

Appendix B
FOIA Request



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Re: Freedom of Information Act Request

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), the implementing rules and policies of the Department of the Air Force (“Air Force”), including but not limited to DoD Regulation 5400.7-R_AFMAN 33-302, Paragraphs C1.1.1-C8.1.5, The C-123 Veterans Association (“C-123 Veterans”), by counsel, hereby requests that you provide copies of the records described in this FOIA request.

Background.

The C-123 Veterans Association is a national non-profit group of veterans who were exposed to Agent Orange while they served aboard C-123k¹ aircraft after the Vietnam War, from 1972 to 1982. These aircraft were contaminated during the Vietnam War when they sprayed Agent Orange. Nearly all members of the association suffer from Agent Orange-presumptive illnesses. The C-123 Veterans mission is to educate its members, the press and the public as to the Agent Orange exposure of its members, to disseminate information on its blog and website, and ultimately to gain Department of Veterans Affairs (“VA”) and Air Force recognition of the exposure through advocating to agencies and Congress. To that end, the C-123 Veterans seeks documents concerning the scientific basis and process by the Air Force concluded that the C-123 Veterans were not exposed to Agent Orange as stated in the April 27, 2012 Consultative Letter entitled *UC-123 Agent Orange Exposure Assessment, Post-Vietnam, (1972-1982)* (“Consultative

¹ The C-123k was referred to the UC-123k when fitted with spraying equipment and all references to “C-123k” refer to both names.

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Letter”).² The assessment culminating in publication of the Consultative Letter was, in part, intended to gather all post-Vietnam War Agent Orange C-123k contamination documentation into one location and to analyze that information, so C-123 Veterans also seeks the underlying documentation gathered.

Records Requested.

- All records from 1994 to date regarding the decision to undertake the assessment of C-123 Veterans' Agent Orange exposure that culminated in publication of the Consultative Letter, or containing details of the scope of the assessment as planned and as carried out (if different).
- All records from 1994 to date containing names of individuals who conducted research for the Consultative Letter and their professional qualifications, and all records regarding selection of report personnel and final authors (if different, and if different, documents indicating why initial researchers did not prepare the final Consultative Letter).
- All records that the researchers for the Consultative Letter compiled that concern C-123k contamination, and/or that contain details of all three decontaminations of C-123k Tail #362 at the National Museum of the Air Force, along with copies of all reference materials relied upon by any researchers and/or report authors.
- All records relied upon by researchers as the factual and scientific basis for the conclusions in the Consultative Letter that C-123k Veterans were not exposed to Agent Orange.
- All records from 1994 to date that constitute or contain (1) preliminary findings of the report, (2) drafts or variations of the report that differ from the final Consultative Letter (if any), (3) dissenting opinions of researchers (if any), and/or (4) notes taken by all meeting participants and superiors regarding all stages of the assessment and report.
- All records from 1994 to date containing correspondence among researchers and authors of the report regarding the Consultative Letter and correspondence from the U.S. Air Force School of Aerospace Medicine (“USAFSAM”), U.S. Air Force Material Command or its predecessor agencies (“AFMC”), Air Force Armstrong Labs, or Air Force Surgeon General, on the one hand, and the VA, on the other hand, to the extent such correspondence relates to C-123k Agent Orange exposure.
- All records from 1994 to date concerning the review process for the Consultative Letter, including but not limited to operating instructions and internal procedures

² Col. Mark E. Smallwood, *Consultative Letter, AFRL-SA-WP-CL-2012-0052, UC-123 Agent Orange Exposure Assessment, Post-Vietnam, (1972-1982)*, U.S. Air Force School of Aerospace Medicine (Apr. 27, 2012).

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imposed by: (1) USAFSAM, (2) other agencies within the AFMC, including but not limited to the Air Force Surgeon General, (3) the Air Force Legislative Liaison, (4) the VA, (4) the Centers for Disease Control and Prevention or its component Agency for Toxic Substances & Disease Registry (“ATSDR”), or (5) U.S. Air Force Security Assistance Center.

- All records from 1994 to date containing the names and/or contribution(s) by any professionals providing peer review or outside consultation for the Consultative Letter, or containing any conclusion that peer review was necessary or unnecessary.

C-123 Veterans requests that you provide the full file (100%) for each of these records. However, this request does not seek any individual claimant information, which can and should be redacted. This request also does not seek records C-123 Veterans previously provided to the Air Force. C-123 Veterans further requests that the information be provided in electronic format or on CD-ROM, if feasible, or a similar adequate electronic storage medium.

Fee Waiver Request.

C-123 Veterans qualifies as a “representative of the news media” and seeks the records for non-commercial use.³ Indeed, C-123 Veterans regularly gathers information about the Air Force and VA through FOIA requests and investigation, analyzes that information in light of the science and history of Agent Orange, and publishes the only blog and website⁴ dedicated to C-123 Agent Orange exposure. Moreover, this year, C-123 Veterans published a book on Agent Orange exposure that is available for download to the general public free of charge on iTunes and on the C-123 Veterans’ website.⁵ These are widely-read resources relied upon – not only by veterans concerned about their own exposure and health – but by members of Congress, policy-makers, the media, educators, healthcare professionals, and the public at large. C-123 Veterans and its representatives, including Major Wesley T. Carter, will use information provided in response to this FOIA request to disseminate information about the science the Air Force uses to back up its C-123 Agent Orange policies, practices, and reports through C-123 Veterans’ websites and through journalists at major media outlets. Courts have found that other non-profit organizations that regularly publish as outlined above to be “representatives of the news media,” and the Air Force should find the same here.⁶

³ DoD5400.7-R_AFMAN 33-302, Paragraphs C6.1.5.7.1-3.

