ASSASSINATION RECORDS REVIEW BOARD

Personal Privacy and Public Records

Briefing Paper: March 6, 1995

I. Introduction

The President John F. Kennedy Assassination Records Collection Act of 1992 (ARCA) allows postponement of information to protect personal privacy in narrow situations. The ARCA allows postponement 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."[1]

The legislative history provides little specific guidance for the Review Board's application of this standard. It also is silent on whether it is the agency recommending postponement on privacy grounds that is to provide the clear and convincing evidence necessary to support the Review Board's ratification of a postponement recommendation or whether the Review Board independently must verify the evidence to meet that standard. Moreover, it is unclear whether agencies have a sufficient interest in protecting personal privacy so that the Board can rely upon the evidence they may provide when it evaluates records for privacy postponements.

The ARCA also provides that it supersedes all other laws except where specified to the contrary, thus exempting the Review Board from the need

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[1] 44 U.S.C. § 2107 note (1992), sec. 6(3).

to comply with statutes such as the Freedom of Information Act (FOIA).[2] However, federal government approaches to providing public access to agency documents that contain privacy information are instructive in understanding this issue and are discussed below in Part II. Also helpful in thinking about privacy access issues are the perspectives of other records professionals, including archivists, librarians, and historians, which are discussed below in Part III. Part IV addresses additional public policy considerations. Finally Part V describes particular types of assassination records identified by the Review Board staff to have a privacy component with a short summary of how those categories of records are treated for public access purposes in other contexts. Examples of documents illustrating each category of privacy information are provided at individual tabs in the briefing book, as noted in the text of this paper.

II. Federal Government Access Policies Regarding Privacy Information

A. Freedom of Information Act

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[2] Id. at sec. 11(a).

Nearly three decades of federal agency implementation and judicial interpretation of the FOIA make that statute a good source of guidance in interpreting the ARCA's privacy postponement provision. Moreover, many other public and private institutions look to the FOIA for guidance in shaping their own privacy access policies. However, a key factor behind the ARCA's passage was Congress's conclusion that "the Freedom of Information Act, as implemented by the Executive Branch, has impeded the timely public disclosure of the assassination records."[3] The legislative history says that "[t]he underlying principle for applying the standards for postponement remains the presumption of disclosure established by the Act."[4] Thus, the FOIA standards discussed here operate as a floor, not a ceiling, for the Review Board's development of privacy postponement policies.

The ARCA's privacy postponement language tracks that of the FOIA's personal privacy exemption and case law interpretations of the exemption requiring that privacy considerations be balanced against the public interest served by disclosure. The FOIA states that information can be withheld from public release if it consists of "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of

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[3] President John F. Kennedy Assassination Records Collection Act of 1992,
S.Rep. No. 102-328, 102d Cong., 2d Sess. (1992) at 20.

[4] Id. at 27.

personal privacy."[5] This language's thrust is to limit public access to "intimate" or "personal" details in government agency files.

General FOIA principles relevant to making privacy postponement decisions under the ARCA include the following:

1. Privacy rights do not survive death.

[5] 5 U.S.C. § 552(b)(6).

Under FOIA, the dead generally do not have a right of privacy. If a person is dead, the strong presumption is that information that might otherwise invoke privacy concerns can be released. Moreover, in discussing the release of records about confidential informants, the FBI testified before Congress that it will release information in assassination records if the individual is dead.[6] Thus, there is already precedent for holding agencies, including the FBI, to that same standard where privacy information is concerned. Threshold issues here include determining if the person is known to be dead, what evidence is enough to prove death, and how much time must lapse before it is reasonable to assume death.

Where a privacy right has been recognized after death, the focus has been on whether public access to the information will violate the privacy rights of surviving heirs or close associates. For example, audio tapes of the space shuttle Challenger's crew recorded when the ship exploded were withheld from public release (although transcripts were made public) to protect the privacy of the crew's families.[7] Congress's exclusion in the ARCA from the scope of the term "assassination record" of the autopsy materials of President Kennedy given under deed of gift by the Kennedy

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[6] *Assassination Materials Disclosure Act of 1992*, Hearing before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, House of Representatives, 102d Cong., 2d Sess. (May 20, 1992) at 130.

