




MEMORANDUM

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To: Assassination Records Review Board

Cc: David G. Marwell

From: T. Jeremy Gunn 

Date: October 15, 1996

Subject: ARRB Staff Recommendations for Processing Records in the Segregated Collections and Records that Contain Information Having "No Apparent Relevance" (NAR) to the Assassination of President Kennedy.

Introduction

Federal government records coming within the Review Board's mandate typically fall into one of two categories: (a) groups of Federal agency records readily identifiable as being directly relevant to the assassination of President Kennedy, and (b) the "Segregated Collections" (or "Sequestered Collections") of Federal agencies, which consist of records that had been requested for examination by the HSCA or other government body in conjunction with an investigation of the Kennedy assassination.¹ The first category of records includes the FBI's "Core and Related files" (including, for example, the Oswald, Ruby, and the assassination investigation files) and the CIA's Oswald 201 file. Most of the Board's work has, to date, consisted of reviewing postponements from this first category of records. The Board has reviewed the proposed postponements in these records on a word-by-word basis. With only a few exceptions, these records have been understood to be relevant to the assassination and have been reviewed accordingly.² Although the detailed review of these records has

¹These other government bodies include the Church Committee, the Pike Committee, the Abzug Committee, and the Rockefeller Commission. A separate category of documents consists of records requested by these government bodies in conjunction with their work that was unrelated to the Kennedy assassination. These non-Kennedy assassination records, as a category, do not come within the Board's mandate. However, if any record in this separate category should include information that would enhance the historical understanding of the Kennedy assassination, the Board could, of course, designate it as an "assassination record."

²There were some records in this first category that had no apparent relevance to the assassination. Postponements in these records were nevertheless reviewed on a word-by-word basis and the records were released by the Board.

been time consuming and demanding for both the Review Board and the Federal agencies, the Board has believed that such a detailed review was necessary to fulfill its responsibilities under the The President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (Supp. V 1994) (JFK Act).

The Segregated Collections contain many records clearly related to the assassination. Postponements in records that clearly are related to the assassination should continue to be reviewed carefully. However, the Segregated Collections also contain a great deal of information that has no apparent relevance to the assassination.³ If the Review Board were to attempt the same detailed review of these apparently irrelevant records that it has heretofore afforded to assassination records, it would require vastly more time and resources than the Board now has at its disposal. Such a review would also require a significant expenditure on the part of the agencies to prepare detailed postponements and to supply evidence supporting the proposed postponements. The decisions of the Review Board regarding the disposition of the segregated records will have a significant affect on the use of ARRB Staff resources and on the resources of the agencies whose records are under consideration.

The immediate issue for the Review Board is to decide how to process and review the records in the Segregated Collections. A related issue, albeit one having a lesser impact on resources, is how records should be reviewed when they contain material that is unquestionably related to the assassination, but also contain information that is unrelated but nevertheless sensitive information. Specifically: (a) how should records be reviewed when they contain information with no apparent relevance to the assassination; (b) what should be the disposition of these records; and (c) how should individual records be reviewed that contain some information relevant to the assassination but also contain sensitive information that is not relevant to the assassination?

I. Origin and Description of the "Segregated Collections"

Several government bodies, including the House Select Committee on Assassinations, the Church Committee, the Rockefeller Commission, and others, have investigated the assassination of President Kennedy. In the course of their work, these bodies made requests to examine files of the CIA, FBI, and other government agencies. The requests may have been for records on a particular subject matter or for any information on

³This issue was described in the Board's public hearing on August 6, 1996, by the ARRB Staff and in the sworn testimony of John Pereira and Barry Harrelson of the CIA. The transcript of the public hearing is incorporated herein by reference.

specific names provided to the agencies. In response to the requests, the agencies frequently made their files available for review and copying by the investigators. On occasion, the investigators requested a file, but never actually reviewed it.

At the conclusion of the HSCA's work in the late 1970s, Congress entered into agreements with agencies, including the FBI and CIA, not to destroy the records that had been requested and to keep those records segregated from the remainder of the agencies' other files. The term "segregated" or "sequestered" collections thus describes those records now held by Federal agencies that were originally requested by the investigative bodies in the course of their investigations of the Kennedy assassination, and that have, in most cases, been stored separately from other agency files.

