DRAFT

January 24, 1995

TO: David Marwell
cc: Jeremy Gunn, Tom Samoluk
FROM: Sheryl Walter
RE: Draft guidelines for privacy postponements

Per yesterday's conversation, set out below is some draft guidance for the staff's analysis and review and the Board's consideration of agency recommendations for privacy postponements where the material potentially postponed can be characterized as revealing intimate personal details about an individual. This draft is not intended to craft definitive guidance on this issue but to serve as a springboard for analysis and discussion. Please let me know your suggestions, comments, or revisions.

<u>Privacy Postponements</u>

Our statute provides in section 6(3) that "[d]isclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of the Act if

a. 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

b. that invasion of privacy is so substantial that it outweighs the public interest.

Read in light of the Act's strong presumption of disclosure, the analysis applicable to postponement of information on privacy grounds is a two-step process that establishes a much higher threshold to qualify for postponement than whether the information simply consists of personal matters traditionally treated as private. The "unwarranted invasion of personal privacy" requirement suggests that the nature of the postponed material must be such that in ordinary circumstances (absent its inclusion in an "assassination record" to which a presumption of disclosure applies), no excuse or grounds would justify its release, and that the evidence to support that conclusion must be stronger than merely a possibility of an extreme privacy invasion. The second step in the analysis emphasizes again the high degree of encroachment upon the individual's privacy that must be highly likely to result from release, and that to prevent its release the public interest in access to it as part of the historical record is less important than the continued preservation of the individual's interest in keeping the information secret.

In applying this analysis, it is useful to remember that the Act's postponement standards contemplate that *all* information in "assassination records" postponed on privacy grounds will eventually become publicly available no later than 25 years from date of enactment (which is the year 2017). See Section 5(g)(2)(D) (specifying the 25 year sunset date and excluding, sub silentio, privacy reasons from the grounds available for Presidential certification for continued postponement of information from

assassination records after that date by limiting them to information raising "identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations"). Arguably, then, any gaps in the historical record that might occur from the Board's decision now to affirm an agency's privacy postponement recommendation will be cured over time by virtue of this sunset provision.

Based on documents the staff has reviewed already, some types of information that agencies recommend be postponed on privacy grounds tends to reveal intimate details of personal conduct, often sexual in nature -- precisely the sort of information that, if made public, most people would commonly consider an extreme invasion of personal privacy. Sometimes the information relates to persons central to the assassination and subsequent investigations; sometimes the information relates to or reveals identities of persons very peripheral to the subject matter of the JFK Records Collection. One way to strike a balance between the Act's strong presumption in favor of eventual release of all privacy-postponed material in assassination records, now or later, and possible concerns that release now of certain intimate information would unfairly violate a particular individual's reasonable expectations of privacy might be to adopt the following approach:

> Information of an intimate private nature can continue to be postponed if the person is known to be still alive or if determining whether the person is alive or dead is unduly burdensome to the originating agency recommending the postponement. Where possible, information should be released but names or similar identifying information should be postponed with a summary document prepared to explain the reasoning behind the continued postponement. In lieu of [or

> in addition to] recommending a date for re-review of the material in the interim between the Board's determination to continue postponement and the information's mandated release in 2017, names and information postponed on privacy grounds may be re-reviewed and released upon a showing of the individual's assent to release (by a notarized affidavit) or death (by, for example, submission of a death certificate or obituary).

This approach is similar to how agencies often treat requests for an individual's records under the Freedom of Information Act. In such situations, agencies will not release records containing information about individuals absent a privacy waiver from the individual, if alive, or documented proof of death. Whether or not one agrees that privacy rights expire at death, for the Act's purposes the clear and convincing evidence standard and presumption of disclosure arguably would much more strongly tip the privacy balancing analysis towards disclosure after an individual's death even if the information had initially been determined by the Board to be worthy of postponement. Further, releasing some or all of the privacy information at issue, without release of the name or other identifiers but with a summary document that explains that only identities are withheld, may serve as an additional means for the Board to adhere closely to the Act's presumption of disclosure without causing undue harm to individuals.