[7] New York Times Co. v. NASA, 920 F.2d 1002 (D.C.Cir. 1990) (en banc), *summ. judgment granted on remand*, 782 F.Supp. 628 (D.D.C. 1991).

family to the federal government was interpreted by a court as also supporting denial of public release of the material on privacy grounds.[8] These instances are the exception to the rule that privacy rights do not survive death.

2. Releasing public information does not invade personal privacy.

Once information is in the public domain, its subsequent release cannot constitute an invasion of personal privacy. Prior disclosure makes the most intimate details about a person's life disclosable to the public. This is especially true if the information was previously released in government documents, but can also hold if the information has been the subject of previous media coverage. Like death, prior disclosure (and especially voluntary disclosure) so diminishes an individual's privacy interest in that information as to amount to an effective waiver of privacy. [9]

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[8] Katz v. NARA, No. 92-1024-TAF (D.D.C. Mar. 2, 1994).

[9] See Diamond v. FBI, 532 F.Supp. 216, (S.D.N.Y. 1981), aff'd, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984).

Partial disclosure of information sometimes can weaken privacy interests,[10] though the fact that some personal information is in the public domain does not automatically waive a privacy interest in the continued confidentiality of other facts. Speculative publicity as opposed to accurate disclosure of a record's contents may not void a privacy interest. Moreover, the fact that information may be on the public record somewhere may affect but doesn't necessarily defeat a privacy expectation, as the Supreme Court held when it found an unwarranted invasion of personal privacy in public release of a prisoner's rap sheet even though the individual pieces of information on the rap sheet likely were on the public record somewhere.[11]

3. Expectations of confidentiality are relevant but not controlling in determining invasions of personal privacy.

In the FOIA privacy context, a prior promise of confidentiality is sometimes relevant to the degree of invasion of personal privacy from release of particular information but is not determinative and cannot be used to frustrate an openness policy.[12] Courts have found that a privacy interest is not demonstrated if an agency "assert[s] simply that it received the file under a pledge of confidentiality to the one who supplied it.

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[10] See Simpson v. Vance, 648 F.2d 10, 16 (D.C.Cir. 1980).

[11] Reporters Committee v. Dept. of Justice, 489 U.S. 749 (1989).

[12] See Washington Post Co. v. HHS, 690 F.2d 252, 263 (D.C.Cir.1989).

Undertakings of that nature cannot, of themselves, override [FOIA]." [13] A promise of confidentiality may have "special significance" where it helped elicit "private matters that the individual would not otherwise have exposed to the public and where the individual would be in danger of mistreatment absent anonymity." [14] However, an understanding that information may be disclosed as part of litigation or a criminal prosecution can defeat an alleged privacy expectation. Prior public disclosure also can defeat confidentiality as a rationale for asserting a privacy expectation. [15]

4. Public figures have less privacy protection than private citizens.

The scope of protectable privacy rights is narrower for persons who are public figures compared to the average citizen, although public figures do not forfeit all privacy rights. As a practical matter, much information about a public figure may already have been disclosed by that person or with their knowledge or consent or be in the public domain via media coverage. Extensive public knowledge about a person narrows the scope of material the release of which is potentially an invasion of privacy.

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[13] Ackerly v. Ley, 420 F.2d 1336, 1339-40 n.3 (D.C.Cir. 1969).

[14] See Department of State v. Ray, 112 S.Ct. 541 (1991).

