

March 22, 1995

TO: Assassination Records Review Board

FROM: Sheryl Walter, General Counsel

RE: Summary of comments received on proposed interpretive regulations

As of March 22, 1995, the Review Board has received comments submitted by 26 individuals, organizations, or government entities. The sources of these comments are identified below. Copies of comments not submitted as of the date of the last public board meeting on March 7 have been provided to supplement the copies of comments distributed at the last board meeting.¹ Summarized below are some of the key points made by commenters and, where relevant, suggested changes in the proposed interpretive regulations' text.

Comments were filed by the following:

Federal agencies

FBI

NARA

CIA

State and local government

Dallas County Commissioners' Court

¹ A full set of the comments filed will be available for the Review Board's reference at or before the public meeting on Friday, March 24.

City of Dallas, Records Management Division, Office of the City Secretary
Professional organizations

Assassination Archives and Research Center (Jim Lesar)

Citizens for the Truth about the Kennedy Assassination (Dennis Effle)

Committee for an Open Archives (John Judge)

National Coordinating Committee for the Promotion of History (Page Miller)

Research community

Adams, Bill

Marsh, W. Anthony

Allen, Mark

McGuire, Matthew

Backes, Joseph

Osborn, Steven

Chapman, Robert

Rademacher, John

Edisen, Adele E.U.

Ravnitzky, Michael

Horne, Douglas

Sanders, Charles and Zaid, Mark

Kistemaker, Arend

Scott, Peter Dale

Mantik, David W.

Weatherly, Daryll

Wilson, Thomas

SUMMARY OF COMMENTS

I. § 1400.1 Interpretation of assassination record.

Text:

(a) An assassination record includes, but is not limited to, all records, public and private, regardless of how labeled or identified, that document, describe, report, analyze, or interpret activities and events that may have

led to the assassination of President John F. Kennedy; the assassination itself; and investigations of or inquiries into the assassination.

(b) An assassination record further includes, without limitation:

(1) All records as defined in Sec. 3(2) of the ARCA;

(2) All records collected by or segregated by all federal, state, and local government agencies in conjunction with any investigation or analysis of or inquiry into the assassination of President Kennedy (for example, any intra-agency investigation or analysis of or inquiry into the assassination; any inter-agency communication regarding the assassination; any request by the House Select Committee on Assassinations to collect documents and other materials; or any inter- or intra-agency collection or segregation of documents and other materials);

(3) Other records or groups of records listed in the Catalog of Assassination Records, as described in §1400.8 of this chapter.

Comments:

The CIA commented generally that it believes the proposed interpretive regulations sweep in records not intended by Congress to be covered by the ARCA. It stated that while the Review Board's interpretive regulations are entitled to "great deference [they] cannot be inconsistent with congressional intent to cover only certain specific activities." In particular, CIA stated its belief that "[t]he ARCA reflects a congressional desire to limit the DCI's authority to protect sources and methods, but only for 'assassination records' as ARCA defined it" and that "[a]n interpretive definition by the Board that would sweep in records not covered by the Act . . . would exceed the Board's limited rulemaking authority."

NARA's comments voice strong concerns as to whether

"the board intends to collect all documents in private hands relating to the assassination, declare them assassination records, and transfer them to the Assassination Records Collection here at the National Archives. [The Archivist] believe[s] this far outstrips the provisions and intent of the law."

NARA is especially concerned about administrative decisions it may need to make regarding anticipated storage needs, archival processing requirements, and preservation actions based on the final scope and effect of these interpretive regulations. The Archivist urges that the scope of assassination records be defined "with great care" to aid government employees interpreting the regulations to know with some certainty what records fall into its range.

One comment suggests that the title of this section be changed from "Interpretation" to "Scope" of assassination record on the grounds that this word more accurately reflects the function of this portion of the proposed interpretive regulations.² Several comments suggested rewording of paragraph (a), especially the "may have led to" construction. The CIA would rephrase this to read "may reasonably be considered to have led to"; the FBI would substitute "may have an articulable causal nexus to" for the original proposed language. Sanders and Zaid suggest substituting the following: "that document, describe, interpret, analyze, or report on

² *See* comments of Sanders and Zaid.

activities, events or persons that reasonably relate to the assassination of President John F. Kennedy and its surrounding history." Another comment proposes replacing the current language with the phrase "all material that could reasonably be expected to shed light on the circumstances surrounding the assassination of President Kennedy."³

Jim Lesar's comments suggest substituting the following for the proposed language that follows the words "document, describe, report, analyze, or interpret":

- "(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)."

