

## MEMORANDUM

To: Jeremy Gunn  
From: Dennis Quinn  
Date: May 15, 1995

RE: PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD  
(PFIAB)  
File: 3.5.3

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I. **ISSUE ONE:** Is the President's Foreign Intelligence Advisory Board (PFIAB) subject to the Freedom of Information Act, 5 U.S.C. 552.

SHORT ANSWER: NO

II. **ISSUE TWO:** Is the PFIAB subject to The JFK Assassination Records Collection Act, 42 U.S.C. 2107.

SHORT ANSWER: YES

### III. DISCUSSION:

#### A. FOIA

The statutory definition of "agency" in the FOIA includes ". . . any executive department, military department, Government Corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including* the Executive Office of the President) (emphasis added). 5 U.S.C. 552(e). At first blush, it would seem that the specific inclusion of the Executive Office of the President in the statute would hold entities like the PFIAB accountable under the FOIA, but this is not so. The courts have consistently held that the term "Executive Office" does not include the Office of the President and the President's immediate personal staff, or units in the White House Staff **whose sole function is to advise and assist** the President (emphasis added). *See, e.g., Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *National Security Archive v. Archivist of the United States* (Office of Counsel held not an "agency" for purposes of Act); 909 F.2d 541 (D.C. Cir. 1990); *Rushforth v. Council of Economic Advisors* (CEA held not an "agency" for purposes of Act), 762 F.2d 1038 (D.C. Cir.

1985).<sup>1</sup>

This rationale is supported by the legislative history of the FOIA, specifically the Conference Report.

With respect to the meaning of the term “Executive Office of the President” the conferees intended the result reached in *Soucie v. David*, 448 F.2d. 1067 (D.C. Cir 1971). The term is not to be interpreted as including the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R.Rep. No. 1380, 93rd Cong., 2d Sess. 14-15 (14-15), U.S. Code Cong. & Admin.News 1974, 6293.

In *Soucie*, the court determined that the Office of Science and Technology, an entity in the Executive Office of the President, was an “agency” within the meaning of FOIA. The court observed that the OST was specifically authorized to evaluate the scientific research programs of Federal agencies. The court went on to state that “if the OST’s sole function was to advise and assist the President, that might be taken as an indication that the OST is part of the President’s staff and not a separate agency.” 448 F.2d. at 1075.

The President’s Foreign Intelligence Advisory Board was established to advise and assist the President. Based on the foregoing, the PFIAB is not an agency for purposes of the FOIA and is not subject to the reporting or disclosure requirements thereof.

## B. ARCA

The definition for “agency” used in the ARCA is identical to that used in FOIA, right down to the language about the Executive Office of the President. So, assuming that the PFIAB did have assassination records that it did not want to turn over to the Board, it could use the FOIA argument that it is not part of the EOP and therefore not subject to the ARCA.

However, Section 3(5) of the ARCA defines “Government office” as any office of the Federal

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<sup>1</sup> Administratively, those entities that exist to advise and assist the President are listed within the White House Office, or WHO. Examples of these include the Press Office, Counsel’s Office, Domestic Policy Council, Office of Public Liaison, Presidential Personnel and the Advance Office. The Executive Office of the President, or EOP, includes OMB, USTR and The Office of Science and Technology, among others.

Government that has possession or control of assassination records. Section 7(j) gives the Board extensive powers to direct “government offices” to identify and turnover assassination records. While the PFIAB could claim it is not an “agency” under the statutory definition, it would be quite difficult for it to claim it is not a “government office.”

This discussion is based on the assumption that the PFIAB has assassination records and that it will be unwilling to turn them over to the Board. If the PFIAB ever had such records, they may have been transferred to the appropriate Presidential Library, along with other administration records.<sup>2</sup>

If it still has records, I hope that the Board could get help from the White House Staff in getting the records reviewed. If you want further discussion on this aspect, please advise.

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<sup>2</sup> I recall reading in Clark Clifford’s book that President Johnson called a meeting of the PFIAB shortly after the assassination. Any such records of that meeting should be in the LBJ Library.