

Appendix E
Administrative Appeal



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December 16, 2013

VIA U.S. MAIL AND EMAIL

Office of the Secretary of the Air Force
U.S. Air Force School of Aerospace Medicine
Karen Cook
Carmen Oglesby
Lynn Kane
88 CS/SCOKIF (FOIA)
3810 Communications Blvd
Wright-Patterson AFB, OH 45433-5767

**Re: ADMINISTRATIVE APPEAL
of Denial of Fee Waiver and of Freedom of Information Act Request
FOIA Request Assigned Case Nos. 2014-00247-F & 2014-00423-F ST2**

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), and 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 C5.3.1-C5.3.6, the C-123 Veterans Association (“C-123 Veterans”), by counsel and on behalf of its members, hereby appeals the Air Force’s October 24, 2013 denial of C-123 Veterans’ request for a waiver of fees associated with the above-referenced FOIA request, and also appeals your agency’s inaction otherwise in response to the request. Attached as Exhibits 1-3 are, respectively, a copy of C-123 Veterans’ October 11, 2013 FOIA request, which includes the request for a fee waiver that has been denied, a copy of your agency’s confirmation of receipt of the request, and a copy of a subsequent letter assigning the request to Wright-Patterson AFB, which includes an attachment with a notation in the margin denying the associated fee waiver request.

Introduction

The FOIA request asked that the Air Force provide the C-123 Veterans with copies of certain documents concerning the scientific basis and process by which 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 Letter”).¹ The C-123 Veterans also demonstrated in the FOIA request that

¹ 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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waiving any fees associated with the request was appropriate, on grounds that C-123 Veterans qualifies as a representative of the news media and will use the records provided in response to the FOIA request to disseminate publicly information about the scientific approach the Air Force takes toward supporting its policies, practices, and reports in this area.

As discussed below, the Air Force has concluded incorrectly in denying the fee waiver that either C-123 Veterans, or the media channels it uses to disseminate information (it is unclear which from the margin-comment denying the waiver), “[d]oes not reach a large portion of the general public.” In addition, as also discussed below, the failure to respond to C-123 Veterans’ request for records violates the duty to comply with FOIA requests within the time specified in the statute and in the Air Force’s own rules. Timely processing of C-123 Veterans’ FOIA request – and of this appeal – is particularly critical given the ways in which the C-123 Veterans members’ age and physical ailments make time of the essence in receiving the records requested.

Discussion

A. Appeal of Denial of Fee Waiver Request

C-123 Veterans requested a waiver of fees as a “representative of the news media” seeking records for non-commercial use.² C-123 Veterans asserted that fees should be waived because disclosure of the requested information is in the public interest as 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.³ On October 24, 2013, C-123 Veterans received the denial of its request for fee waiver. The denial consisted of a summary, handwritten note stating only: “Request for fee waiver is denied. Does not reach a large portion of the general public.” This conclusory denial cannot stand in light of C-123 Veterans’ proven ability to share the results of its investigation with the public through its website, books, and its intention to disseminate this information further through other news outlets.

In assessing whether a public interest fee waiver request should be granted, courts “consider the requester’s ability and intention to effectively convey or disseminate the requested information to the public.” *Prison Legal News v. Lappin*, 436 F.Supp.2d 17, 26 (D.D.C. 2006) (quoting *Judicial Watch, Inc. v. United States DOJ*, 185 F.Supp.2d 54, 62 (D.D.C. 2002)). A requester may demonstrate its ability to disseminate the information directly, or it may show that it will share the information with established organizations who intend to disseminate it widely. See *Prison Legal News*, 436 F.Supp.2d at 26-27; *Linn v. DOJ*, 1997 U.S. Dist. LEXIS 9321, 20-21 (D.D.C. 1997).

In its request, C-123 Veterans explained the channels through which it disseminates the results of its investigation and analysis, which include the only blog and website⁴ dedicated to

² See Exh. 1 at 3-4. See also 5 U.S.C. § 552(a)(4)(A)(ii)(II) (fee reduction for requests from educational or non-commercial scientific institutions involved in scholarly or scientific research, or from representatives of the news media); DoD5400.7-R_AFMAN 33-302, Paragraphs C6.1.5.7.1-3.

³ See Exh. 1 at 3-4. See also 5 U.S.C. § 552(a)(4)(A)(iii) (fee waiver for requests that are in the public interest). DoD5400.7-R_AFMAN 33-302, Paragraph C6.1.4.3.1.

