MEMORANDUM

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cc: Laura Denk, Esq.

From: Krista LaBelle

Subject: The Potential Liability of the Assassination Records Review Board under Charges of Alleged Invasion of Privacy in the Release of Assassination Records.

I. Introduction

The *President John F. Kennedy Assassination Records Collection Act of 1992* ("JFK Act") requires "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). Accompanying the need for prompt disclosure of assassination records, is the requirement that the Assassination Records Review Board ("the Review Board") recognize the importance of protecting personal privacy interests. *See* 44 U.S.C. § 2107.6(3).[2] Although the Review Board may be subject to suit for an invasion of privacy claim if they determine that the privacy interest involved is not substantial enough to warrant postponement of the record, the charges will be difficult to substantiate.

It will be difficult to sustain a case under any of the three central theories of liability. The elements of a cause of action under the Privacy Act and the history of cases arising under that statute, suggest that the plaintiff's burden of proof is difficult to meet so long as the Review Board acted in good faith in determining the release status of the document. Also, under the Federal Tort Claims Act, so long as the Review Board acted reasonably and within the scope of their duty they are immune from suit. Finally,

[1] The statute defines "assassination record"as any record 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).

[2] A privacy interest can only postpone release of a record when 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).

individual members may be sued for alleged violation of a Constitutionally protected right but the members may claim qualified immunity as long as they acted within the scope of their Federal employment.

II. The Privacy Act

Relevant Statutory Provisions

The Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V 1993) ("Privacy Act") is the central statutory provision involved and applies to any Government record maintained on an individual.[3] 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, p. 457). The Privacy Act allows an individual to access any file referencing himself or herself that is maintained by a Federal agency in their "system of records."[4] 5 U.S.C. § 552a(d)(1).

The Privacy Act acts as a waiver of sovereign immunity, thus allowing individuals to sue the Federal Government for violations of its provisions. The Act offers both civil and criminal remedies. *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] the 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:

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[3] "'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*." 5 U.S.C. § 552a(a)(4).

[4] "'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).

> 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*.

5 U.S.C. § 552a(i)(1)(emphasis added).

Civil Liability of the Review Board

If a plaintiff sues the Review Board, the members may not be held individually liable for their decision to release an assassination record. The Privacy Act creates a civil cause of action against a Federal agency, not its individual members.[5] 5 U.S.C. § 552a. In *Connelly v. Comptroller of the Currency,* 876 F.2d 1209, 1212 (5th Cir. 1989), the plaintiff sued officers of the Comptroller of the Currency for their decision not to hire him as the new president of the organization. The court found that the plaintiff could not sue the officers in their individual capacity under the Privacy Act. *Id.* ("Individual government officials [are] not liable under the Privacy Act"). Therefore, the Privacy Act only permits suit for civil damages against the Review Board as a Federal agency and not against individual members.

Most of the provisions of the Privacy Act do not apply to the Review Board because they properly obtained possession of the documents for review under the provisions and interpretation of the JFK Act and the Privacy Act.[6] However, the Privacy Act's general civil penalty allows a plaintiff to file suit against the Review Board. Section (g)(1)(D) provides the most likely ground for civil liability under the Privacy Act. This general provision subjects an agency to suit whenever it violates any provision of the Privacy Act not covered by other specific penalties. *See* 5 U.S.C. § 552a(g)(1)(D).

Section (e) of the Privacy Act provides the likely basis for a challenge under the general liability provision of (g)(1)(D). Section (e)(5) imposes civil penalties when an agency fails to fairly and accurately maintain records regarding an individual. *See* 5 U.S.C. § 552a(e)(5). Also, section (e)(6) requires an agency to make "reasonable" efforts to determine the accuracy of the records prior to their dissemination. *See* 5 U.S.C. § 552a(e)(6). The Review Board may be sued under either of these provisions.

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

[6] The JFK Act gives the Review Board the right to request non-Review Board documents and consider documents which are potentially assassination records. 44 U.S.C. § 2107.5. The Privacy Act allows an originating agency to disclose records to another Government agency engaged in an authorized Government activity. 5 U.S.C. § 552a(b)(7).

In order to sustain a suit under either section, a plaintiff must establishing that an agency's release of a document: (1) caused an adverse effect to the individual; (2) that the adverse effect was directly related to the agency's release of the information; and (3) that the agency released the information in an intentional and willful manner. *See Quinn v. Stone*, 978 F.2d 126, 135 (3rd Cir. 1992). Each of these elements must be proven to prevail under the Privacy Act.