[15] Palmer v. Derwinski, No. 91-197 (E.D. Ky., June 10, 1992) (prior press reports concerning gunman's relatives and listings in phone books tipped balance in favor or release of medical records disclosing relatives names and addresses)

5. Privacy protections erode over time.

There is general agreement under FOIA decisions that the need for protecting personal privacy diminishes over time. However, opinion differs as to how and over what period the release of particular information may be deemed to not constitute an unwarranted invasion of privacy. The sensitivity to privacy concerns in federal records generally is of shorter duration than are the protections afforded records in private hands. In contrast to the federal practice, archivists often view privacy interests as diminishing more slowly over time. This perspective holds that "[u]nlike business information, which often ages quickly, information about an individual has a privacy aura throughout his or her lifetime . . . Monsanto can develop a new herbicide, but it is not possible to build a new reputation so easily. Archivists must always be cautious when handling personal information about living individuals."[16] See also the discussion of NARA's privacy access policies in Part II(C), below (establishing a sliding scale to screen privacy information for public release).

6. Identifying an unwarranted invasion of personal privacy.

Under FOIA, an "unwarranted invasion of privacy" generally means the release of information to the public of personal, intimate details of an individual's life and the lives of family members. Mere embarrassment is

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[16] Peterson and Peterson, *Archives and Manuscripts: Law*, Basic Manual Series, Society of American Archivists (Chicago, 1985) at 55. See excerpts at Tab B(1).

not enough to trigger withholding on privacy grounds. Privacy interests also apply only to individuals and do not extend to corporations (which may, however, have protections based on trade secrets). A privacy interest must be tangible and substantial, limited to "threats to privacy interests that are more palpable than mere possibilities."[17]

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[17] Rose v. Dept. of the Air Force, 425 U.S. 352, 380 n.19 (1972).

The FOIA's legislative history states that "the phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government informa-tion."[18] Courts since have followed the Supreme Court's interpretation of the phrase to mean "information that applies to a particular individual" to protect that person from "the injury and embarrassment that can result from the unnecessary disclosure of personal information." [19] However, courts also recognize that the "clearly unwarranted" standard "instructs the [decisionmaker] to tilt the balance in favor of disclosure."[20]

Based on this general standard and on the staff's review of assassination records already released by agencies or recommended for postponement in whole or in part, categories of privacy information that the Review Board will be required to consider for potential postponements are discussed in Part V, below.

7. Applying a public interest balancing test.

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[18] *Clarifying and Protecting the Right of the Public to Information*, S.Rep. No. 813, 89th Cong. 1st Sess. (1965) at 9. See also id., H.Rep. No. 1497, 89th Cong., 2d Sess. (1966) at 9.

[19] Department of State v. Washington Post, 456 U.S. 595, (1982).

[20] Getman v. NLRB, 450 F2d 670, 674 (D.C.Cir. 1971).

In determining under FOIA whether to release information that might trigger an unwarranted invasion of personal privacy, it is "the balancing of private against public interest, not the nature of the files" that governs the decision to release or withhold.[21] In evaluating this balance, the "public interest" generally is whether release of the information will benefit the public for research or similar purposes, not simply a response to general public curiosity about an individual. Applying this test under FOIA requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the 'FOIA 'to open agency action to the light of public scrutiny'"[22] in order to allow the public to decide whether particular government action is proper and allow public oversight of government operations. Some courts have concluded that "unless the public would learn something directly about the workings of the government, disclosure is not affected with the public interest." [23]

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[21] Washington Post, 456 U.S. at 599-600.

[22] Rose, 425 U.S. at 372.

[23] National Assn. of Retired Federal Employees v. Horner, 879 F.2d 873, 879 (D.C.Cir.1989), *cert. denied*, 110 S.Ct. 1805 (1990).

The strongest cases finding a public interest that compels disclosure even when release of the information might otherwise invade personal privacy are where the release of the information serves to inform the public about government or other official behavior. Types of information in which the public interest has been considered to weigh heavily in favor of disclosure include proven violations of the public trust (especially if it is the government's wrongdoing at issue), professional and business dealings with the federal government (such as the names of violators of federal laws), issues in which the public has special interests and rights (like the operation of court systems), and basic information about public employees (including names, position titles, grades, salaries, and duties). In borderline cases, one benchmark used is whether the requested material is needed to inform the public or whether, even if released, it still would not further that objective.[24] Finally, even if some overriding privacy interest strongly suggests on balance that some information should be withheld, careful consideration has been given to whether there is any way to segregate and release at least part of the information in question.