Peter Dale Scott suggests the Review Board add three additional 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

³ See comments of Mark Allen.

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)]."

For subparagraph (b)(2), one comment suggests adding the parenthetical phrase "(including all protocol and data utilized for analysis)" after the words "any investigation or analysis of or inquiry into" and "any intra-agency investigation or analysis".⁴ Another comment would add a new subparagraph, reading:

"(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."⁵

⁴ See comments of Thomas Wilson.

⁵ See comments of Michael Ravnitzky.

The City of Dallas Records Management Division of the Office of the Secretary objects to the construction "any investigation" in subparagraph (b)(2) and requests it be amended to read "a federal investigation".⁶

II. §1400.2 Interpretation of additional records and information.

Text:

The term additional information and records includes:

- (a) All documents used by government offices and agencies during their declassification review of assassination records as well as all other documents, indices, records, and other material that disclose cryptonyms, code names, or other identification material in assassination records.*
- (b) All training manuals, instructional materials, and guidelines created or used by the agencies in furtherance of their review of assassination records.*
- (c) All records, lists, and documents describing the procedure by which the agencies identified or selected assassination records for review.*
- (d) Organizational charts of government agencies.*
- (e) Records necessary and sufficient to describe the agency's:
 - (1) Records policies and schedules;*
 - (2) Filing systems and organization; and*
 - (3) Storage facilities and locations.**

Comments:

⁶ The City of Dallas's letter notes that copies of its comments were sent to Senator Phil Gramm and Senator Kay Bailey Hutchison.

The FBI suggests several changes to paragraph (a) based on its continuing "grave concern regarding the identities of informants and other types of confidential sources." It suggests inserting the phrase "including but not limited to" after the words "records and other material." The FBI also suggests substituting for "or other identification material" the words "and other identifiers that appear." Finally, it recommends adding at the end of the paragraph the following:

", which, as articulated in writing, the Board has a reasonable basis to believe may constitute an assassination record or would assist in the evaluation or interpretation of an assassination record. 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."

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.

Other comments suggest adding additional subparagraphs to this section. One recommends a new subpart (4) to read "(4) Reasons for opening, closing, reclassifying to higher level, or destroying assassination records or files of assassination records."⁷ Another comment suggests a

⁷ See comments of Peter Dale Scott.

new subparagraph (f), reading:

"(f) Any other record, public and private, that does not fit within the scope of assassination record as described in §1400.1, but which would more likely than not enhance, enrich, and broaden the historical record of the assassination."⁸

Lesar suggest inserting the following as new subparts after (3): *"(4) Indexing symbols, marks, codes, instructions, guidelines, methods and procedures; and (5) search methods and procedures used in the performance of the agencies' duties."*

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

Text:

Assassination records and additional records and information may be located at, or under the control of, without limitation:

- (a) Agencies, offices, and entities of the executive, legislative, and judicial branches of the federal government;*
- (b) Agencies, offices, and entities of the executive, legislative, and judicial branches of state and local governments;*
- (c) Record repositories and archives of federal, state, and local governments, including presidential libraries;*

⁸ See comments of Sanders and Zaid.

- (d) *Record repositories and archives of universities, libraries, historical societies, and other similar organizations;*
- (e) *Individuals who possess such records by virtue of service with a government agency, office, or entity;*
- (f) *Persons, including individuals and corporations, who have obtained such records from sources identified in paragraphs (a) through (e) of this section;*
- (g) *Federal, state, and local courts where such records are being held under seal; or*
- (h) *Foreign governments.*

Comments:

A new subparagraph suggested for inclusion in this section reads as follows:

"(i) Private individuals who have created or obtained such records from sources other than identified in paragraphs (a) through (e) of this section."⁹

Another commenter states that "'government contractors' and 'private agencies' . . . used to conceal covert government operations should be expressly included in this section."¹⁰ An additional comment suggest adding a parenthetical to subparagraph (f) after the word "corporations" to specify "(including suppliers to the federal government and military)."¹¹

The City of Dallas Records Management Division objects to

⁹ See comments of Sanders and Zaid.

¹⁰ See comments of John Judge.

