DRAFT MEMORANDUM

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To: T. Jeremy Gunn, General Counsel

cc: Laura Denk, Esq.

From: Krista LaBelle

Subject:

I. Introduction

The President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act") is intended "to require the expeditious public transmission to the Archivist and public disclosure of [assassination records[1]]. 44 U.S.C. § 2107.2 (b)(2)(Supp. V 1994). Related to the fundamental power to disclose all assassination records is the power of the Assassination Records Review Board ("the Board") to postpone the release of "assassination records" if there is "clear and convincing evidence that the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy and that invasion of privacy is so substantial that it outweighs the public interest." 44 U.S.C. § 2107.6(3).

II. Relevant Statutory Provisions

[1] The statutory definition of 'assassination record" is any record that was obtained or produced by any of the congressional committees convened to investigate the assassination, any office of the Federal Government or any State or local law enforcement record related to support of the federal government in the investigation of the assassination. 44 U.S.C. § 2107.3 (2)(A-L) (Supp. V 1994).

The Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V 1993) ("Privacy Act") applies to any government record[2] maintained on an individual. The purpose of the Privacy Act is to balance the needs of the government to collect information with the privacy rights of individuals. *See, U.S. Department of Justice, Freedom of Information Act Guide & Privacy Act Overview (1994).* The Act allows an individual access to any file on himself or herself maintained by a federal agency in their "system of records"[3]. 5 U.S.C. § 552a(d)(1).

The Privacy Act explicitly waives the federal Government's sovereign immunity and provides both civil and criminal penalties. *See 5. U.S.C. § 552a*(g)(1), (i)(1). Section (g)(1) of the Privacy Act specifies the grounds and the amount of **civil penalties** available when an agency violates the Act. It provides:

> Whenever an agency fails to maintain any record concerning an individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefit to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual . . . the individual may bring civil action against the agency . . .
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> [and] [T]he United States shall be liable to the individual in an amount equal to the sum of (a) actual damages sustained by the individual . . . but in no case shall a personal be entitled to recovery receive less than the sum of $1,000; and (b) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(1)(C), (4)(A),(B).

Section (i)(1) of the Privacy Act specifies the grounds for **criminal penalties** available under the Privacy Act and provides:

> Any officer or employee of an agency, who by virtue of his employment or official position, has possession of , or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

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[2] "'Record' means any item, collection, or grouping of information about an individual maintained by an agency . . . that contains his name, . . . or other identifying particular assigned to the individual, such as a finger or voice print or a *photograph*. The Privacy Act of 1974, 5 U.S.C. § 552a(a)(4) (Supp. V 1993).

[3] "'System of records; means a group of any record under the control of any agency from which information is retrieved by the name of the individual . . . or by some identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

5 U.S.C. § 552a(i)(1).

III. The Privacy Act

Liability of Individual Board Members

If the Board is sued under the Privacy Act, the members may not be held individually liable for their decision to release an assassination record. The Privacy Act creates a cause of action against a federal agency[4], not its individual members. 5 U.S.C. § 552a; Connelly v. Comptroller of the Currency 876 F.2d 1209 (5th Cir. 1989) (The Privacy Act does not create individual liability . . ."). The Privacy Act only permits suit against the Board as a federal agency and not against individual members. Therefore, the individual members will not be liable for civil or criminal penalties.

Civil Liability of the Board

Assuming the Privacy Act applies to the Board, it will be difficult for them to be liable for their decision to release an assassination record. The Board properly obtained possession of the documents for review under the provisions and interpretation of the JFK Act and they were never responsible for the "system of records" or the "maintenance" of those assassination records as defined by the Privacy Act. Finally, the Board's duties under the JFK Act include identifying assassination records and designating them as historically valuable documents, thus exempting the Archives' decision to release those records from compliance with the Privacy Act.