B. Privacy Act

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[24] Minnis v. Dept. of Agriculture, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053; Marzen v. HHS, 825 F.2d 1148, 1153-54 (7th Cir. 1987) (despite substantial public interest and extensive public record in an adoption case, medical records were withheld because intimate details of an infant's deteriorating condition would not appreciably serve public debate and would certainly cause anguish to parents); New York Times Co., supra note 7 (audio tape of space shuttle explosion).

The Privacy Act of 1974[25] is of limited relevance to the Review Board's privacy postponement decisions. The Privacy Act allows individuals to obtain material contained in government records only on themselves, subject to certain exemptions, and only of records in "systems" in which the records are retrievable by a personal identifier (meaning they are filed by a name, address, number, or similar symbol). NARA itself is exempt from the Privacy Act (except as insofar as the act covers NARA employees). Given these limitations, the Privacy Act will not be discussed further here (except as noted in Part V below regarding medical records).

C. NARA Policies for Public Access to Privacy Information

Guidelines established by NARA covering the treatment of information in government documents that raises personal privacy issues closely track the FOIA standards outlined above. NARA's general rule, styled "Information that would invade the privacy of an individual," describes:

> Records containing information about a living individual that reveal details of a highly personal nature that the individual could reasonably assert a claim to withhold from the public to avoid a clearly unwarranted invasion of privacy, including but not limited to information about the physical or mental health or the medical or psychiatric care of treatment of the individual and that (1) contain information not known to have previously

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[25] 5 U.S.C. § 552a.

been made public and (2) relate to events less than 75 years old.[26]

NARA's screening guidelines for personal privacy identifies the following types of information as revealing highly personal information that is normally withheld:

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[26] Archives 1400, CHGE 2, App. 6C. See copy of text at Tab B(2).

medical information, including mental health; intimate details of a person's life, including marital status, political beliefs, financial information, substance abuse, and sexual relationships; and allegations of criminal wrongdoing that did not result in an indictment or conviction. [27]

NARA's guidelines also acknowledge the lessened sensitivities of personal privacy material over time. For records less than 30 years old, they recommends detailed page-by-page review. For records between 30 and 75 years old, spot-checks are suggested to determine the sensitivity of the information and the likelihood the person is dead. Finally, the guidelines note that "personal information *may* be considered less sensitive if it concerns prominent individuals (e.g., politicians and celebrities), as individuals in the public eye generally have less of a claim to privacy than ordinary citizens." (emphasis in guidelines) [28]

III. Other Archival and Library Perspectives on Personal Privacy

A. Professional archival policies regarding privacy.

In administering public access to information of a personal nature contained in government records, the role of archivists attempting to negotiate that access has been characterized as the "'honest broker' between

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[27] Id. at App. 6D(2).

[28] Id.

today's citizens and tomorrow's historians."[29] Especially tricky for archivists are situations where it is "unclear whether the information was actually confidential and it could be harmful to families if released."[30] Because there is no federal privacy statute of general applicability, archivists look to the FOIA and also to common law tort principles as a source of legal and policy guidance. Generally, archival policies parallel federal standards under the FOIA, although when they differ federal policies are usually more liberal in favor of disclosure.

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[29] MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives,* The Society of American Archivists and The Scarecrow Press (Metuchen, N.J, 1992) at 127-28. See excerpts at Tab B(3).

[30] Id. at 129.

