propriety commercial information. In *Exxon Corp.*, the court refused to direct the FTC to provide written notice to affected parties before providing trade secret information to Congress: “For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever these inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality.”¹⁶

¹⁰ Plea Agreement at ex. 3-14, *United States v. Volkswagen AG*, No. 16-CR-20394 (E.D. Mich. Jan. 11, 2017).

¹¹ *See Fed. Trade Comm'n (FTC) v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *see also Exxon Corp. v. FTC*, 589 F.2d 582, 585-86, 589 (D.C. Cir. 1978); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (per curiam).

¹² *Owens-Corning Fiberglass Corp.*, 629 F.2d at 970 (emphasis added).

¹³ *See Ashland Oil*, 548 F.2d at 983; *Exxon Corp.*, 589 F.2d at 588-89.

¹⁴ *Ashland Oil*, 548 F.2d at 979 (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 308 (D.D.C. 1976)).

¹⁵ *Jaymar-Ruby, Inc. v. FTC*, 496 F. Supp. 838, 845 (N.D. Ind. 1980).

¹⁶ 589 F.2d at 588.

Finally, we note that any confidentiality concerns are negated by public reporting of the Monitor's report. On April 21, 2018, German newspaper *Bild am Sonntag* reported that the Monitor had issued a report to the Justice Department, and that the report raised serious concerns about VW's actions regarding the emissions matter.¹⁷ It appears that the substance of the report was provided to the newspaper; accordingly, there can be no legitimate confidentiality reason to withhold this information in full from Congress.¹⁸

The Plea Agreement recognizes that the Monitor's reports should be disclosed if "required by law."¹⁹ The Committee is endowed with broad oversight authority derived from the Constitution, the "supreme Law of the Land," U.S. Const., Art. VI. Likewise, under the Constitution, Congress is a co-equal branch of government and courts are hesitant to engage in "creating needless friction with a coordinate branch of government."²⁰ The Committee's oversight authority cannot be thwarted by executive branch agreements such as the VW Plea Agreement. It has long been recognized that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation . . . to respect the dignity of the Congress and its committees[] and to testify fully with respect to matters within the province of proper investigation."²¹

If the Committee's April 24, 2018, request letter and this letter are not sufficient to obtain copies of the Monitor's reports, the Committee will use compulsory process.

* * *

The Committee remains concerned about VW's conduct. Since the Committee launched its investigation, the former chairman of the management board of VW, Mr. Martin Winterkorn and several other VW executives were charged "with conspiracy and wire fraud in connection with VW's long-running scheme to cheat U.S. diesel vehicle emissions requirements."²² As stated in the April 12, 2018, letter to VW's current CEO, the Committee is planning to hold a hearing on VW's technology and other technologies used to circumvent the U.S. regulatory framework.²³ To prepare for the hearing and assist the Committee with its fact-finding, we request that the Monitor provide the Committee with electronic copies of all Monitor report(s)

¹⁷ See Jack Ewing, *Overseer Faults Volkswagen's Reform Efforts Since Emissions Scandal*, N.Y. TIMES (Apr. 22, 2018), <https://nyti.ms/2F5ep6t>; Gerhard Mauerer, *VW's internal handling of emissions scandal 'unsatisfactory,' U.S. monitor finds*, AUTOMOTIVE NEWS (Apr. 23, 2018), <http://www.autonews.com/article/20180423/COPY01/304239972/vws-internal-handling-of-emissions-scandal-unsatisfactory-u.s>.

¹⁸ *Id.*

¹⁹ Plea Agreement at ex. 3-14, *United States v. Volkswagen AG*, No. 16-CR-20394 (E.D. Mich. Jan. 11, 2017).

²⁰ Order Re Cong. Subpoena at *3, *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-cv-03522-WHO (N.D. Cal. Oct. 6, 2015), 2015 U.S. Dist. LEXIS 136599*.

²¹ *Watkins v. United States*, 354 U.S. 178, 187-88 (1957).

²² Press Release, U.S. Dep't of Justice, *Former CEO of Volkswagen AG Charged with Conspiracy and Wire Fraud in Diesel Emissions Scandal* (May 3, 2018), <https://www.justice.gov/opa/pr/former-ceo-volkswagen-ag-charged-conspiracy-and-wire-fraud-diesel-emissions-scandal>.

²³ Smith, Apr. 12 Letter, *supra* note 3.

Mr. Michael A. Sullivan
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prepared pursuant to the Plea Agreement. Please provide the requested documents on or before May 24, 2018.

If you have any questions about this letter or transmission of the documents, please contact Troy Hall or Ashley Callen of the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



Lamar Smith
Chairman



Dana Rohrabacher
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science, Space, and Technology