First, a plaintiff may allege the Board refused a request to amend an assassination records referencing the individual. Under provision of the Privacy Act, an individual may request the amendment of documents maintained by a federal agency if he or she feels the document is inaccurate or no longer relevant. *See 5 U.S.C. §* 552a(d)(2). Corresponding to the right afforded by the Privacy Act are civil remedies, available when an agency refuses to consider an individual's request or refuses to amend a document. 5 U.S.C. § 552a(g)(1)(A)[5]. Although the Board may be sued under this section, they can claim they do not assume control of the system of records nor are they responsible for the maintenance of a system of records for purposes of the Privacy Act.

Examining both the JFK Act provisions outlining the process of reviewing assassination records, and the language of the Privacy Act regarding the maintenance of a system of records, it is clear the Board never assumes responsibility of records originating in other agencies. The language of the JFK Act requires only that the originating agency "organize and make available to the Review Board" documents regarding the assassination, it says nothing about transferring possession or maintenance of

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[4] An "agency"includes "any Executive department . . . or other establishment in the executive branch of the [federal] Government." 5 U.S.C. § 552a(a)(1).

[5] Whenever any agency makes a determination . . . not to amend an individual's record in accordance with his request, or fails to make such review . . . the individual may bring a civil action against the agency. 5 U.S.C. § 552a(g)(1)(A).

those documents. *See* 44 U.S.C. § 2107.5(c)(2)(E), (F), (H).

The purpose of the JFK Act is to "require the expeditious transmission to the Archivist and public disclosure of [assassination] records." 44 U.S.C. § 2107.2(b)(2). There is no indication in the language of the JFK Act that the Board assumes possession of another agency's system of records. In fact, most assassination records never reach the Board for a decision on their status because the originating agency internally classifies most of the documents according to the standards established by the JFK Act without the involvement of the Board. 44 U.S.C. § 2107.5(a)(1) ("[E]ach Government office shall identify and organize records relating to the assassination . . . for transmission to the Archivist . . ."). Therefore, the majority of document do not even reach the Board for review but are transferred directly to the Archives.

Even for those records requiring a decision by the Board, the Board never assumes possession of the system of records for amendment purposes. After the Board determines a document is an assassination record, possession of that record passes directly from the originating agency to the Archivist. Section 2107.9 provides:

The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public . . .

44 U.S.C. § 2107.9(c)(1).

The language does not say that the Board will transfer the documents, only that they will direct the originating agency to transer the documents once they are identified as assassination records unworthy of postponement. Therefore, because the Board never assumes control of the system of records, they are not responsible for requests to amend another agency's records.

The Board is also protected from the Privacy Act's remedy for a third-party's improper maintenance of another agency's documents. *See* 5 U.S.C. § 552(g)(1)(C). Although the responsibility for the system of records remains with the originating agency the Board may request the physical possession of specific documents. Section2107.9(a) provides:

"Pending the outcome of the Review Board's review activity, a Government office shall retain custody of its assassination records for purposes of preservation, security and efficiency, unless (1) The Review Board requires the physical transfer of records for reasons of conducting an independent and impartial review; or (2) such transfer is necessary for an administrative hearing or other official Review Board function.

44 U.S.C. § 2107.9(a)(1),(2).

Although this section allows the transfer of an assassination record to the Board they do not assume responsibility for the maintenance of that record under the Privacy Act's definition and therefore are

not responsible for civil remedies. 5 U.S.C. § 552a(a)(3). First, the Board does not maintain[6] the records. They are never responsible for the preservation of the records. In fact, the JFK Act requires that the responsibility for the review, amendment, and preservation of the system of records remain at all times with the originating agency. 44 U.S.C. § 2107.9(a)(1),(2).

The Board only require specific documents for a limited period of time, not the entire group of records. *Id.* Therefore, most of an agency's records are directly transferred to the Archives in a group and only a small number of documents remain for the Board to review. For those remaining documents, the Board is simply an intermediary in their transfer from the originating agencies to the permanent collection in the Archives.