⁴ Respectively, <http://www.c123kcancer.blogspot.com> and <http://www.c123cancer.org>.

⁵ Major Wesley T. Carter, *Decades of Deception: 1972 to 2013, USAF C-123 Veterans; VA Illegally Denies Agent Orange Claims*, C-123 Veterans Association (2013), available at <https://dl.dropboxusercontent.com/u/11413053/C-123%20Kindle%20&%20PDF.pdf>; see also http://www.c123agentorange.com/C-123_Agent_Orange_Book.html.

⁶ See, e.g., *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit group that published electronic newsletter and books was “representative of the news media” under FOIA); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (holding organization that compiled, organized, and distributed agency documents and published book was “representative of the media” under FOIA).

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Disclosure of the requested information to C-123 Veterans is in the public interest, because it is likely to contribute significantly to the public's understanding of government operations and activities, and is not primarily in C-123 Veterans' commercial interest.⁷ Recent news articles in *The Washington Post*⁸ and *The Huffington Post*,⁹ and engagement by the United States Congress, show the considerable public interest in the records that C-123 Veterans seek. The requested records concern "the operations or activities"¹⁰ of the Air Force because they seek the scientific and policy basis for the Air Force's conclusion, practice, or policy of denying that C-123 veterans were exposed to Agent Orange. The records are "likely"¹¹ to contribute to an understanding of these government operations, because a public debate currently exists about the basis for the Air Force's position that dried dioxin from Agent Orange is unable to enter the human body in a significant amount – indeed, according to experts on Agent Orange quoted in *The Huffington Post* article, "It looks like the Air Force and VA has placed their faith in some sort of mysterious new state of matter that is neither solid, nor liquid, nor gas" and the position "disregards everything we know about chemistry, about toxicology[.]" The scientific basis for the Air Force's claims would therefore provide new, valuable information¹² that would likely contribute significantly¹³ to the understanding of a reasonably broad swath of the public interested in whether a federal government agency follows reasonable scientific standards and its own policies in providing benefits to veterans who have served their country.¹⁴

Based on the foregoing, C-123 Veterans requests a waiver of all fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)-(iii), and pursuant to DOD5400.7-R AFMAN 33-302, Paragraphs C6.1.4.3.1.1-4 and C6.1.5.7.1-3.

Procedural Matters.

If any information described above is withheld, C-123 Veterans requests copies of all non-exempt, reasonably segregable portions of such materials, as well as a detailed statement of

⁷ DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.

⁸ Steve Vogel, *Agent Orange's Reach Beyond the Vietnam War*, *The Washington Post*, Aug. 3, 2013, available at http://articles.washingtonpost.com/2013-08-03/politics/41031021_1_operation-ranch-hand-planes-agent-orange; Steve Vogel, *VA Reverses Denial of Benefits for Veteran in Agent Orange-Related Case*, *The Washington Post*, Aug. 7, 2013, available at http://www.washingtonpost.com/politics/va-reverses-denial-of-benefits-for-veteran-in-agent-orange-related-case/2013/08/07/7cfla680-f81-11e2-96a8-d3b921c0924a_story.html.

⁹ Lynne Peeples, *Veterans Sick from Agent Orange-Poisoned Planes Still Seek Justice*, *The Huffington Post*, July 10, 2013, available at http://www.huffingtonpost.com/2013/07/10/agent-orange-vietnam-veterans_n_3572598.html.

¹⁰ DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.1

¹¹ DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.3.

¹² DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.2.

¹³ DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.4.

¹⁴ See *Institute for Wildlife Protection v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1230-33 (D. Or. 2003) (finding a nonprofit organization qualified for a public-interest fee waiver because the organization intended to distribute information on its website, electronic mailing lists, and through the popular news outlets on topics of public interest, including the agency's interactions with the public and scientific organizations and the overall "quality of science" relied on by the agency in carrying out the statute).

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the statutory basis and reasons for each instance of withholding, including specifically but not limited to the FOIA exemption relied upon for such withholding, and an index or similar statement of the nature of any materials withheld. If any of the requested documents require pre-release processing, we ask that the remaining documents be made available in advance of processing the entire request. To expedite this request, the C-123 Veterans is willing to discuss in advance of a final determination any questions you may have concerning this request, any specific instances of deletion or claims of exemption from disclosure, waiver of fees, or other procedural matters.

* * * *

We look forward to your response within twenty (20) working days from the date you receive this request, as required by 5 U.S.C. § 552(a)(6)(A)(i). Please call the undersigned if you have any questions. Thank you for your attention in this matter.

Very truly yours,



Ronald G. London