

January 11, 1995

TO: David Marwell

FROM: Sheryl Walter

RE: Additional suggestions for proposed "assassination record" guidance

A. Suggested new text re "artifacts"

At the Board's public hearing on December 14, representatives of the National Archives expressed concerns about the Board's inclusion of "artifacts" in the scope of "assassination records" to be made part of the JFK Collection at NARA. NARA is troubled about:

- (1) how the Act's provisions requiring public access to the Collection could be managed in order to preserve those items that are artifacts and are currently handled on a very restricted basis,
- (2) how to implement the requirement that copies be provided upon demand given the practical problems -- if not impossibility -- of "copying" an artifact, and
- (3) the potential precedent government-wide for expanding the definition of a federal record that may be set through the Board's actions.

To help answer these concerns, I suggest the Board consider adding some language to the proposed guidance similar to the following:

The Board has determined that, for purposes of applying the Act's provision that "copies" be provided upon request of items in the Collection to artifacts that may be a part of the Collection a photograph of the particular artifact for which a "copy" is sought will suffice to achieve the act's purposes. "Public access" shall be granted in a way that guarantees the continued preservation and integrity of the artifact, as determined by the staff of NARA based on their evaluation of the preservation needs and related considerations of the particular artifact.

I asked Miriam Nisbet at NARA for her informal reaction to this general approach. While she recognizes that it does deal with some of NARA's concerns, she also emphasized that NARA's biggest problem is with the precedent that the Board's inclusion of artifacts in the scope of "assassination records" will set government-wide. Miriam suggests that we seek guidance from the Justice Department's Office of Legal Counsel, initially on an informal basis (a formal written opinion will likely take several weeks or months). Although this may delay publication in the Federal Register, I would like to pursue this avenue before the Board issues its proposed guidance.

B. Another question that arose as I reviewed the revised draft and compared the relevant legislative history is whether the Board wishes to consider whether to defer publishing guidance on its intended interpretation of "additional records and information." It would be consistent with the Board's commitment to an open process to publish guidance on its intended interpretation of this term. It also likely would be useful to get comments now from the agencies and the public as to the intended scope of the Board's implementation of its power to request "additional records and information."

On the other hand, neither the Act nor the legislative history indicates that Congress intended that the Board issue guidance for a working definition of this term as it did for the term "assassination record." The legislative history does indicate that agencies are extremely anxious about the Board's powers in this respect, that Congress intended that the term be applied in a "reasonable" manner, and that Congress envisioned the Board's interpretation of the reasonable scope of this power would evolve over time as the review of records progressed. Agencies may interpret the current language as imposing an additional burden on them that broadly requires each, as part of their responsibilities under the Act, to produce now all of the materials described in the guidance for rather than as simply notice of the types of records they may be asked to produce to assist the Board in its identification of all "assassination records." At a minimum, the Board may wish to refine the current draft of the description of "assassination records" to clarify that not all agencies will be asked to produce all types of records and information listed, and that such materials need be produced only upon request.