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ASSASSINATION RECORDS REVIEW BOARD

36 CFR Part 1410

Rules Implementing the Freedom of Information Act

AGENCY: Assassination Records Review Board

ACTION: Notice of Proposed Rulemaking (NPRM)

SUMMARY: The Assassination Records Review Board (Review Board)

proposes the following set of regulations to discharge its responsibilities

under the Freedom of Information Act (FOIA). The FOIA law

establishes: (1) basic procedures for public access to agency records and

guidelines for waiver or reduction of fees the agency would otherwise

assess for the response to the records request; (2) categories of records

that are exempt for various reasons from public disclosure; and (3)

basic requirements for federal agencies regarding their processing of

and response to requests for agency records. The Review Board invites comments from interested groups and members of the public on these proposed regulations.

DATES: To be considered, comments must be mailed, delivered in person, or faxed to the address listed below by 5 p.m. on (Insert date 30 days after date of publication in the FEDERAL REGISTER).

ADDRESS: Comments on these proposed regulations should be mailed, faxed or delivered to the Assassination Records Review Board, 600 E Street, N.W., 2nd Floor, Washington, D.C. 20530, fax (202) 724-0457. All comments received within the comment period will be placed in the Review Board's public files and will be available for inspection between 10 a.m. and 4:30 p.m., Monday through Friday (except on Federal holidays), in the Review Board's Public Reading Room at the same address.

FOR FURTHER INFORMATION CONTACT:

T. Jeremy Gunn, Acting General Counsel, Assassination Records Review Board, 600 E Street, N.W., 2nd Floor, Washington, D.C. 20530, (202) 724-0088.

SUPPLEMENTARY INFORMATION:

Background and Statutory Authority

This proposed rule complies with the requirements of the Freedom of Information Act, 5 U.S.C. 552, as amended by the Freedom of Information Reform Act of 1986, Pub. L. 99-570, Title I, sections 1802, 1803, 100 Stat. 3207-48, 3207-49 (FOIA), to issue implementing regulations. In particular, proposed 1410.30 and 1410.35 implement the Reform Act of 1986 and the Office of Management and Budget's Uniform Freedom of Information Act Fee Schedules and Guidelines, 52 FR 10012. This proposed rule also incorporates the presidential memorandum on the administration of the Freedom of Information Act, issued on October 4, 1993, which

calls upon agencies to comply with the letter and spirit of the FOIA's commitment to openness and to its proper administration.

Further, this proposed rule incorporates the presumption of openness that was a driving force behind enactment of the Review Board's enabling legislation, the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. 2701 (1992) (JFK Act). In the JFK Act, Congress prescribed the establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection, to be housed at the National Archives and Records Administration (NARA) and currently located at NARA's facility in College Park, Maryland. Congress also mandated that the Review Board have an initial term of two years, with an option for the Review Board to extend its tenure for one additional year if its work is not completed within the initial two year period. Id. at Section 7(o)(1). Congress also required that "[u]pon termination and winding

up, the Review Board shall transfer all of its records to the Archivist for inclusion in the Collection, and no record of the Review Board shall be destroyed." *Id.* at Section 7(o)(3). Thus, while the public may file FOIA requests with the Review Board during the term of its existence, the public should also be aware of the opportunity to examine and obtain copies of the Review Board's records as a part of the JFK Records Collection at the National Archives and Records Administration.

Other key aspects of this proposed rule include the following:

- (1) The Review Board would establish, consistent with 5 U.S.C. 552, two categories of Review Board records: records available through the Public Reading Room (§ 1410.15(b)) and records not available through the Public Reading Room (§ 1410.25).
- (2) Procedures for requesting or examining Public Reading Room records (§ 1410.15).