Although many of the segregated records are clearly relevant to the assassination of President Kennedy, there is also a great deal of information in these records that, as has been discussed elsewhere, has no apparent relevance to the assassination. There are four basic reasons that information having no apparent relevance to the assassination is contained in the Segregated Collections (and, in some cases, in the Core and Related files):

First, the mandates of the investigative bodies included not only the Kennedy assassination, but other areas as well. For example, the HSCA also investigated the assassination of Martin Luther King. The Rockefeller Commission investigated a wide range of CIA activities and the Church Committee investigated domestic surveillance activities of the US intelligence community. Although records requested by these investigatory bodies on issues other than the Kennedy assassination might also be relevant to the assassination, it is also possible they would have no relevance whatsoever. Although Segregated Collection records that are unrelated to the assassination are not within the Board's mandate (see footnote 1 above and Part II B below), in many cases the files are intermingled in such a way that it may be initially unclear whether the records are related to the Kennedy assassination.

Second, even in the course of making inquiries relevant to the Kennedy assassination, records were sometimes pulled from the files that in fact have no apparent relation to the assassination. One obvious example, as described in the Public Hearing, was that of a "false hit." In a false hit, the HSCA may have been seeking information on a certain "John Smith," but was provided a file on another person named "John Smith." The wrong "John Smith's" file is now included in the Segregated Collection, although the information contained in the file has no relevance to the assassination.

Third, there are some files, pulled in response to HSCA requests, that contain documents that are clearly relevant to the assassination, but also contain some

documents that have no apparent relevance. For example, the HSCA may have requested the personnel file of a CIA officer who was stationed in Mexico City at the time of Oswald's visit. Although the personnel file contains some information of relevance, it also includes personal information on the career of the officer both before and after the Mexico City assignment. In some instances, this type of information, albeit apparently irrelevant to the assassination, would reveal a great deal about sensitive CIA activities.

Fourth, there are some documents -- in both the Segregated Collections and in the FBI's Core and Related files -- that contain both relevant and irrelevant information. One example is the briefing memos (*e.g.*, to President Johnson) that include the assassination as one of several topics. Another example are FBI informants' reports prepared immediately after the assassination that contain a statement about the assassination (typically that the informant had no information) along with reports on other matters that have no apparent relation to the assassination.

II. The Problem: Whether information and records in the Segregated Collections (and in some Core and Related files) that have no apparent relevance (NAR) to the Kennedy assassination should be reviewed in the same manner that the Board has followed for those records that clearly are related to the assassination?

A. Public Comment.

The public was invited to make comments and recommendations to the Board on the procedures for reviewing and processing the Segregated Collections. Several members of the public spoke in the August 6, 1996 Public Hearing, and several others sent written comments to the Board. The comments tended to follow one of two possible approaches. The first suggested that the Board might well differentiate relevant records from those that are less relevant, but urged that the Board proceed prudently and that it prioritize wisely.

The second approach, which we will call the "broad" position, argues that the records in the Segregated Collections should be reviewed in the same manner as the Board has heretofore followed with the core collections, and that all postponements should be reviewed on a word-by-word basis. These commentators made essentially two arguments in favor of the broad approach. The first argument is that all segregated records are assassination records *because* they were requested as a part of an investigation into the assassination. According to this reasoning, all files that were made available as a result of a name search are *necessarily* relevant because they were

retrieved in connection with an investigation of the assassination.

The second argument for the broad position is that no one can know with certainty whether any given record *might possibly* be relevant to the assassination. For example, a record may contain information that would illuminate the assassination only when other information not now known becomes available. Similarly, a researcher in the future might make a connection that is not apparent today.

B. ARRB Staff Response.

The broad position has one undeniable advantage: it would essentially preclude the Review Board and its Staff from engaging in the task of judging what information might be relevant to the assassination. Were this recommendation to be adopted, the Review Board would be less likely to be accused of hiding probative information under the guise of its being irrelevant to the assassination.⁴

Although conceding that the broad position does have this advantage, the ARRB Staff does not support this position for three basic reasons:

First, this broad position is overly inclusive. Although it is clear that, in some instances, records are included within the Segregated Collection that have no relevance to the assassination, the broad position would include them without differentiation. The basis for treating all segregated records as assassination records is not that the records are reasonably likely to enhance the historical understanding of the assassination, but that they might possibly, in some remote or unforeseen way, have information that might explain the assassination. No historian, prosecutor, or social scientist should use such criteria as a basis for understanding a historical event or a crime. In fact, the arguments favoring this broad position could be used with identical force (or lack of force) with respect to tens of thousands of other records in the files of the CIA, FBI, and other agencies. Who today *necessarily* knows that the files of a European desk officer in the State Department or of the Director of Central Intelligence contain no additional information that might one day be argued to be relevant to the assassination? An approach to the segregated records that is premised on the belief that no apparent relevance need be ascertained is one that is obviously over inclusive, and, presumably, would consume the limited resources both of the agencies and the Review

⁴There will, of course, always be people who will be suspicious of the significance of any withheld information. Ultimately, the Board's credibility will be judged less by these anticipated allegations than by the releases that have been made and by the conscientiousness of the Board's procedures.