Archivists tend to view the issue in terms of what is an invasion of privacy, not what is privacy per se. Under tort law, invasion of an individual's privacy means an intrusion into the person's seclusion or solitude or into his or her private affairs, public disclosure of embarrassing private facts about the individual, or publicity that places the individual in a false light in the public eye. [31] In comparison, libel laws, which are sometimes used as another guide in this area, focus on the "malicious publication, expressed in print or in writing, or by signs or pictures, tending either to blacken the memory of one who is dead or the reputations of one who is alive, and expose him to public hatred, contempt, or ridicule."[32] As reflected in standard deed or donation agreements, the language often used to address privacy concerns restricts access to materials that would "embarrass, damage, injure or harass" living persons. [33]

B. American Library Association/Society of American Archivists Joint Committee Statement on Access and Privacy

The American Library Association (ALA) and the Society of American Archivists (SAA) periodically have issued joint statements as guidance for providing access to original research materials. The 1994 ALA/SAA Joint Statement focuses mostly on standards governing donation of private records, but its approach to the extent and duration of access restrictions based on privacy is instructive. In describing an institution's obligations with respect to its collections of records or record groups, the ALA/SAA Joint

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[31] Peterson, supra note 16 at 40 n.4, citing Prosser on Torts.

[32] Id. at 44.

[33] Id. at 42.

Statement emphasizes preservation of the materials and providing access for research purposes as soon as possible. Recognizing that there may be legal and institutional obligations to protect confidentiality in collections and that private donors may impose restrictions upon their papers for privacy or confidentiality reasons, the ALA/SAA Joint Statement notes that these restrictions should be "reasonable" and apply only for a "reasonable" time.[34] This focus (even in the context of donor control over collections of private papers) on prompt, full access to researchers based on a reasonableness standard suggests privacy withholdings should apply in only very limited situations.

C. Public Archives of Canada Historical Research Guidelines

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[34] "American Library Association and Society of American Archivists Joint Statement on Access," *Archival Outlook* (Sept. 1994) at 8. See copy of text at Tab B(4).

The Public Archives of Canada has established comprehensive guidance for the disclosure for historical purposes of personal information that may be found in archival government records. The guidelines acknowledge that "there must be a balance of interest between the protection of an individual's privacy and the preservation of the public's right to government information."[35] The guidelines also set out a four-factor test for evaluating whether an "unwarranted invasion of personal privacy" would occur from release of the information. These factors include the expectations of the individual, the sensitivity of the information, the probability of injury, and the context of the file.[36] Types of information the guidelines identify as especially sensitive include medical information, material relating to criminal activity, law enforcement and security, and sensitive personal financial information.[37] The Canadian guidelines also establish a "drop dead" date after which personal information can be assumed disclosable. That date is 110 years after the birth of the individual, as proved from internal evidence in the file or additional proof of birth date.[38]

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[35] *Guidelines For the Disclosure of Personal Information for Historical Research at the Public Archives of Canada*, (Public Archives of Canada, 1985) at 1. See excerpt at Tab B(5).

[36] Id. at 4.

[37] Id. at 5. See also discussion of privacy categories under Part V, below.

[38] Id. at 6-7.

IV. Additional public policy perspectives

Many researchers and historians, including those studying the assassination of President Kennedy, strongly advocate the release of all information touching on historical events despite personal privacy concerns. In contrast, individual citizens increasingly are seeking protection from release of personal information contained in government and other records on privacy grounds. Concerns about computer matching capabilities and direct marketing intrusions into the personal lives of average citizens has sparked increased interest in ensuring there are means to prevent unwarranted invasions of personal privacy while still recognizing the public interest in broad access to information about how government works. There are no uniform federal provisions governing the collection, storage, or dissemination of personal information in public records, a situation comprehensively documented in the 1977 U.S. Privacy Protection Commission's report, *Personal Privacy in an Information Society.*[39] Given the lack of standards and the difficulties and sensitivities involved in mediating between legitimate privacy and access concerns, some privacy advocates now support general refusals of access to all such information unless the individual's identity is masked or cannot be detected.