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

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C-123 Agent Orange exposure. 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 at 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. See *Prison Legal News*, 436 F.Supp.2d at 26-27 (holding intention to “analyze and publish” information requested in printed journal and on website constituted adequate ability to disseminate information to the public).

C-123 Veterans also will share the results of its investigation, including the fruits of the instant request for agency records, with other organizations, including universities and news outlets, that can widely disseminate information to the public at large. C-123 Veterans has previously worked with and helped develop scientific opinions regarding C-123 contamination and aircrew exposures from the CDC/Agency for Toxic Substances and Disease Registry, the NIH/National Toxicology Center, the NIH/National Environmental Health Institute, the US Public Health Service, the US Army Joint Services Records Research Center, the USAF Historical Records Research Agency, HQ Air Force Reserve, Columbia University, Harvard University School of Public Health, Oregon Health Sciences University, University of Texas Medical School and Oregon State University to provide expert opinions to the Assistant Secretary of the Air Force, Air Force Materiel Command, and the Department of Veterans Affairs. C-123 will share the results of this FOIA request with these organizations, who have requested to use it in continued research. Materials have been and will continue to be provided to the Senate Veterans Affairs Committee, the Vietnam Veterans of America, the American Legion and the National Association of State Directors of Veterans Affairs.

Further, recent news articles in *Stars and Stripes*, the *Officer*, the *Oregonian*, the (McMinnville, OR) *News-Register*, the *Washington Post*⁶ and *Huffington Post*,⁷ and engagement by the United States Congress, show the considerable public interest in the issues on which C 123 Veterans focuses. Decades of public concern about Agent Orange make any conclusion that such information is of relatively limited interest completely misguided. C-123 Veterans accordingly will share the results of the FOIA request with the *Washington Post*, *Huffington Post* – and any other new outlets that request it – in order to ensure the information is disseminated to the public. C-123 Veterans’ established relationships with academic and news organizations and their interest in disseminating the results of its investigation qualify it for a fee waiver. See *Linn*,

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. In this regard, it is notable (even if not precedential), that your agency granted a fee waiver under similar circumstances last year, to Major Wesley Carter, a leading member of C-123 Veterans, for a FOIA request seeking the same kinds of records as are sought under the instant FOIA request. A copy of that grant is attached as Exhibit 4.

⁶ Steve Vogol, *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 Vogol, *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/?hpid=hp_a680-f181-11e2-96a8-d3b921c0924a_story.html.

⁷ Lynne Peoples, *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.

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1997 U.S. Dist. LEXIS 9321, 20-21 (“based upon Plaintiff’s representations that he will supply the information he has received to organizations which can widely disseminate it to the relevant public, and because this record gives the Court no reason to doubt the truth of such representations, ... Plaintiff’s fee waiver must be granted”). For all these reasons, the margin note denying the C-123 Veterans’ fee waiver request associated with the instant FOIA request must be reversed, and all fees should be waived.

B. Appeal of Constructive Denial of FOIA Request

While the Air Force responded to and (summarily and improperly) denied C-123 Veterans’ request for a fee waiver, it has failed to respond at all to the underlying FOIA request, which sought the following records:

- 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 imposed by: (1) USAFSAM, (2) other agencies within the AFMC, including but not

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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.

See Exh. 1 at 2-3. The FOIA request also asked that if any information was withheld, C-123 Veterans should receive copies of all non-exempt, reasonably segregable portions of the material, as well as a detailed statement of the statutory basis and reasons for each instance of withholding, and an index or similar statement of the nature of any withheld materials. *Id.* at 4-5. C-123 Veterans expressed its willingness to discuss any questions in order to expedite processing of the request, including specific instances of potential deletion or claims of exemption from disclosure.

Under 5 U.S.C. § 552(a)(6)(A)(i) and DOD5400.7-R AFMAN 33-302 C5.2.5; 38 C.F.R. § 1.556(a), the time for the Air Force to respond to the FOIA request was November 13, 2013, or at the latest by November 27, 2013, if it exercised the ten-day extension permitted under 5 U.S.C. § 552(a)(6)(B) for when unusual circumstances are present.⁸ Indeed, the initial letter confirming receipt of the FOIA request indicates that your agency would “provide ... our release determination by 13 November 2013.” See Exh. 2. But the Air Force has not responded substantively to C-123 Veterans’ FOIA request, and has offered no explanation why its response has been delayed. This failure to respond timely to C-123 Veterans’ FOIA request is unlawful, and the Air Force accordingly must grant this appeal, which is proper given the failure to respond. See 5 U.S.C. 552(a)(6)(C) (administrative remedies are considered exhausted where there is no response by statutory deadlines).

