

April 10, 1995

TO: Assassination Records Review Board

FROM: Sheryl Walter

RE: Discussion items for revising proposed interpretive regulations

BACKGROUND

This memorandum supplements the March 22 memorandum titled "Summary of comments received on proposed interpretive regulations" that was included in the briefing book for the Boston meeting. The March 22 memorandum summarized all comments submitted on the proposed regulations; this memorandum more succinctly lays out for each section of the proposed interpretive regulations those points that will require Review Board discussion. [The identity of the source of the suggestion is noted following each point.] The suggestions listed below should not necessarily be construed as staff recommendations but are provided for purposes of the Board's fullest understanding and consideration of the concerns expressed in the public's and agencies' submitted comments.

Comments that were primarily technical or sought clarification of meaning on non-controversial points have been made to the draft text already and are not included in this memo. A revised draft incorporating those changes, "redlined" to show where changes were made, is attached to

this memorandum.¹ Copies of the original text will be available for the Review Board's reference, as will a set of all comments received.²

DISCUSSION ITEMS

I. § 1400.1 Interpretation of assassination record.

RE 1400.1 (a)(1):

A. Suggested changes to "may have led to":

- 1. "may reasonably be considered to have led to" [CIA]*
- 2. "may have an articulable causal nexus to" [FBI]*

¹ Lines are drawn through deleted text; new text is printed in a slightly lighter font (which may not be obvious on faxed versions but will be discernible in hard copy.)

² Since the Board's meeting in Boston one additional comment, a one-page letter from the State Department, was submitted. A copy is attached for your reference.

3. "that document, describe, interpret, analyze, or report on activities, events or persons that reasonably relate to the assassination of President John F. Kennedy and its surrounding history." [Charles Sanders & Mark Zaid]

4. "all material that could reasonably be expected to shed light on the circumstances surrounding the assassination of President Kennedy." [Mark Allen]

5. After the words "document, describe, report, analyze, or interpret", add:

"(i) activities and events that may shed light on the assassination of President John F. Kennedy or any investigations or inquiries related thereto;

(ii) persons or organizations which figure in any official or unofficial investigation of the assassination and the published literature relating thereto; and

(iii) all programs or operations which may shed light on the events, activities, persons, and organizations which come within the scope of §1400.1(a)." [Jim Lesar]

B. Other suggested additions to 1400.1(a):

1. Include new subparagraphs between what is now (2) and (3), as

follows:

"(3) All records collected by all federal, state, and local government agencies with respect to Lee Harvey Oswald and to Jack Ruby (under these names or any other aliases) and to their activities, and the activities of anyone else suspected of using their names, together with all files in which these records were deposited;

(4) All records collected by all federal, state, and local government agencies with respect to any government operation directed against any organization with which either Oswald or Ruby was associated;

(5) All records collected by all federal, state, and local government agencies with respect to anyone who in 1963 was officially accused or suspected by any public agency of involvement in the John F. Kennedy assassination; and

(6) [text of current (3)]." [Peter Dale Scott]

RE 1400.1 (b)(2):

A. After the words "any investigation or analysis of or inquiry into" and "any intra-agency investigation or analysis", add this parenthetical:

"(including all protocol and data utilized for analysis)" [Thomas Wilson]

B. *Add a new paragraph:*

"(4) Records requested by the ARRB from federal, state, or local government agencies pertaining to persons (individuals or groups) who have been cited in any investigation or analysis or inquiry into the assassination of President Kennedy." [Michael Ravnitzky]

C. *Change "any investigation" to "a federal investigation." [The City of Dallas Records Management Division]*

II. §1400.2 Interpretation of additional records and information

RE 1400.2(a):

A. *Add this sentence to the clarifying changes already made at the FBI's request:*

"In such instances, the Board would be mindful of the need to protect sources, methods, and confidential matters, as set forth under the standards in Section 6 of this Act." [FBI]

The FBI also suggests that this subparagraph mention that "the Board's reasonable basis for requesting a record will be articulated in writing" and that "if the Board contemplates using this provision to obtain other types of records that do not involve classified information and/or sources" the section's language should so state.³

B. A new subpart (4) is recommended, reading:

"(4) Reasons for opening, closing, reclassifying to higher level, or destroying assassination records or files of assassination records." [Peter Dale Scott]

III. **§1400.3 Sources of assassination records and additional records and information.**

A. Add a subparagraph listing "'government contractors' and 'private agencies'. . . used to conceal covert government operations." [John Judge]

B. Add a parenthetical to subparagraph (f) after the word "corporations" to specify "(including suppliers to the federal government and military)." [Thomas Wilson]

³ This type of clarification, if the Board wishes to include it, can be treated in the supplemental information section that precedes the regulatory text in Federal Register notices.