Another consideration that arises repeatedly in the context of the FOIA and archivist discussions of public access to privacy materials is the significance of the use that may be made of the information if released. The issue is sometimes addressed by archivists in the context of screening to

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[39] A copy of the U.S. Privacy Commission's report is available at the Review Board's offices.

limit access to "bona fide" or "legitimate" researchers or projects. It has arisen in the FOIA context in the idea of "derivative use," where privacy invasions imputed by courts have barred release despite a public interest that would also flow from disclosure.[40] The practical result of such "vetting" or attempts to second-guess the uses to which material touching on personal privacy may be used has been viewed with some skepticism. Objections to exercising this kind of discretion center on the implication that "a clear-cut and defensible distinction may be drawn between serious and non-serious research" and how the information can or will be used.[41] This perspective argues that "access should be regarded 'as something which cannot be divided into open categories for "scholars" and closed categories for "sensational writers," or available to those with a "genuine" interest and unavailable to those who lack an appropriate "appreciation." Access should be indivisible.'"[42] This perspective is supported by some court decisions under FOIA, finding that it is the "production" of the records, not the speculation they may generate, by which an invasion of privacy must be measured. [43]

Some historians who support broad access to public records containing personal information have argued that there is "no great threat in full

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[40] Reporters Committee v. Department of Justice, 489 U.S. 749 (1989); Department of State v. Ray, 112 S.Ct. 541 (1991).

[41] MacNeil, supra note 27 at 143.

[42] Id. (citation omitted).

[43] Arieff v. Dept. of Navy, 712 F2d 1462, 1469 (D.C.Cir. 1983).

disclosure of an individual's transactions with the government."[44] One writer, asserting that broad confidentiality restrictions to information can make that material as useless to researchers as if it had been destroyed, has said that "[t]he position that we should close records to protect individuals is much less in the interests of the historical researcher and the public than is the principle that there should be appropriate penalties for the misuse of information derived from personal records."[45]

Finally, even if the Review Board ratifies an agency's recommendation for continued withholding of all or part of an assassination record on privacy grounds, that record nevertheless will be publicly released in the year 2017. Thus, the Review Board's decisions do not result in unlimited secrecy, but only extend the time before the record's release. The Review Board may wish to establish deadlines for re-review of the material or designate interim events that could trigger earlier release. Those triggering events might include the proof of death of the individual involved via reliable proof such as a death certificate or a published obituary, or by the request for release of the information by the individual himself or herself, in writing and notarized or sworn under oath.

V. Privacy Postponement Categories in Assassination Records

A. Threshold issues

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[44] MacNeil, supra note 27 at 147.

[45] Id. (citation omitted).

As discussed above, preliminary questions that should be answered in the postponement analysis of privacy information include:

- Is the individual living or dead or is the individual's status unknown?

- Is the information already in the public domain? Has the information previously been publicly disclosed
  - In government records?
  - in press reports or in other media?
  - by the individual with an expectation of eventual public release?

- Additional threshold issues include:

  - Who has the burden of proving by clear and convincing evidence that release will cause an unwarranted invasion of personal privacy that outweighs the public interest in disclosure? The agencies or the Review Board?

  - To what extent should the staff engage in research to supplement the record of clear and convincing evidence?

B. Categories of privacy information in assassination records [46]

1. Intimate personal details

Generally, personal information that touches on the following kinds of intimate details has been found to trigger a privacy interest potentially precluding public access:

- Family relationships (including marital status, birth legitimacy, and family rights and reputation);
- Personal relationships;
- Sexual conduct; and
- Personal habits or characteristics (including religious or political affiliation and allegations regarding character or credibility).

See, e.g., document examples at Tabs D, J, L, and Q through Y.