First, the plaintiff must establish he or she was adversely effected by the release of the information. This initial requirement is not a difficult standard to meet. There is a broad spectrum of injuries that courts recognize as producing an adverse effect. The type of injuries range from allegations of emotional distress, embarrassment and other types of nonphysical harm to physical damage. *See Id.; Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984). Once a plaintiff meets this relatively low threshold requirement, the next step involves establishing a sufficient causal connection between the release of information and the adverse effect.

Although the initial stage may be relatively easy to establish, the causation requirement imposes a much higher standard. In order to prove that the agency's release of the document caused the adverse effect, the plaintiff must prove that he or she actually sustained damage. *Quinn*, 978 F.2d at 135; *Albright*, 732 F.2d at 187. The plaintiff must prove that he or she incurred the injury alleged, they may not rely on the mere possibility of the injury's occurrence.

In addition, the plaintiff must show that the Review Board's release of the record caused the injury rather than disclosure from another source. There is some disagreement in the courts regarding the reach of this standard. Some courts do not hold an agency responsible for consequences resulting from the release of information previously published or available to the public. *See FDIC v. Dye*, 642 F.2d 833, 836 (5th Cir. 1981) (finding the disclosure of foreclosure information did not violate the Privacy Act because the information had previously been released to the public). However, other courts have held an agency responsible for the consequences of disclosure despite the previous availability of the information to the public. *See Quinn*, 978 F.2d at 134. Although the success of the argument is unclear, if the records were previously released or available from another source, the Review Board may argue that dissemination of the records under their authority was not the cause of the alleged injury.

Finally, the plaintiff must establish that the Review Board released the assassination records with intentional and willful disregard of Privacy Act provisions. 5 U.S.C. § 552a(g)(4)(A). The plaintiff must prove that the Review Board's action amounted to something greater than gross negligence. *Rose v. United States*, 905 F.2d 1257, 1260 (9th Cir. 1990) (willful violation of the Privacy Act requires conduct amounting to more than gross negligence); *Sterling v. United States*, 826 F.Supp 570, 572 (D.D.C. 1993) (finding an agency did not act willfully when their "efforts both before and after the release of information . . . indicate sensitivity to the potential harm the release might cause . . ."). So long as the Review Board can demonstrate an appreciation for the sensitivity of the document and a good faith effort to account for the privacy interests of the individual, it will be difficult to establish that the Review Board willfully violated the Privacy Act. In fact, only one

circuit court has recognized a willful violation of the Privacy Act since the Act's inception in 1974.[7]

This high standard of proof applies even when the plaintiff claims the released records contain false or inaccurate information. In *Hill v. United States Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986), the court found that even assuming the truth of the allegation that the Air Force maintained inaccurate records regarding the plaintiff, he failed to establish that they did so in willful violation of the Privacy Act. Therefore, regardless of the accuracy of the information released, the plaintiff would have to prove that the Review Board released the allegedly inaccurate information with willful disregard for the truth and in violation of the Privacy Act.

The Archival Record Exemption

If the Review Board is sued under the Privacy Act they may also claim protection under the Privacy Act's exemption of archival records. The Privacy Act specifically exempts from compliance with the Act's provisions, historically important records that are transferred to the National Archives. *See* 5 U.S.C. § 552a(l)(1)(3).[8] Under the JFK Act, the Review Board's primary responsibility is to determine the release status of an assassination record. *See* 44 U.S.C. § 2107.6(3). Once the Review Board determines a document is an assassination record, or denies a request for postponement, the originating agency directly transfers that document to the Archives. 44 U.S.C. § 2107.9(c)(1). Upon transfer to the Archives, the record is designated a historically significant document and its dissemination is exempt from the limitations of the Privacy Act.[9] Therefore, the Review Board is never directly responsible for the release of a non-Review Board assassination record to the public. The Archives assumes that responsibility and thus the protection of the Privacy Act exemption for historically valuable documents.

Criminal Liability of the Review Board

Unlike the civil penalties of the Privacy Act, the criminal penalties could apply to individual Board members.

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[7] In *Covert v. Harrington*, 876 F.2d 751, 756 (9th Cir. 1989), the ninth circuit went against established precedent and found the Department of Energy willfully violated section (e)(3)(C) in releasing reports to the Justice Department regarding potential criminal fraud.

[8] "Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as 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).

[9] Neither the Privacy Act nor the JFK Act specifically define "historically significant." However, the JFK Act declares 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).

Section (i) punishes "any officer or employee of an agency . . ." who improperly discloses privacy protected information. 5 U.S.C. § 552a(i)(1). Although the individual Review Board members may be sued, the charge should be difficult to substantiate.