- (3) Procedures for filing a FOIA request (§ 1410.20).
- (4) Procedures for processing FOIA requests, including prescribed response times (§ 1410.40).
- (5) Procedures for administrative appeal of denials of FOIA record requests or of requests for fee waivers or reductions (§ 1410.45).
- (6) Procedures for handling requests for classified information (§ 1410.50).
- (7) Fee schedule for services performed in response to FOIA requests (§ 1410.35(b)(6)).

It is the Review Board's intention to implement these regulations so as to avoid any unnecessary barriers to public access to information and to ensure that the principle of openness in government is applied in each and every decision made under the FOIA. It is also the Review Board's hope that persons seeking information or records from the Review Board will consult with the Designated FOIA Officer or other

Review Board staff member before invoking the procedures in the proposed regulations. To the extent permitted by law, the Review Board may make available Review Board records which it is otherwise authorized to withhold under 5 U.S.C. 552.

Paperwork Reduction Act Statement

The proposed rule is not subject to the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et seq.) because it does not contain any information collection requirements within the meaning of 44 U.S.C. 3502(4).

Regulatory Flexibility Act Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, the Review Board certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis need not be prepared. 5 U.S.C. 605(b). Whatever economic impacts may result

to small entities were already considered by Congress in enacting and amending the FOIA or by OMB in Promulgating the Uniform Fee Schedules and Guidelines.

Review by OMB

This proposed regulation has been reviewed by OMB under Executive Order 12866.

List of Subjects in 36 CFR Part 1410

Freedom of Information Act.

The Proposed Regulations

Accordingly, the Review Board proposes to amend chapter XIV in title 36 of the Code of Federal Regulations to read as follows:

**PART 1410--RULES IMPLEMENTING THE FREEDOM OF
INFORMATION ACT**

Sec.

1410.5 Scope

1410.10 Definitions.

1410.15 Requests for Review Board records available through the
Public Reading Room.

1410.20 Review Board records exempt from public disclosure.

1410.25 Requests for Review Board records not available through
the ARRB's Public Reading Room (FOIA requests).

1410.30 Requests for waiver or reduction of fees.

1410.35 Fees for Review Board record requests.

1410.40 Processing of FOIA requests.

1410.45 Procedure for appeal of denial of requests for Review Board
records and denial of requests for fee waiver or reduction.

1410.50 Requests for classified agency records.

Authority: 5 U.S.C. 552; 44 U.S.C. 2107.

§ 1410.5 Scope.

This part contains the Review Board's regulations implementing

the Freedom of Information Act, 5 U.S.C. 552.

§ 1410.10 Definitions.

(a) Review Board record is a record in the possession and control of the Review Board that is associated with Review Board business.

Review Board records do not include:

(1) Publicly available books, periodicals, films, sound or video recordings, photographs, or other publications that are owned or copyrighted by nonfederal sources;

(2) Documents owned by another Federal agency that the Review Board temporarily holds for the purpose of conducting its review under the President John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act).

(b) Designated FOIA Officer means the person designated by the Executive Director to administer the Review Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also

be the Review Board officer having custody of or responsibility for Review Board records and shall be the Review Board's officer responsible for authorizing or denying production of Review Board records upon request filed pursuant to § 1410.25.

(c) Executive Director means the principal staff official appointed by the Review Board pursuant to 44 U.S.C 2107.8(a).

(d) Review Board means the Assassination Records Review Board created pursuant to 44 U.S.C. 2107.7.

§ 1410.15 Requests for Review Board records available through the Public Reading Room.

(a) A Public Reading Room will be maintained at the Review Board headquarters and will be open between 10 a.m. and 4:30 p.m., Monday through Friday, except on Federal holidays. Documents may be obtained in person from the Public Reading Room.