2. Medical records

Medical records concerning physical and mental health are the kind of "intimate, personal" information usually withheld from public release

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[46] Documents found at Tabs C through T have been postponed and are provided in redacted form; unredacted copies will be available at the Review Board briefing. Documents found at Tabs U through Z have been released in full and are highlighted in yellow to illustrate information released of a personal nature.

under federal and state law and under guidelines followed by other records professionals. (Similarly, information developed or imparted during a client relationship is often assumed to have a privacy element.) Public access to a person's medical records is currently the subject of heated political debate over health care reform and efforts to put such records into electronic formats. This sensitivity to release does not generally extend to the release of the medical records of a dead person. Instances where medical records have been publicly released usually involve some element of public oversight of government activities. Examples from FOIA cases include the public release of information regarding shipments of prescription drugs to members of Congress by the Attending Physician to Congress, the medical records of a deceased veteran to his ex-wife where he had killed her new husband and two children, and the names and addresses of servicemen who participated in an atmospheric nuclear weapons testing program.

Even an individual's own ability to gain access to his or her own medical records when the information is in the control of a federal agency has been difficult in the past under both the FOIA and the Privacy Act. Under Section (f)(3) of the Privacy Act, special procedures can require transmitting the medical information only to a designated third party if the agency believes the records could have an adverse effect upon the individual. In practice, this has meant that an individual could request release to another physician or health professional but could not get access directly himself or herself. The concern underlying this restriction seems to have been a focus on psychiatric records and that the material is put in an understandable context, not that such records always should be completely withheld from the person.

At least two types of medical records on individuals have surfaced among the assassination records in the JFK Collection: records regarding a person's physical condition generally and records regarding psychological or mental health issues or treatment. Information relating to a person's medical condition does not appear solely in copies of a doctor's attending records or hospital files, but also in interviews with a physician or mental health professional who treated or was in a position to know details about the person's health or mental state. See, e.g., document examples at Tabs D, H, I, P, Q, R, V, W, and Y.

3. School or academic records

Information regarding an individual's educational background is often found releasable to the public, especially if the individual is a public employee. However, information like course grades or evaluations is often withheld, subject to a showing of a strong public interest in disclosure. This kind of information often is found in employment files, although it can also arise in the context of an investigation of an individual. See, e.g., document example at Tab U.

4. Social Security numbers

Although the use of Social Security numbers has become ubiquitous in daily life (from drivers' licenses to check-cashing identification), this information is carefully guarded under federal and state law and accepted records professionals' practices. The issue of public access to social security numbers has been hotly debated for years, most recently in the context of proposals for medical records identification systems under a national health

care system. Sensitivities about strictly limiting public release flows from the very fact that social security numbers have become a *de facto* national identifier and can act as the key to many public and private systems of records on an individual.[47] The central concern here is that releasing social security numbers of living persons to the public allows easy compilation of other records on the person without any compensating increase in public knowledge about government activities.

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[47] *Methods of Identifying Individuals in Health Information Systems*, Center for Democracy and Technology Briefing Paper (1995) at 6-7. See excerpt at Tab B(6).

Both federal and state courts have affirmed the individual's right to not have his or her social security number released absent written consent or death. The Fourth Circuit, voiding Virginia's requirement that Social Security numbers be provided by voters, observed that the harm that can occur from disclosure of a social security number "is alarming and potentially financially ruinous . . . [A]rmed with one's social security number, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on the person's checking account, obtain credit cards, or even obtain the person's paycheck." [48] The Ohio Supreme Court recently ruled that the privacy of social security numbers can be guaranteed by the U.S. Constitution, stating that "the high potential for fraud and victimization caused by the unchecked release of city employees' social security numbers outweighs the minimal information about governmental processes gained through [their release] . . . [and allow an] inquirer to discover the intimate personal details of each city employees' lives, which are completely irrelevant to the operations of Government."[49] See, e.g., document examples at Tabs C through I and Z.

5. Criminal conduct

Information touching on an individual's actual or alleged criminal conduct can turn up in official government criminal records, an individual's

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[48] Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993).

