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14 December 1992

MEMORANDUM FOR: Chief, Historical Review Group

VIA: W. George Jameson
Associate General Counsel
Litigation Division, OGC

FROM: Robert J. Eatinger, Jr.
Assistant General Counsel
Litigation Division, OGC

SUBJECT: Declassification Guidelines Established by the
President John F. Kennedy Assassination Records
Collection Act of 1992

1. The enactment of the President John F. Kennedy Assassination Records Collection Act of 1992 ("the Act") has created declassification guidelines that are to some extent different from the Historical Review Program guidelines established by the Director of Central Intelligence. In the continuing review of material related to the assassination of President Kennedy, the guidelines established by the Act must be used.

2. The Act's most fundamental changes are the burden it creates on agencies to justify continued classification of information, and a requirement that agencies balance the national security concerns against the public interest. Under the Act, information must be declassified unless a showing is made by clear and convincing evidence that release of the information would demonstrably impair the national security.

3. The Act's guidelines for declassification are found in its Section 6 and are as follows:

Sec 6. GROUND FOR POSTPONEMENT OF PUBLIC DISCLOSURE OF RECORDS.

Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that--

(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination is of such gravity that

it outweighs the public interest, and such public disclosure would reveal--

(A) an intelligence agent whose identity currently requires protection;

(B) an intelligence source or method which is currently utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

(C) Any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk to that person;

(3) 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;

(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

4. The Act therefore superseded the guidelines established for the Historical Review Program to the extent the Historical Review Group (HRG) is processing information related to the assassination of President Kennedy. The specific changes are as follows.

a. The most basic change is that you must apply a balancing test before maintaining the classification of any information. You must balance continued classification against the public interest in the information. Therefore, the greater light disclosure of the information would shed on the assassination of the President, or on the

government's investigation into that assassination, the more serious must be the need to continue to withhold the information for classification to be maintained.

b. HR 70-14.e(2) states the reviewers of information advocating continued classification of information will bear the burden identifying any damage that disclosure could reasonably be expected to cause to the national security. The Act defines that burden as one of "clear and convincing evidence." Further, the Act changes "reasonably could be expected to cause" to "demonstrably." Therefore, unless a showing is made by clear and convincing evidence that release of the information would demonstrably impair the national security, the information must be declassified.

c. HR 70-14.e(4) addresses the standards for maintaining the classification of foreign government information, the identity of a foreign source, and intelligence sources and methods. It notes that Executive Order 12,356 presumes that this information is classified. Under the Act, with respect to these categories of classified information found with records related to the assassination of President Kennedy, you must still find demonstrable damage by clear and convincing evidence regardless of the presumption in the Executive Order. Further, with respect to intelligence sources and methods, the Act requires that they--

(1) be either currently utilized or reasonably expected to be utilized by the U.S. Government; and

(2) that they not have been officially disclosed; and

(3) that their disclosure would interfere with the conduct of intelligence activities.

All of these factors must be met by a showing of clear and convincing evidence.

d. HR 70-14.e(4) also discusses CIA personnel and organizational information. The Act only permits the continued withholding of the identity of an "intelligence agent" if, by clear and convincing evidence, it can be shown the person's identity requires protection. Further, the Act does not permit the withholding of organizational information unless, by clear and convincing evidence, it can be shown the disclosure of the organizational data would demonstrably impair the national security.

e. HR 70-14.e(7) states that the HRG will determine whether information warrants continued protection pursuant to statutory or other requirements. The Act supersedes all other statutory authority for withholding information except

for a provision of the Internal Revenue Code dealing with tax return information. This means the Act takes precedence over 50 U.S.C. § 403(d)(3) and § 403g, as well as the Privacy Act, when determining whether to release records related to the assassination of President Kennedy. The Act also makes no provision for protecting information on the basis of executive privilege, such as deliberative process and attorney-client communications.

5. Certain categories of information may fall into more than one of the grounds set forth in Section 6 of the Act. We recommend that you review all of the grounds when determining whether to release or withhold specific information. For example, a human intelligence source may fall into grounds (1)(A) ("intelligence agent"), (1)(B) ("intelligence source"), (2) ("living person who provided confidential information to the United States"), and/or (4) ("understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual"). At this point, we do not know how the Assassination Records Review Board will interpret each of these grounds. Therefore, if you determine the standards of the Act are met to permit withholding of certain information, you should assert as many grounds as may arguably apply as authority for that withholding.

6. Although the Act severely limits what information may be withheld from disclosure, it may be possible to protect information not expressly covered by the Act. However, such information may be withheld only with the personal authorization of the President. When the President signed the Act, he issued a statement that included the following:

My authority to protect [executive branch deliberations, law enforcement information of the executive branch, and national security information] comes from the Constitution and cannot be limited by statute. Although only the most extraordinary circumstances would require postponement of the disclosure of documents for reasons other than those recognized in the bill, I cannot abdicate my constitutional responsibility to take such action when necessary.

7. The Act provides individuals the ability under the Administrative Procedures Act to challenge in court final decisions of the Assassination Records Board. We can expect, then, court challenges to the Board's decisions to uphold any of our determinations that certain information meets the criteria for postponement of release. Additionally, as you know, there are FOIA litigations for this same material. Plaintiff's counsel has indicated in court pleadings and orally that he wants the court to review our redactions not under FOIA standards, but under the standards of the Act. Thus, you should apply the Act's standards knowing your judgments may be questioned by the Board.

subsequent court challenges to the Board's action, and the FOIA cases.

8. If you have any questions concerning the application of the Act to your review of the assassination records, please call me on secure extension 76105..



Robert J. EATINGER, Jr.

DCI/OGC/RJE:ig 76105/ 15 Dec 1992

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