Board.

Second, the language of the JFK Act repeatedly and specifically identifies records *related to the Kennedy assassination* as being the relevant body of material. The findings and declarations repeatedly refer to the relevant body of records as being those that are "related to" or "concern" the assassination. *See, e.g.*, § 2(a) (1), (2), (4), (5), (6), and (7). When referring to the Segregated Collections, the JFK Act does not presume that all records contained therein are necessarily related to the assassination or that all segregated records should be declassified. When referring to the Segregated Collection, the Act specifies that an "assassination record" is "*a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of [the HSCA or other investigative body].*" JFK Act, § 3(2) (emphasis added). Nowhere does the Act identify any records that must be (or even should be) declassified if they have no relevance to the assassination. The Act thus can reasonably be read to presume that the Segregated Collections contain records related to the assassination as well as records that are not related. In short, the statute is the "JFK Assassination Records Collection Act," not the "Segregated Collections Act."

Third, even if the JFK Act were read to presume that all records in the Segregated Collection are "assassination records," there are common sense reasons for not doing so. It is expected that such a review would consume a vast amount of resources of the Board and agencies while producing little information probative of the assassination. The ARRB Staff believes that if Congress in fact wishes to have all of the segregated records reviewed in the manner that the Board has followed for assassination records, it is fully capable of enacting appropriate legislation to do so.

III. ARRB Staff Proposal for Processing Records Having No Apparent Relevance (NAR) to the Assassination of President Kennedy.

In finding that the broad position described above would be overly inclusive of records, it should nevertheless be recognized that the most significant risk in not adopting the broad position is that any case-by-case selection and identification process might be under inclusive. Although the ARRB Staff fully acknowledges that any selection of records runs such a risk, the proposals below are designed for the purpose of ensuring that the greatest number of true assassination records are properly identified and reviewed. There should be no mistake that the ARRB Staff fully intends, to the best of its ability, to identify all records that plausibly can be identified as being relevant to the assassination and subjecting those records to the full review process.

Developing any system to identify assassination records within the Segregated Collections is inevitably a complicated problem and the Staff has been unable to identify a perfect solution. With these understandable difficulties in mind, the Staff proposes, for the Review Board's decision, the following guidelines for the review of the Segregated Collections and disposition of the records. The recommendations below cover three separate (but necessarily related) issues: (a) the reviewing of the Segregated Collections for the purpose of identifying assassination records as well as records containing information not apparently related to the assassination; (b) disposition of the original segregated records that are not designated "assassination records," and (c) procedures for handling individual records that contain information related to the assassination as well as information unrelated to the assassination.

A. ARRB Staff Proposal for review of Segregated Collection records.

The ARRB Staff will review every record in the Segregated Collections to determine whether they contain information relevant to the assassination, including any information that enhances the historical understanding of the assassination. Whenever the ARRB Staff identifies assassination-related information in a record, the Staff will recommend to the appropriate agencies that the record as a whole be designated an "assassination record" under the JFK Act and that it thereafter be reviewed for postponements on a word-by-word basis. If the agency disagrees with the ARRB Staff designation, the Staff will notify the Review Board and make the disputed record available to the Review Board for its decision whether the record is an "assassination record." During the process of reviewing the Segregated Collections, the Staff will seek continued guidance from the Review Board regarding the scope of records that the Board believes will enhance the historical understanding of the assassination.

When the Staff identifies records containing information that has "no apparent relevance" to the assassination, it will designate such information as "NAR" and document that finding in a writing that reasonably describes the records at issue. These writings shall be made available to the Review Board for its independent review and the Review Board shall have the ultimate authority to determine whether the records are assassination records or "NARs." Those records found to be NARs shall not be further reviewed by the Review Board. Upon the termination of the Review Board's activities, the ARRB Staff writings describing the NAR records shall be made available to the public in the JFK Collection at NARA.

**B. ARRB Staff Recommendations for the disposition of records
Designated as "NARs."**

If the Review Board adopts the above proposal for the identification of assassination records and NARs, the Board must then decide who shall have custody of the original NAR records and whether those records must be opened at some future date.

a. **Custody of NARs.** There are three plausible options for the disposition of the original NAR records: *first*, the Review Board could permit the original NAR records to be left in the custody of the agencies and permit the agencies to dispose of the records in accordance with the disposition schedules established in conjunction with NARA. *Second*, the Review Board could permit the agencies to retain custody of the records (presumably in conjunction with NARA oversight), provided that the agencies agree to preserve the records in perpetuity. *Third*, the Review Board could instruct the agencies to send the original NAR records to NARA and order them to be placed in a security classified facility that is not open to the public.⁵

The Staff believes that the first option should be rejected if for no other reason than that it is important to ensure that the valuable historical records, even if not clearly related to the assassination, be preserved. Additionally, the records should be preserved in such a way as to preserve their archival integrity.