Looking further at the language of the Privacy Act, the Board does not "collect[7]" documents originating in other agencies. As discussed above, the Board reviews documents but rarely possesses individual documents and never takes possession of entire groups of documents. Once the Board decides that a document is an assassination record, the chain of possession passes from the originating agency directly to the Archives. 5 U.S.C. § 2107. 9(c)(1).

Finally, the Board does not "use or disseminate" assassination records. Although the Board reviews documents and determines their classification as assassination records, they never use the documents for agency purposes, such as employment decisions. Also, the public dissemination of documents occurs only after the records are transferred to the Archives[8]. The Board merely defines the nature of the record, they never directly release assassination documents to the public.

The second civil remedy provided by the Privacy Act involves the alleged improper "maintanance"of a record by a third-party agency. Section (g)(1)(C) provides damages:

> Whenever any agency fails to maintain any record concerning an individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . character, rights or opportunities . . that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

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[6] Maintain is not further defined in the Privacy Act but according to the dictionary, it means "to preserve or keep in a given existing condition." Riverside Webster's II New College Dictionary (1995).

[7] Again, the Privacy Act fails to define "collect," but its common usage means "to bring together in a group." Riverside Webster's II New College Dictionary (1995).

[8] "The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection . . ."44 U.S.C. § 2107.9(c)(1)

5 U.S.C. § 552a(g)(1)(C).
However, as discussed above, the Board does not assume responsibility for the "maintenance" of assassination records because those documents remain under the control of the originating agency until they are transferred to the Archives.

Section (g)(1)(D) provides the final grounds for civil liability in the Privacy Act. This general provision subjects an agency to suit when it:

[F]ails to comply with any other provision of this section, or any rule promulgated thereunder, in any such way as to have an adverse effect on an individual.

5 U.S.C. § 552a(g)(1)(D).

There are several avenues the plaintiff may pursue under this section. First, he or she may challenge the Board's possession of the document. This is unlikely to be successful
because the Board physically possesses only a limited number of documents which were properly obtained under provisions of both the JFK Act[9] and the Privacy Act[10].

A second theory might challenge the maintenance of the documents. As discussed above, it will be difficult for the plaintiff to establish the Board's duty to "maintain" the documents as defined by the Privacy Act. However, assuming the court recognizes the Board's duty to maintain the document within the guidelines of section (g)(1)(B) the Board is potentially liable for the breach of any agency requirement under section (e). There are several areas under section (e) that may provide a basis for suit. Section (e)(5) requires an agency:

[M]aintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5)

Also, section (e)(6) requires an agency:

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[9] Each agency must make available to the Board records designated for postponement and records where the status as an assassination records is unclear. 44 U.S.C. § 2107.5(c)(2)(E), (F).

[10] The Board may claim a right to possession of the assassination record as a "designee of the Archivist" with the purpose of determining the historical value of the record or they may cite the general provision that allows an agency of the federal government access to records originating in other agencies. 5 U.S.C. § 552a(b)(6), (7). Under either scenario, the Board properly obtained possession of the assassination records.

Prior to disseminating any record about an individual to any person other than an agency . . . make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.

5 U.S.C. § 552a(e)(6)

Finally, section (e)(8) requires an agency:

[M]ake reasonable efforts to serve notice on an individual when any record on such individual is make available to any person under compulsory legal process when such process becomes a matter of public record.

5 U.S.C. § 552a(e)(8)

Even assuming the Board is responsible for the maintenance of the system of records, they may raise the Archives exemption contained in the Privacy Act as a defense to an invasion of privacy claim. Once the Board determines a document is an assassination record or denies a request for postponement, the originating agency transfers that document to the Archives. Upon transfer, the record is designated a historically significant document[11] and its dissemination is exempt from the limitations of the Privacy Act. Section (l)(1) of the Privacy Act provides:

Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, . . . shall for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section . . . .