[49] State ex rel. Beacon Journal Pub. Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994).

admissions in a variety of contexts, allegations made about the individual, presentencing reports, honor and ethics hearings, arrest records, prison records, or records of or investigations into past criminal activity. Whether this sort of information is publicly released seems to depend on the degree of public oversight into government activities that the released information may allow. For example, the arrest record of a prosecution witness has been made publicly available where there were allegations of a deal made with the prosecution in exchange for his testimony. Names of contributors to a Watergate-related operation were publicly released. The personnel records of federal employees accused of taking bribes also have been released.[50] See, e.g., document examples at Tabs D, F, J through O, V, and Y.

6. Employment-related information

Information publicly releasable by virtue of an individual's employment relationship has included salary history, employment background, and sometimes evaluations, personal observations, and similar information. Especially for federal employment, information that has been found releasable includes the names of agency officers, staff, or consultants, their employment history, their attendance records, and wages paid.

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[50] See, e.g., Congressional New Syndicate v. Dept. of Justice, 438 F.Supp. 538 (D.D.C. 1977); Fund for Constitutional Gov't v. NARA, 656 F.2d 856, 865-66 (D.C. Cir. 1981).

Other basic information that has been released includes date and place of birth, naturalization date, educational background, work experience, military service appointments, promotion history, work assignments, awards, and skills such as knowledge of foreign languages.

Archivists often take a more restrictive view about the public release of employment and personnel information, based in part on an assumption that employees believe that access to such data will be restricted. Archivists will normally release the names of employees, their positions and dates of employment, but usually withhold information like salary figures unless there is a legal requirement for release. Information regarding federal service that is often withheld includes material uncovered in background investigations or checks and reviews of employees, which by their nature often probe areas where an individual might reasonably assert privacy rights. Other material generally withheld includes home addresses, performance studies and award recommendations, complaints made against supervisors, and other categories of information already discussed in this briefing paper that may turn up in a personnel file (such as medical and related details in employee claims, marital status, or college grades).

In the assassination records reviewed so far by the Review Board staff, security and personnel files of government agency employees have surfaced in the files of the House Select Committee on Assassinations. The House Select Committee requested the personnel files of certain CIA employees, which contain among other information fitness reports and performance evaluations, medical evaluations and credit checks on individual CIA officers. The CIA has argued publicly against release of this material on privacy grounds, asserting that they are irrelevant to the question of who killed

President Kennedy, that the information in these documents is sometimes derogatory and based on gossip or rumor, and that any benefit to the public from release does not outweigh the clear privacy interest of the individuals in keeping the information confidential.[51] See, e.g., document examples at Tabs D through J, U, and Z.

7. Tax returns and financial information

[51] See House Judiciary Committee Hearing, supra note 6 at 118.

Tax records are protected from public release under 18 U.S.C. §2510. The ARCA further provides that tax records are exempt from release under section 6103 of the Internal Revenue Code.[52] Courts have rejected bids by regulatory commissions to subpoena tax records, although in criminal investigations federal prosecutors can obtain the tax returns of targets for investigation. Among the "assassination records" that the staff has reviewed are tax returns for which it is unclear whether they were voluntarily provided to investigators or whether they were obtained by other means. Other types of personal financial information also are often withheld from public release on grounds they implicate personal privacy interests, for example information about a person's loan history and personal wealth.

See, e.g., document examples at Tabs C, Y, and Z.

8. Citizenship issues

Records related to citizenship and immigration issues have sometimes been found to implicate privacy interests sufficient to bar public release based on a conclusion that harm would result to the individual from that release. For example, reports of interviews of persons who unsuccessfully sought to immigrate to the U.S. or sought asylum have been withheld on grounds that they would likely face adverse consequences if the

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[52] The ARCA's "Rules of Construction" provide that "[w]hen this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code. . ." 44 U.S.C. §2107 note sec. 11(a).

information was known to officials in the country they seek to leave.[53] However, naturalization and related information has not been considered to implicate privacy interests and is generally released. See, e.g., document example at Tab J.

[53] Department of State v. Ray, supra note 39.