As between the second and third options, the ARRB Staff is undecided. On the one hand, the records are more likely to be properly archived if they are housed at NARA. On the other hand, the records – particularly the personnel records of clandestine CIA employees – are very sensitive and the agencies are best able to ensure that legitimate security measures to safeguard the records would be taken. The ARRB Staff does recommend, however, that when any assassination record is separated from a file containing NAR records and sent to the JFK Collection, that a complete copy of the entire file be maintained either at the originating agency or at NARA.

⁵One might raise the question whether the Review Board has the power to instruct an agency on the handling of records that are not considered to be "assassination records" within the meaning of the JFK Act. This question seemingly is answered by reference to the general supervisory power of the Review Board, as stated in the JFK Act, to "direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act" § 7(j)(1)(C)(ii). Given that the Review Board could designate all segregated records as "assassination records," it would thus seem well within its powers, and in the interest of the agencies, to make this lesser decision. In any case, the Review Board could enter into a binding agreement with the agencies regarding the disposition of the records.

b. **Opening of NARs.** Regardless of who maintains custody of NARs, the Review Board should decide whether NARs, like assassination records, should be opened at some future date. There are two obvious options in this regard, although there are many other possibilities as well. The first would be to allow the agencies to make the decision whether the records will be opened in the future. The second option would be for the Review Board to order that all NAR records be opened in the year 2017, consistent with the opening of assassination records. The ARRB Staff does not make a recommendation on how this issue should be resolved.

C. ARRB Staff Proposal for the review of records that contain information clearly related to the assassination as well as information with no apparent relation to the assassination.

The Review Board and Staff have heretofore preferred that documents containing information related to the assassination be reviewed as integral wholes, even if the document contains some information that is unrelated to the assassination. All documents reviewed to date have been reviewed, as a whole, under the postponement standards of Section 6 of the JFK Act. The ARRB Staff believes this practice should continue to the greatest reasonable extent.

There are, however, some assassination records that will be reviewed by the Board that contain some relevant information, but also contain information that is not apparently relevant to the assassination (NAR) and that is sensitive. The question for the agencies, and for the Review Board, is whether NAR information in individual documents may be withheld on the grounds that it is not apparently relevant to the assassination. The Review Board has already addressed this issue, to some extent, in its regulations.

"An assassination record shall be released in its entirety except for portions specifically postponed pursuant to the grounds for postponement of public disclosure of records established in . . . the JFK Act, and no portion of any assassination record shall be withheld from public disclosure solely on grounds of non-relevance unless, in the Review Board's sole discretion, release of part of a record is sufficient to comply with the intent and purposes of the JFK Act."

36 CFR 1400.5 (emphasis added). Reading this regulation in conjunction with specific postponement criteria described in Section 6 of the JFK Act, the ARRB Staff recommends as follows: whenever an agency identifies an assassination record that also contains some information that it believes to be NAR, the ARRB Staff will review the proposed NAR material to determine: (a) whether it is in fact NAR, and (b) whether the type of information appears, on its face, to fall within one of the specific grounds for postponements. If the ARRB Staff believes that both (a) and (b) apply, it shall

recommend to the Review Board that the NAR material be postponed and that the agency need not provide any additional evidence in support of the postponement. The record and the ARRB Staff recommendation shall then be made available to the Review Board for its final determination. The final determination form shall reflect that such postponements have been sustained on both (a) the specific grounds enumerated in Section 6, and (b) its NAR status.⁶ The Staff further recommends that material postponed on both NAR and Section 6 grounds be opened in 2017, unless there is a specific reason made for some other opening date. Under no circumstance shall information that is relevant to the assassination be postponed on the joint NAR-Section 6 grounds.⁷

The Staff requests that the Review Board provide guidance with respect to these recommendations at its Public Meeting on October 16, 1996. Once the Review Board has decided whether to accept the ARRB Staff recommendations (including any amendments or clarifications), the ARRB Staff will begin to process the records according to the Review Board's decisions. The Staff also will draft proposed regulations incorporating the Review Board's decisions (and modifying any previous regulations) and present them to the Board for its final decision.

⁶The Staff anticipates that once the NAR status has been recognized for a document or a file, the Section 6 criteria will be applied to a file or to a document as a whole.

⁷In other words, the agencies must provide specific evidence in support of postponements in assassination-related material.

It is also important to recall the category of records, described in footnote 1 above. Records requested by agencies (such as the Church Committee) that were requested as a part of their investigations on matters unrelated to the assassination are not, *per se*, "assassination records" and do not need to be processed under the JFK Act.