¹¹ See comments of Thomas Wilson.

subparagraph (b)'s inclusion of state and local records within the scope of potential sources of "assassination records". It believes this language to impermissibly infringe on the powers of state and local governments to identify and control their own records, goes beyond the intent of Congress, and should be removed from this section. It also commented that subparagraph (d)'s extension to the private sector as well as public universities under the jurisdiction of state and local governments goes beyond the scope of the ARCA and requests those portions be deleted.

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

Text:

The term record in assassination record and additional records and information includes, for purposes of interpreting and implementing the ARCA:

- (a) papers, maps, and other documentary material;*
- (b) photographs;*
- (c) motion pictures;*
- (d) sound and video recordings;*
- (e) machine readable information in any form; and*
- (f) artifacts.*

Comments:

NARA's comments reiterate its objection to the inclusion of artifacts in this section. Another commenter strongly disputes NARA's position on

artifacts.¹²

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

Text:

An assassination record shall be disclosed in its entirety except for portions specifically postponed pursuant to the grounds for postponement of public disclosure of records established in Sec. 6 of the ARCA, and no portions of any assassination records shall be withheld from public disclosure solely on grounds of non-relevance.

Comments:

The FBI's comments state its belief that this "language should be amended to address situations in which there is an incidental appearance of an assassination -related matter in a document that clearly contains no other information that is in any way pertinent to the assassination." The FBI says this situation occurs with some regularity in the documents it has processed, generally through "See" references, and proposes that in these cases only the "assassination related context" should be disclosed and the rest withheld as non-relevant. (The FBI does emphasize that all

documents in their entirety are available for review and final determination by the Board.) The substitute language it proposes is:

"However, where there is an incidental appearance of

¹² See comments of Joseph Backes.

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.

Text:

(a) *For purposes of determining whether originals or copies of assassination records may be made part of the President John F. Kennedy Assassination Records Collection (the JFK Records Collection) to be established under the ARCA:*

- (1) *In the case of papers, maps, and other documentary material, the Assassination Records Review Board (the Board) may determine that a true and accurate copy of the original is sufficient;*
- (2) *In the case of photographs, the term record means the original negative if available, otherwise, the earliest generation print;*
- (3) *In the case of motion pictures, the term record means the camera original if available, otherwise, the earliest generation print;*
- (4) *In the case of sound and video recordings, the term record means the original recording, if available, otherwise, the earliest generation copy;*
- (5) *In the case of machine-readable information, the Board may determine that a true and accurate copy of the*

original is sufficient; and

(6) Artifacts means the original object itself.

(b) In cases where a copy, as defined in paragraph (a) of this section above, is authorized by the Board to be included in the JFK Records Collection the Board may, at its discretion, require a certified copy. In cases where an original, as defined in paragraph (a) of this section, is required for inclusion in the JFK Records Collection the Board may, at its discretion, accept the best available copy.

Comments:

NARA raises several questions about this section. It requests a definition of the term "original". It also notes that the ARCA refers to "record copies of government records", which in government practice can be "either the signed original (or original production) or a reproduction that the agency treats as its official record maintained to document its functions or activities." NARA also believes that with regard to records of foreign governments the regulations should state that only copies, not originals, are sought. NARA additionally comments that it would treat the materials listed in subparts (a)(2), (3), and (4), the same as those listed in subparts(a)(1) and (5). It also requests the addition of language "to permit reformatting the record to different hardware and software requirements," so as to preserve usable copies, and notes that these definitions as now formulated arguably exclude prints where the original has been obtained. NARA also believes that subparagraph (b) is unclear and asks whether a procedure will be established to allow exceptions to the rules on originals and copies.

One commenter suggests a new subparagraph (7) to read "Subparts 1

through 6 of this subparagraph shall include all technical protocol or data utilized to generate the copy."¹³ Other commenters make some technical suggestions to clarify this section, request that definitions be included of the terms "copy" and "artifact", and add a sentence to the end of subparagraph (b) reading "In such cases that original records included within the Collection contain illegible portions, such records shall have attached thereto a certified transcription of the illegible language."¹⁴

The City of Dallas Records Management Division objects to what it perceives as this section's intent to exercise jurisdiction over and remove from their original locations records now housed in state and local governments, private hands, university libraries, and similar institutions and place them in the JFK Collection at the National Archives. Its position is that collections in non-federal agencies should remain in their original locations under the jurisdiction of their own governing boards, and requests that the language be amended to apply only to federal records.