(b) The Public Reading Room records will include the following (if

and when such records are created):

(1) The Review Board's rules and regulations;

(2) Statements of policy adopted by the Review Board;

(3) Transcripts of public hearings;

(4) Review Board orders, decisions, notices, and other formal

actions;

(5) Copies of all unclassified filings, certifications, pleadings, Review

Board records, briefs, orders, judgments, decrees, and mandates in

court proceedings to which the Review Board is a party and the

correspondence with the courts or clerks of court;

(6) Unclassified reports to Congress in which the Review Board's

operations during a past fiscal year are described;

(7) Administrative staff manuals and instructions to staff to the

extent that such manuals or instructions affect a member of the public;

and

(8) Index of the documents identified in this section, but not including drafts thereof.

§ 1410.20 Review Board records exempt from public disclosure.

The Review Board will make all records available for inspection and copying, except:

- (a) (1) Review Board records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive Order;
- (b) Review Board records related solely to the internal personnel rules and practices of the Review Board;
- (c) Review Board records specifically exempted from disclosure by statute (other than 5 U.S.C. 552), provided that such statute:
 - (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

- (2) *establishes particular criteria for withholding or refers to particular types of matters to be withheld;*
- (d) *Trade secrets and commercial or financial information obtained from a person and privileged or confidential;*
- (e) *Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Review Board;*
- (f) *Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;*
- (g) *Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:*
- (1) *Could reasonably be expected to interfere with enforcement proceedings,*

(2) Would deprive a person of a right to a fair trial or an impartial adjudication,

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record of information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could

reasonably be expected to risk circumvention of the law, or

(6) Could reasonably be expected to endanger the life or physical safety of any individual;

(h) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(i) Geological and geophysical information and data, including maps, concerning wells.

§ 1410.25 Requests for Review Board records not available through the Public Reading Room (FOIA Requests).

(a) Upon the request of any person, the Review Board shall make available for public inspection and copying any reasonably described Review Board record in the possession and control of the Review Board, but not available through the Public Reading Room, subject to the provisions of this part.

(b) A person may request access to Review Board records that are not available through the Public Reading Room by using the following procedures:

(1) The request must be in writing and must reasonably describe the Review Board records requested to enable Review Board personnel to locate them with a reasonable amount of effort. A request for all Review Board records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that Review Board records be reasonably described.

Where possible, specific information such as dates or titles that may help identify the Review Board records should be supplied by the requester, including the names and titles of Review Board personnel who may have been contacted regarding the request prior to the submission of the written request.

(2) The request should be addressed to the Designated FOIA Officer,

and clearly marked "Freedom of Information Act Request." The address for such requests is: Designated FOIA Officer, Assassination Records Review Board, 600 E Street, N.W., 2nd Floor, Washington, D.C.

20530. Requests must be either mailed or hand-delivered to the above address. Hand-delivered requests will be received between 8:30 a.m. and 5:00 p.m., Monday through Friday, except on Federal holidays.

For purposes of calculating the time for response to the request under § 1410.40, the request shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or such other person who may be responsible for receiving such requests.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under § 1410.35(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

No request shall be deemed to have been received until the Review Board has received a statement of willingness to pay, as indicated in paragraph (b)(3)(i), of this section or has received and approved a request for waiver or reduction of fees.

(c) Requests for Review Board records containing information received from another agency, or records prepared jointly by the Review Board and other agencies, and that do not fall under category § 1410.20(a)(2) above, shall be treated as requests for Review Board records. The Designated FOIA Officer shall, however, coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, shall cite the other agency Denying Officials as well as the Designated FOIA Officer if a denial by the Review Board is also involved.

(d) If a request does not reasonably describe the Review Board

records sought, as provided in paragraph (b) of this section, the Review Board response shall specify the reasons why the request failed to meet those requirements and shall offer the requester the opportunity to confer with knowledgeable Review Board personnel in an attempt to restate the request. If additional information is needed from the requester to render the agency records reasonably described, any restated request submitted by the requester shall be treated as an initial request for purpose of calculating the time for response under § 1410.40.

(e) The Review Board will not be required to create new agency records, compile lists of selected items from its files, or provide a requester with statistical or other data.