C. Remove from subparagraphs (b) and (d) references to state and local records and public universities under the jurisdiction of state and local governments. [City of Dallas Records Management Division]

IV. §1400.4 Types of materials included in scope of assassination record and additional records and information.

NARA continues to object to the inclusion of artifacts in this section. Another commenter strongly disputes NARA's position on artifacts. No changes to this section have been made in the revised draft from the original text.

V. §1400.5 Requirement that assassination records be released in their entirety.

The FBI proposes the following additional language for the Board's consideration:

"However, where there is an incidental appearance of assassination material in a record that contains no other such material, the disclosure will consist of the assassination-related material and whatever non-assassination material is sufficient to show the context of the record in which that assassination material appears."

VI. §1400.6 *Originals and copies.*

Extensive changes have been made to this section to reflect suggestions made by the commenters, particularly the National Archives, that seek to clarify this section's intent. Additional changes for the Board's consideration are:

(1) Adding a new subparagraph (8) to read "Subparts 1 through 6 of this subparagraph shall include all technical protocol or data utilized to generate the copy." [Thomas Wilson]

(2) Adding qualifying language that this provision applies only to federal records and that records now housed in state and local governments, private hands, university libraries, and similar institutions will remain in their original locations. [City of Dallas Records Management Division; NARA]

VII. §1400.7 *Additional guidance.*

Questions have come up, both in the comments and otherwise, regarding the Review Board's ability or intent to include in the Collection at NARA listings of relevant documents already housed in other archives or private collections.

Given that the ARCA specifically refers only to the Board's power to

require placement in the JFK Assassination Records Collection of federal government records (but grants power to subpoena and review records not in federal government hands), it is arguably within the scope of the Board's power to include in the Collection indexes to and descriptions of collections in state or local government or private hands in lieu of including the originals or copies in the collection housed at NARA where those records are not federal records. One consideration worth noting is that if the government requires deposit in the JFK Assassination Records Collection of non-federal records in private hands which are not donated to the federal government, takings issues that compel the payment of compensation to the current owner can arise.

Extensive changes have been made to the original draft language based on comments requesting additional clarity, as noted on the attached draft. Additional changes for the Board's consideration are:

1. Adding to subparagraph (c) this sentence: "All citizens of the U.S. shall have the right to examine the original artifacts in the Collection provided they adhere to NARA's terms and conditions established to preserve and protect the artifacts for posterity." [Thomas Wilson]

2. Clarifying that the second sentence in subparagraph (d) does not require that all records on any individuals who are merely mentioned in an assassination record be made available. [CIA]

3. Qualifying the definition in subparagraph (a) to refer only to "federal" entities, that subparagraph (c) be limited to "federal" artifacts and requests that the word "federal" also be inserted in subparagraph (d) to

modify the term "records".

[City of Dallas Records Management Division]

VIII. §1400.8 Implementing the ARCA -- Catalog of Assassination Records.

Suggested changes to this section include the following:

1. *Add a sentence stating that "the COAR is deemed by the Board to consist of the database and finding aids taken together." [NARA]*
2. *Clarify whether the last sentence in subparagraph (c) is meant "to engraft a new, additional requirement onto the definition of assassination record." [NARA]⁴*
3. *Replace "more likely than not" with the term "non-frivolous" as the standard for including records in the COAR. [Sanders and Zaid]*
4. *Provide that the COAR include references to other sources on non-federal information such as that collected and preserved by state and local government or educational organizations or entities, including other archives. [Dallas County Historical Foundation]*

⁴ This is another example of the type of question that can be addressed in the supplemental information section of the Federal Register notice.

5. Add a provision stating that should non-federal records be listed in the COAR, this would not automatically subject these records to federal regulations regarding access and that non-federal entities should be able to decide whether their holdings will be included in the COAR. [City of Dallas Records Management Division]