There is no excuse for such failure to respond by administrative agencies charged with helping “promote [the] policy of broad disclosure of Government documents” that is necessary to “ensure an informed citizenry, vital to the functioning of a democratic society.” *Center for Public Integrity v. Department of Energy*, 191 F.Supp.2d 187, 189 (D.D.C. 2002). Moreover, while it may not be necessary that an agency provide all records responsive to a request by the statutory deadline to meet its FOIA obligations, it must at least provide *something* that can be fairly characterized as a “response” to a request for records under the Act. *Pollack v. DOJ*, 49 F.3d 115, 118-19 (4th Cir. 1995). The Air Force has not done so here.

It is our hope this appeal can be resolved quickly and without the expenditure of substantial additional resources. Time is of the essence, as the requested information relates to the health of many veterans, including members of C-123 Veterans, as well as to their VA claims, military retirement disability awards, and ongoing and future medical care for exposure to toxins during their military service. There are C-123 members awaiting a response to the FOIA request

⁸ This is not to concede that unusual circumstances were present, but rather only notes the outer limit of time to respond that is permitted under the statute and rules.

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who are seriously ill with maladies that impact their life expectancies, including Major W.T. Carter, Master Sergeant Richard Matte, Chief Master Sergeant Steven Caracker, Lieutenant Colonel Edward Kosaksoki, and others. Indeed, in just the time since the instant FOIA request was filed, C-123 Veterans member Lt. Col. (Retired) Paul Bailey, who had previously sought related information under FOIA from the Veteran's Administration, passed away from ailments acknowledged by the VA as related to his C-123K Agent Orange exposure. Other former military officers who passed away since C-123 Veterans first started seeking agency records relating to their common concern include Brigadier General Michael Walker, Colonel Warner Jones, Colonel Louis Pazcowitz, Master Sergeant George Gadbois, Master Sergeant Robert Boyd and others, all with claims denied for C-123 Agent Orange exposure.

Given the urgent need for the records requested from your agency to obtain potential medical aid and other relief for C-123 Veterans' members, we ask that the records requested be provided as expeditiously as possible. In addition, it is imperative that C-123 Veterans receive all records sought in the FOIA request to which it is entitled.

Conclusion

For the foregoing reasons, your office should reverse the denial of C-123 Veterans' request for a waiver of fees associated with their FOIA request for records concerning the scientific basis and process by which the Air Force concluded the C-123 Veterans were not exposed to Agent Orange, and it should also grant this appeal to require the timely production of the requested records. If there are questions regarding this matter, or if there is information we can provide to bring it to an expeditious resolution, please contact us. We will look forward to a response to this appeal within the twenty working days specified by FOIA and Air Force rules.

Very truly yours,



Ronald G. London

Enclosures

cc: C-123 Veterans Association

Exhibits 1-3 to the Initial Appeal are omitted as duplicative of Appendices B, C,
and D to the Complaint

Exhibit 4 to the Initial Appeal

October 12, 2012
Grant of Fee Waiver



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LIFE CYCLE MANAGEMENT CENTER (AFMC)
WRIGHT-PATTERSON AIR FORCE BASE OHIO

12 October 2012

88 CS/SCOKIF (FOIA)
3810 Communications Blvd
Wright-Patterson AFB OH 45433-5767

Mr. Wesley Carter
102 Walker Street
Black Mountain, NC 28711

Dear Mr. Carter,

We received your Freedom of Information Act (FOIA) request, dated 18 Sep 12, in our office on 18 Sep 12. The request was assigned control number 2012-06182-F ST 2.

Your request for a fee waiver has been approved by the Ms. Karen Cook, Wright-Patterson AFB FOIA Manager.

The point of contact is Ms. Carmen Y. Oglesby. You may reach her at 937-257-1436 or email at carmen.oglesby@wpafb.af.mil. It is a pleasure serving you.

Sincerely

A handwritten signature in cursive script that reads "Carmen Y. Oglesby".

CARMEN Y. OGLESBY, Civ, DAF
Freedom of Information Act Analyst
Information Management Branch
88th Communications Squadron

Attachment:
Your FOIA request