

DRAFT MEMORANDUM

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To: T. Jeremy Gunn, Esq., General Counsel

cc: Laura Denk, Esq.

From: Robert Arreola

Subject: Permissible Scope of JFK Act Compulsion of NARA (and Presidential
Libraries) to Transmit to the JFK Collection Records It Holds In Which Private
Individuals May Have an Ownership Interest

The *President John F. Kennedy Assassination Records Collection Act of 1992* (“JFK Act”) requires each Government office to “review, identify and organize each assassination record in its *custody or possession* for disclosure to the public, review by the Review Board, and transmission to the Archivist.” 44 U.S.C. § 2107.5(c)(1) (Supp. V 1994) (“Section 5(c)(1)”) (emphasis added). The JFK Act, in relevant parts, defines “assassination record” as “a record that is related to the assassination of President John F. Kennedy that was created or made available for use by, obtained by, or otherwise came into the *possession* of ... the National Archives and Records Administration ... [and] any Presidential library.” 44 U.S.C. § 2107.3(2)(G), (H) (Supp. V 1994) (emphasis added). Similarly, “Government office” is defined as “any office of the Federal Government that has *possession or control* of assassination records, including ... the National Archives as custodian of assassination records that it has obtained or *possesses*.” 44 U.S.C. § 2107.3(5)(D) (Supp. V 1994) (emphasis added).

On its face, Section 5(c)(1) and the JFK Act’s definitions do not clarify the scope of “custody” or “possession” which would compel a Government office to transmit assassination records to the Collection, particularly where private individuals have an ownership interest in the record. Nor does the JFK Act explicitly define “Government records” which could have provided further insight. A narrow reading of the terms might limit the scope of the JFK Act to only those records which the National Archives and Record Administration (“NARA”) has full control over without any competing private ownership interests. A broader, more literal reading of the terms would indicate that NARA must transmit assassination records it controls within its walls regardless of private interests. Clarification of these terms may answer an important question of the Congressional intended scope of the JFK Act.

The JFK Act’s purported findings and declarations call for “*all Governmental records* related to the

assassination of President John F. Kennedy should be preserved for *historical* and governmental purposes ... [and] should be eventually disclosed to enable the public to become fully informed about the *history* surrounding the assassination.” 44 U.S.C. § 2107.2(a)(1), (2) (Supp. V 1994) (emphasis added). The Act goes on to generally describe the necessity of the legislation in light of governmental restrictions on the timely public disclosure of such records. *See* 44 U.S.C. § 2107.2(a)(4) - (7). On one hand, legislative necessity based on governmental hindrances to disclosure may imply that the Act was not intended to cover those records with a private ownership interest, as such records would not be burdened by the procedural restriction which the Act aims to overcome. On the other hand, considering that the initial declarations indicate an emphasis on *historical* preservation and public access to records, a plausible broader reading would indicate Congress was not concerned with private interests, but rather with the broader historical value of full public disclosure.

The JFK Act lends further support to a broad facial interpretation by proclaiming that “[t]he [JFK Assassination Records] Collection shall include all assassination records that have been *transmitted* to the National Archives ... prior to the date of enactment of this Act [Oct 26, 1992].” 44 U.S.C. § 2107.4(a)(2)(A)(i) (Supp. V 1994). A facial reading indicates that, regarding the composition of the Collection, Congress was not concerned with outside interests as long as a particular record had somehow ended up at the NARA.

In another relevant provision, the JFK Act states that “[n]o assassination record created by a person or entity outside government ... shall be withheld [by a Government office].” 44 U.S.C. § 2107.5(a)(4) (Supp. V 1994). Again, a facial reading indicates that, regardless of private ownership interests, if a Government office has an assassination record created by one outside the government, it should be included in the Collection.

In a series of catch-all provisions in direct reference to Section 5(c)(1), the JFK Act mandates that Government offices “organize and make available to the Review Board *any* record concerning which the office has *any uncertainty* as to whether the record is an assassination record *governed* by this Act [and] make available to the Review Board *any* additional information and records that the Review Board *has reason to believe* it requires for conducting a review under this Act.” 44 U.S.C. § 2107.5(c)(2)(F), (H) (Supp. V 1994) (emphasis added). Again, no reference is made to potential varying ownership interests in assassination records. In its narrowest reading, the fact that the Act requires records to be made available regardless of office uncertainty as to the scope of the Act indicates that Congress wanted NARA to make its records available for the Collection despite any internal concerns as to whether the Act affects records with a private ownership interest.

Section 5(d)(3) of the JFK Act mandates that “assassination records which are in the *possession* of the National Archives on the date of enactment of this act ... and which have been publically available in their entirety without redaction, shall be made available in the Collection without any additional review.” Here, “possession” is utilized in terms of records which have been available “without

redaction.” Considering that redaction is typically done on records which the government creates and wishes to keep secret, “possession” in this sense may plausibly be limited to records which fundamentally have no private ownership interest. A record privately owned is typically available to the public for a fee, with the government having little or no opportunity to perform redaction. Reading this provision as pertaining to such records would yield the reference to “redaction” superfluous.

The definition of “custody” is clarified a bit in the language of section 5(f) entitled “Custody of postponed assassination records.” Postponed records “shall ... be *held* ... by the originating body until such time as the information security program has been established at the National Archives.” *Id.* (emphasis added). “Held” in this context reveals that “custody” literally refers to being physically within the walls of the agency.

The corollary between “physical” and “custody” is reinforced by section 9(a)(1) which mandates “a Government office shall retain *custody* of its assassination records ... unless the Review Board requires the *physical transfer* of records.” (emphasis added).

That the JFK Act was intended to pertain to records beyond those created or wholly owned by the government finds support in section 9(c)(1)(B), calling for the public disclosure of records in the absence of clear and convincing evidence that “a Government record *or* particular information within an assassination record qualifies for postponement of public disclosure under this Act.” (emphasis added). Read broadly, Congress may have intended “Government” records to be distinguished from other types of “particular information” which are covered by the JFK Act.