5 U.S.C. § 552a(l)(1)(3).

The plaintiff may challenge the Board's designation of the record as historically significant and thus undeserving of the protection afforded by the Archives exemption of the Privacy Act. However, the JFK Act liberally defines "assassination record" and presumes that any record of an "official investigation"[12] is a viable assassination record which carries a "presumption of immediate disclosure." 44 U.S.C. § 21072(a)(2). That presumption is only limited by the five options for

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[11] Neither the Privacy Act nor the JFK Act specifically define "historically significant." However, the JFK Act declared that "all Government records related to the assassination of President John F. Kennedy should be preserved for *historical* and governmental purposes. 44 U.S.C. § 2107.2 (emphasis added)

[12] "Official Investigation" includes the review of the assassination by any Presidential or Congressional committee and any independent investigation by a government agency undertaken in response to a Presidential or Congressional request for information.

temporary postponement detailed in section 6 of the JFK Act. *See 44 U.S.C. § 2107.6.* The relevant grounds for postponement based on a privacy interest delays release of a document if:

> [T]he public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest [in disclosure].

U.S.C. § 2107.6(3).

In order to determine if the document should be temporarily postponed, the Board must weigh the privacy interest against the public interest in full disclosure of assassination documents. The individual or agency attempting to postpone the release of an assassination document bears the burden of proving by "clear and convincing" evidence[13] that the privacy interest outweighs the public interest in disclosure. *See* 44 U.S.C. § 2107.2(a)(2); 44 U.S.C. § 2107.6(1)(3). The standard encompassed in the JFK Act and the legislative intent surrounding the standard suggest a strong inclination toward public disclosure unless a substantial security or privacy interest is at stake[14].

Criminal Liability of the Board

The criminal penalties provided in the Privacy Act protect the willful[15] improper disclosure of protected documents to other agencies or to the public. 5 U.S.C. § 552a(i)(1). This should be difficult charge to substantiate. An analysis similar to that discussed for civil penalties would apply. The Board's statutory duty requires them to review and determine the classification of a record as well as to evaluate the potential for postponement. 44 U.S.C. § 2107.7(2)(A),(B). So long as they make reasonable and fair determinations about the records they should not be liable for willful disclosure.

Also, as discussed above, the Board is not responsible for the actual release of a document to the public. The Archives assumes responsibility for the document and it becomes part of the assassination collection. As part of the collection, the information is released to the public and is protected by the Privacy Act exemption for historically significant records.

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[13] The clear and convincing evidence standard rests between the preponderance of the evidence and the reasonable doubt standard of criminal trials. <u>United States v. Rizzo</u>, 539 F.2d 458, 465 (5th Cir. 1976).

[14] "In striking the required balance between personal privacy and the public interest in disclosure, . . . [there is] a heavy weight on the disclosure side of the scale. Assassination Materials Disclosure Act of 1992, H.R. Rep. No102-625, 102d Cong., 2d Sess., pt.1, at 29 (1992).

[15] Judicial interpretation has created a high standard that amount to something "greater than gross negligence." <u>Rose v. United States</u>, 905 F.2d 1257, 1260 (9th Cir. 1990).

Common Law Tort Claim

Suing the Review Board Under the Federal Tort Claims Act

The plaintiff may also allege that the Review Board committed a common-law tort claim based on an invasion of privacy or intentional infliction of emotional distress. Because of the principle of sovereign immunity, the only way for a plaintiff to sue the Review Board (an agency of the United States Government) in tort is through the Federal Tort Claims 28 U.S.C. § 1346(b) (Supp. V 1994) ("FTCA"). The FTCA waives the Government's sovereign immunity in some cases and provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment*, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b) (Supp. V 1994) (emphasis added).

Although the FTCA generally operates to waive the Government's sovereign immunity, section 2680 lists exemptions which, if they apply, operate to retain the immunity of the Government. 28 U.S.C. §2680 (Supp. V 1994). Two of these exemptions may protect the Review Board from a claim of invasion of privacy or intentional infliction of emotional distress. The relevant sections provide immunity for:

> (a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved by abused; or
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> (h) Any claim arising out of assault, battery . . . libel, slander, misrepresentation, deceit or interference with contract rights.

