

Appendix A

FOIA Request



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October 11, 2013

VIA U.S. MAIL & FACSIMILE – 202-632-8925

Department of Veterans Affairs
Veterans Benefits Administration (VBA)
Gwendolyn Smith (Alt)
810 Vermont Avenue, NW
(20M33) (VACO)
Washington, DC 20420

VIA U.S. MAIL & FACSIMILE – 202-273-9386

Department of Veterans Affairs
Veterans Health Administration (VHA)
Jeffrey Parrillo
Deanna Marakowski
810 Vermont Avenue, NW
(10P2C1) (VACO)
Washington, DC 20420

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 Veterans Affairs (“VA”), including but not limited to 38 C.F.R. §§ 1.550-1.562, 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 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 VA’s policy and practices to deny that C-123 Veterans have been exposed to Agent Orange in service-connection claims, in the VA’s advocacy to Congress, and its messages to the public. C-123 Veterans also seeks documents related to an October 27, 2011 teleconference and a March 8 2012 conference hosted by Mr. Brooks Tucker of Senator Richard Burr’s staff, attended by representatives of the C-123 Veterans and members of the Veterans Benefits Administration

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.

October 11, 2013

Page 2

("VBA") or the Veterans Health Administration Office of Public Health ("OPC"), including Mr. Carter Moore, Mr. James Sampsel, Dr. Michael Peterson, Dr. Wendi Dick, and Dr. Terra Irons, among others.

Records Requested.

- All records from January 2007 to date that contain VBA and OPH instructions, policy, or guidance underlying the following or similar statement in letters to C-123 Veterans denying some claims: (1) "As of this date, the Department of Veterans Affairs (VA) does not currently recognize remote or secondary exposure to Agent Orange from contact with aircraft or equipment previously used in Vietnam" (Under Secretary Allison A. Hickey letter to Maj. Wesley T. Carter, Oct. 1, 2012); and (2) "VA regulations do not allow us to concede exposure to herbicides for veterans who claim they were exposed after the Vietnam war while flying in aircraft used to spray those chemicals" (Manchester, N.H. VARO letter to Lt. Col. Paul Bailey, Feb. 29, 2013).
- All records that contain VA instructions, policy, or guidance regarding C-123 Agent Orange exposure provided in advance to each participant in the October 27, 2011 teleconference and/or March 8, 2012 conference.
- All records drafted by Dr. Wendi Dick, Dr. Michael Peterson, Dr. Terry Walters, and/or Dr. Terra Irons in preparation for, during, or after the October 27, 2011 teleconference and March 8, 2012 conference that relate to their assertion that C-123 Veterans were not exposed to Agent Orange.
- All records drafted by Dr. Wendi Dick, Dr. Michael Peterson, Dr. Terry Walters, and/or Dr. Terra Irons for any C-123 Agent Orange posters, bulletins (such as the Office of Public Health's *Agent Orange: The 50 Year History & Newest Chapter of Concerns*), or other public information releases that relate to the assertion that "exposure" to Agent Orange is defined by the "concentration present" and "bioavailability."
- All records that contain instructions, policy, or guidance from VA executives, including the Deputy Secretary or any Under Secretary, regarding the denial or approval of C-123 Veterans' claims.
- All records reflecting decisions or concerning plans, contracts, approval, funding, or reasons for cancelling the Institute of Medicine C-123 special contract that VA representatives promised to C-123 Veterans at the March 8, 2012 conference.
- All records that reflect (1) the types of information the VA seeks from the Joint Services Records Research Center ("JSRRC"), (2) how the JSRRC responds to VA requests, and/or, (3) how the VA uses information it receives from the JSRRC, as any of these relate the C-123 Veterans' service-connection claims.

October 11, 2013

Page 3

- All records relating to the VA's practice or policy to refuse to consider C-123 Veterans' supporting documentation from non-military U.S. government entities, including but not limited to the Centers for Disease Control and Prevention, the CDC component Agency for Toxic Substances & Disease Registry ("ATSDR"), and/or the U.S. Public Health Service Commissioned Corps.
- All records containing the factual and scientific basis for the VA Compensation Service's September 25, 2012 conclusions, in the Advisory Opinion "Service-Connection Based on Exposure to Agent Orange Due to Flying C-123 Aircraft," from Thomas J. Murphy, Dir. Compensation Service to Maj. Wesley T. Carter, Sept. 25, 2012, to the effect that:

(1) a non-physician scientist such as a toxicologist cannot provide evidence of a medical nexus; and

(2) "there is no conclusive evidence that TCDD exposure causes any adverse health effects"

as those conclusions relate to the C-123 Veterans member's service-connection claim.

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. 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.² 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 website³ 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.⁴ 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 VA uses to back up its C-123 Agent Orange policies and practices through C-123 Veterans' websites and through

² 38 C.F.R. §1.561(b)(7).

³ Respectively, <http://www.c123kcancer.blogspot.com> and <http://www.c123cancer.org>.

⁴ 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.

October 11, 2013

Page 4

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 VA should find the same here.⁵

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.⁶ Recent news articles in *The Washington Post*⁷ and *The Huffington Post*,⁸ 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 of government”⁹ because they seek the scientific and policy basis for the VA’s practice or policy of denying C-123 Agent Orange service-connection claims. The records are “likely to contribute”¹⁰ to an understanding of these government operations, because a public debate currently exists about the basis for the VA’s position that dried dioxin from Agent Orange is unable to enter the human body in a significant amount – indeed, according to *The Huffington Post* article, “a number of leading scientists and federal officials refute the VA’s claims – calling them ‘ludicrous,’ ‘outrageous,’ and even ‘preposterous.’” The scientific basis for the VA’s claims would therefore provide new, valuable information¹¹ that would likely contribute significantly¹² 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.¹³

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 38 C.F.R. §§ 1.561(b), (n).

⁵ 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).

⁶ §§ 1.561(n)(2)(i)-(ii), (3)(i)-(iv), (4)(i)-(ii).

⁷ 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/2013/08/07/7cfla680-ff81-11e2-96a8-d3b921c0924a_story.html.

⁸ 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.

⁹ § 1.561(n)(3)(i).

¹⁰ § 1.561(n)(3)(iii).

¹¹ § 1.561(n)(3)(ii).

¹² § 1.561(n)(3)(iv).

¹³ 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).

October 11, 2013

Page 5

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 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