Initially, the plaintiff would have to show that the information released deserved the protection of the Privacy Act. As discussed above, it is not clear that the Privacy Act even applies to records designated by the Review Board for release. In addition, even if the Privacy Act applies to the Review Board for the evaluation of civil penalties, the plaintiff would have to prove the member(s) willfully released the record.[10] The Review 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, the individual members, like the Review Board, are not directly responsible for the dissemination of assassination records 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. *See* 5 U.S.C. § 552a(l)(1)(3).

Since Congress enacted the Privacy Act in 1974 there has been one criminal prosecution of an individual for releasing privacy protected information. *See United States v. Gonzalez,* No. 76-132 (M.D. La. Dec. 21, 1976).[11] Additionally, the penalties are solely penal and provide no private cause of action. *See Unt v. Aerospace Corp.*, 765 F.2d 1440, 1448 (9th Cir. 1985).

III. Common Law Tort Claim

The Federal Tort Claims Act

[10] Judicial interpretation has created a high standard for willfulness that amounts to something "greater than gross negligence." Rose v. United States, 905 F.2d 1257, 1260 (9th Cir. 1990).

[11] There is no published opinion for this case.

The plaintiff may also allege a common-law tort claim based on an invasion of privacy or intentional infliction of emotional distress. The limitation imposed by the principle of sovereign immunity requires a plaintiff sue the Review Board (an agency of the United States Government) under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (Supp. V 1994) ("FTCA"). The FTCA waives the Government's sovereign immunity in some cases and allows an individual to sue the Government.[12]

Although the FTCA generally operates to waive the Government's sovereign immunity in tort cases, section 2680 lists exemptions which, if they apply, operate to retain the immunity of the Government. 28 U.S.C. § 2680. 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).

So long as the Review 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 Review Board exercises broad discretion in their decisions regarding assassination records.[13] The JFK Act requires the Review Board presume an assassination record should be released to the public unless the personal privacy interest is so strong that it outweighs the strong public interest in release should the document be withheld. *See* 44 U.S.C. § 2107.6(3). The Review 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 Review Board's discretion, combined with their thorough good faith consideration of the documents within the context of the statute, constitutes the use of "due care" within the meaning of the

[12] "[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).

[13] The JFK Act liberally defines "assassination record" and presumes that any record of an "official investigation" is a viable assassination record which carries a "presumption of immediate disclosure." 44 U.S.C. § 21072(a)(2).

exemption statute.

Federal Employees Liability Reform and Tort Compensation Act

Even if a plaintiff was 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, 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). Upon the Attorney General's certification, 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 Act gives the Review 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 base their decision to release a document on the individual characteristics of that document, and its relationship to the assassination, they are acting within the scope of their duties and are protected from liability.

The Exclusiveness of the FTCA Remedy

In most cases the FTCA will provide the exclusive civil remedy.[14] However, 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) [A violation] of a statute of the United States under which such action against the individual is otherwise authorized.

The Privacy Act does not allow action against the individual, it must be against a Federal agency. 5 U.S.C. § 552a. Also, the JFK Act does not include a provision allowing action against an individual Board member. Therefore, the Review Board may argue that the FTCA is the exclusive remedy afforded the plaintiff, so long as he or she does not allege a Constitutional violation. Under this scenario, regardless of the success of the 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 Review Board will be held liable.

[14] 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 . . . ." 28 U.S.C. § 2679(b).

IV. Constitutional Liability

The plaintiff may also 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 Review Board may claim qualified immunity from suit.

As executive officials, the Review 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 "in light of clearly established law and the information the [official] possessed." *Anderson v. Creighton,* 183 U.S. 635, 636 (1987)*; Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A law is "clearly established" when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson*, 183 U.S. 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. *See* 44 U.S.C. § 2107.6(3).

V. Conclusion

It will be difficult for a plaintiff to substantiate a case against the Review Board or individual members under any of the three theories discussed above. Even if the Privacy Act binds the Review Board, their role as intermediary, and the exemptions provided by the Privacy Act, should protect them from suit because they acted within their official capacity. Likewise, the FTCA's conditional waiver of sovereign immunity does not apply to the Review Board's activities. They acted with due care in the execution of their discretionary function and therefore they retain the protection afforded by the principle of sovereign immunity.

Similarly, the individual members of the Review Board should be immune from suit in most instances. The Privacy Act does not permit civil charges against the individual members of the Board. Although they may be sued for criminal damages, the case history since the enactment of the Privacy Act does not offer much hope for the plaintiff's success. In addition, FELA will protects the individual members from suit under the FTCA because they acted within the scope of their employment in releasing the documents. Although the individual members may be sued under a Constitutional charge, they may claim qualified immunity because

they acted as a reasonable official would have acted given the directive of the JFK Act.