(f) The Review Board staff may also respond to oral, unmarked, or generally stated requests for information and documents even though those requests do not comply with the provisions of this rule.

§ 1410.30 Request for waiver or reduction of fees.

(a) The Review Board shall collect fees for record requests made under § 1410.25 as provided in § 1410.35(b), unless the Review Board grants a written request for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduction request within five working days of the request coming into her possession. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth the appeal rights under § 1410.45.

(b) A person requesting the Review Board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

- (2) Explain the extent to which the requester will extract and analyze the substantive content of the Review Board record;
- (3) Describe the nature of the specific activity or research in which the Review Board records will be used and the specific qualification the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;
- (4) Describe the likely impact of disclosure of the requested records on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;
- (5) Describe the size and nature public to whose understanding a contribution will be made;
- (6) Describe the intended means of dissemination to the general public;
- (7) Indicate if public access to information will be provided free

of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the Review Board records sought.

(c) The Review Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for Review Board records made under § 1410.25, it can determine that it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Review Board shall consider the following factors:

(1) Whether disclosure is likely to contribute significantly to public understanding of Government operations or activities; and

(2) Whether the requester has a commercial interest and, if so, the extent of any interests and how they would be furthered by the

disclosure of the requested Review Board records.

§ 1410.35 Fees for Review Board record requests.

(a) Fees for Review Board records available through the Public

Reading Room. Duplication fees charged shall be limited to the costs

of duplication of the requested Review Board records or the cost to

have them duplicated. A schedule of fees for this duplication service is

set forth at paragraph (b)(6) of this section. A person may also obtain

a copy of the schedule of fees in person or by mail from the Public

Reading Room.

(b) Fees for Review Board records not available through the Public

Reading Room (FOIA requests).

(1) Definitions. For the purpose of paragraph (b) of this section:

Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on

whose behalf the request is made. In determining whether a requester properly belongs in this category, the Review Board must determine the use to which a requester will put the documents requested.

Moreover, where the Review Board has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Review Board will seek additional clarification from the Office of Management and Budget before assigning the request to a specific category.

Direct costs means those expenditures which the Review Board incurs in search, review, and duplication, to respond to requests under § 1410.25. Direct costs include, for example, the salary and benefits cost of Review Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Review Board records

are stored.

Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

Noncommercial scientific institution refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio

stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. A "freelance" journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract is the best proof, but the Review Board may also look to the past publication record of a requester in making this determination.

(2) Fees

(i) If the Review Board determines that the documents are requested for commercial use, it shall charge the average salary rate, including benefits, for Review Board employees, for document search

time and for document review time, in addition to the costs of duplication as established in the schedule of fees in paragraph (b)(6) of this section.

(ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Review Board's charges shall be limited to the direct costs of duplication as established in the schedule of fees in paragraph (b)(6) of this section. There shall be no charge for the first 100 pages of duplication.

(iii) For a request not described in paragraphs (i) or (ii) of this paragraph the Review Board shall charge the average salary rate for Review Board employees (including benefits), for document search time, and the direct costs of duplication as established in the schedule of fees in paragraph (b)(6) of this section. There shall be no charge for

document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) *If the Review Board is asked by a requester to send Review Board records by special methods such as express mail, it may do so, provided that requester pays for the express delivery service.*

(v) *The Review Board may assess charges for time spent searching, even if it fails to locate the records, or if Review Board records located are determined to be exempt from disclosure.*

(vi) Whenever the Review Board estimates that fees are likely to exceed \$25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Review Board personnel to reformulate the request to meet the requester's needs at a lower cost.

(3) Limitations on Fees. The Review Board, or its designate, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Review Board for a FOIA request would be less than the

appropriate threshold, the Review Board shall not charge the requesters.

(4) Payment of fees.

(i) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(ii) Advance Payments.

(A) If the Review Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250, the Review Board shall notify such requester of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(B) If a requester has previously failed to pay a fee in a timely fashion, the Review Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Review Board will begin to process a new request or pending request from that requester.