28 U.S.C. § 2680(a), (h) (Supp. V 1994).

Therefore, so long as the Board carefully reviewed the documents and made their decision in light of the statutory language they should be exempt from liability under the FTCA. The Board exercises broad discretion in their decisions regarding assassination records. The JFK Act requires the Board presume an assassination record should be released to the public and only when the personal privacy interest is so strong that it outweighs the strong public interest in release should the document be withheld. The Board reviewed the document in the context of this statutory guidance and after careful consideration and meeting with the individual decided the public's interest dominated the personal privacy interest. The Board's discretion combined with their thorough consideration of the documents within the context of the statute constitutes the use of "due care" within the meaning of the

exemption statute.

Federal Employees Liability Reform and Tort Compensation Act

Even if a plaintiff were able to state a claim against the members of the Review Board as individuals for releasing allegedly private information, the Federal Employees Liability Reform and Compensation Act, 28 U.S.C. § 2679 (Supp. V 1994). ("FELA"), may further protect the members of the Review Board from individual liability. Where a plaintiff files suit against a Government employee in his or her individual capacity, the FELA allows the Attorney General to certify that the employee acted within the scope of his or her employment when he or she committed the allegedly tortious act. *See* 28 U.S.C. § 2679(1). Then, the United States replaces the individual employee as the defendant in the suit and the suit proceeds under the FTCA. *Id.*

As discussed above, the JFK gives the Board discretion in determining the release status of various assassination records. They must make their decisions in good faith and with careful consideration of the privacy interests involved in the release of the records. As long as they based their decision to release a document on the individual characteristics of that documents and its relation to the assassination they are acting within the scope of their duties.

The Exclusiveness of the FTCA Remedy

In most cases the FTCA will provide the exclusive civil remedy. Section 2679(b) provides:

> The remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter . . . .

There are two exceptions to the exclusivity principle. Section 2679(2) waives exclusivity when the action involves:

> (A) [A] violation of the Constitution of the United States, or
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> (B) [[W]hich is brought for violation of a statute of the United States under which such action against the individual is otherwise authorized.

First, the Privacy Act does not allow action against the individual, it must be against a Federal agency involved. 5 U.S.C. § 552a. Also, the JFK Act does not include a provision allowing action against an individual Board member. Therefore, the Board may argue that the FTCA is the exclusive remedy afforded the plaintiff so long as he does not allege a Constitutional violation. Therefore, regardless of the success of his FTCA charge, any other civil remedies must be dismissed. However, as discussed above, even if the court allows the Privacy Act claim it is unlikely the Board will be held liable.

Constitutional Liability

The plaintiff may properly allege a Constitutional claim under a *Bivens* cause of action which allows the Government officials to be sued for acts committed in their official capacity. Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). However, the Board may claim qualified immunity from suit and move for the dismissal.

As executive officials the Board members are entitled to qualified immunity from prosecution for acts conducted in their official capacity. *See* Scheuer v. Rhodes 416 U.S. 232, 247 (1974). The objective standard governing the scope of qualified immunity inquires whether a reasonable officer would have believed the acts were unlawful "[I]n light of clearly established law and the information the [official] possessed. Anderson v. Creighton 183 U.S. 635, 636 (1987); Harlow v. Fitzgeral, 457 U.S. 800 (1982). A law is "clearly established" when "[T]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson *at 640.*

Although there is no explicit right to privacy guaranteed in the Constitution, in some instances courts have recognized a privacy right in other amendments. However, even if the courts recognize a clearly established privacy right, the statutory directive of the JFK Act creates a high standard for the reasonableness test. Under the terms of the JFK Act, a reasonable official would have to believe that the documents were unrelated to the assassination or that the privacy interest clearly outweighed the public's interest in disclosure of the records and no reasonable person could have believed otherwise.