VII. §1400.7 Additional guidance.

Text:

(a) A government agency, office, or entity includes, for purposes of interpreting and implementing the ARCA, all departments, agencies, offices, divisions, foreign offices, bureaus, and deliberative bodies of any federal, state, or local government and includes all inter- or intra- agency working

¹³ See comments of Thomas Wilson.

¹⁴ See comments of Sanders and Zaid.

groups, committees, and meetings that possess or created records relating to the assassination of President John F. Kennedy.

(b) The inclusion of artifacts in the scope of the term assassination record is understood to apply solely for purposes of establishing the President John F. Kennedy Assassination Records Collection and for fully implementing the terms of the ARCA and has no direct or indirect bearing on the interpretation or implementation of any other statute or regulation.

(c) In the case of artifacts deemed to be assassination records and included in the John F. Kennedy Assassination Records Collection, provision to the public of photographs, drawings, or similar materials depicting the artifacts shall be sufficient to comply with the ARCA's requirement that copies of assassination records be provided to the public upon request. Other display to or examination by the public of artifacts in the John F. Kennedy Assassination Records Collection shall occur under terms and conditions established by the National Archives and Records Administration that are adequate to preserve and protect the artifacts for posterity.

(d) The terms and, or, any, all, and the plural and singular forms of nouns shall be understood in their broadest and most inclusive sense and shall not be understood to be terms of limitation. Any records identified with respect to a particular person also includes any records for that person by any other name, pseudonym, codeword, symbol, number, cryptonym or alias. Any record described with respect to an operation or program includes any record pertaining to that program by any other name, pseudonym, codeword, symbol, number or cryptonym.

Comments:

Sanders and Zaid suggest that subparagraph (a) expressly include agencies, offices, and entities no longer in existence, and suggest additional technical changes to subparagraphs (b) and (c) for clarity. One commenter objected to the second sentence of subparagraph (c) on the grounds it gives NARA too much control over access to the artifacts and requests that it be replaced with language to the effect that "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."¹⁵

The CIA and FBI voiced concerns about the wording of the second sentence in subparagraph (d). The CIA stated that "[t]his appears to require that all records on any individuals who are merely mentioned in an assassination record be made available" and asks for limiting language to reflect "more specific" purposes so as "to assure that all files on an individual or activity be made available regardless of the labels on the files." The FBI reads the current language to mean the Board would receive all records relating to that person regardless of whether the records reflect the person's true name or some other name or identifier and asks for confirmation of this interpretation. Both ask the Board to consider clarifying this subparagraph.

The City of Dallas Records Management Division objects to subparagraph (a) on the grounds that it exceeds the scope of the ARCA and

¹⁵ See comments of Thomas Wilson.

contradicts the definition of "government office" set out in act, defining "government office" as "any office of the federal government. It suggests substitute language limiting the definition to "federal" entities. It also requests 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".

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

Text:

- (a) *A Catalog of Assassination Records (COAR) shall be created as the official listing of all records determined by the Board to meet the definition of assassination record.*
- (b) *Notice of all decisions to include records in the COAR will be published in the Federal Register within 30 days of the decision.*
- (c) *In listing records or groups of records in the COAR, the Board must determine that the record or group of records will more likely than not enhance, enrich, and broaden the historical record of the assassination.*

Comments:

NARA suggests that "the COAR be deemed by the Board to consist of the database and finding aids taken together." It also asks that the Board clarify whether the last sentence in subparagraph (c) is meant "to engraft a new, additional requirement onto the definition of assassination record." Sanders and Zaid suggest replacing the "more likely than not" language in this sentence with "non-frivolous" as a standard for including records in the COAR. They also suggest adding a new subparagraph (d), reading "A

complete up-to-date listing of all entries in the COAR shall be maintained, preserved, and available for review as part of the JFK Records Collection."

The Dallas County Commissioner's Court, via representatives of the Dallas County Records Coordinator and the Dallas County Historical Foundation, recommend that the COAR include reference to other sources on non-federal information such as that collected and preserved by the Dallas County Historical Foundation. The City of Dallas Records Management Division commented that "a catalog of federal and non-federal records would be very helpful to researchers." However, it requests the proposed regulations be amended to state that listing non-federal records in a catalog would not 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.