(C) When the Review Board requires advance payment under this paragraph, the administrative time limits prescribed in § 1410.40(b) will begin only after the Review Board has received the fee payments.

(5) Aggregation of Requests. Requesters may not file multiple requests, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Review Board reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading

assessment of fees, the Review Board may aggregate any such requests and charge the requester accordingly. The Review Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

(6) Fee Schedule

Fees will be charged as provided below:

(i) Duplication of Review Board records. Review Board records will be duplicated at a rate of \$.10 per page, provided the Review Board staff duplicates the records. If the Review Board determines that the duplication is so time-consuming that it must be sent to an outside duplication service, the requester will be charged the actual commercial rate.

(ii) Duplication of large documents. Large documents (e.g., maps, diagrams) will be duplicated at actual commercial rates.

(iii) Review. *Review fees shall be assessed with respect to only those requesters who seek Review Board records for a commercial use, as defined in (b)(2)(i) of this section. For each hour spent by agency personnel in reviewing a requested Review Board record for possible disclosure, the fee shall be \$20.15 except that where the time of managerial personnel is required, the fee shall be \$47.40 for each hour of time spent by such managerial personnel.*

(iv) Search. For each hour spent by administrative personnel in searching for and retrieving a requested Review Board record, the fee shall be \$14.75. Where a search and retrieval cannot be performed entirely by clerical personnel -- for example, where the identification of Review Board records within the scope of a request requires the use of professional personnel -- the fee shall be \$20.15 for each hour of search time spent by such professional personnel. Where the time of managerial personnel is required, the fee shall be \$47.40 for each hour of time spent by such managerial personnel.

§ 1410.40 Processing of FOIA requests

(a) Where a request complies with § 1410.25 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

- (1) *Granting the request,*
- (2) *Denying the request,*
- (3) *Granting or denying it in part,*
- (4) *Stating that the request has been referred to another agency under § 1410.25, or*

(5) *Informing the requester that responsive Review Board records cannot be located or do not exist.*

(b) *Action pursuant to this section to provide access to requested Review Board records shall be taken within 10 working days of receipt of a request for Review Board records, as defined in § 1410.25, except that, if unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting Review Board records is promptly informed in writing by the Designated FOIA Officer of the reason for such extension and the date on which a determination is expected to be made, the Designated FOIA Officer*

may take an extension not to exceed 10 working days.

(c) For purposes of this section and § 1410.45, the term "unusual circumstances" may include but is not limited to the following:

(1) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct Review Board records which are demanded in a single request; or

(2) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

§ 1410.45 Procedure for appeal of denial of requests for Review Board records and denial of requests for fee waiver or reduction.

(a) (1) A person whose request for access to Review Board records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the Executive Director within 30 days of

the determination. Appeals filed pursuant to this section must be in writing, directed to the Executive Director at the address stated above and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Review Board that is not properly addressed and marked will be so addressed and marked by Review Board personnel as soon as it is properly identified and then will be forwarded to the Executive Director. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the Executive Director.

(2) The Executive Director shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for Review Board records of fee reduction is in whole or in part upheld, the Executive Director shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in § 1410.40(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to 10 working days, by the Executive Director, who will send written notice to the requester setting forth the reasons for such extension and the date on which a determination or appeal is expected to be dispatched.

§ 1410.50 Requests for classified agency records.

The Review Board may at any time be in possession of classified records received from other Federal agencies. Except with respect to those documents identified in § 1410.20(a)(2), the Review Board shall refer requests under § 1410.25 for such records or information to the other agency without making an independent determination as to the releasability of such documents. The Review Board shall refer requests for classified records in a manner consistent with Executive Order 12958 of April 17, 1995, or other such law as may apply.

Dated: June 26, 1995

David G. Marwell

Executive Director

Assassination Records Review Board

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