

DRAFT MEMORANDUM

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From: Farand Kan

Subject: Authority of the Assassination Records Review Board to Inspect and/or Disclose the Tax Records of Lee Harvey Oswald under Treas. Reg. §301.6103(a)-1.

Treas. Reg. 301.6103(a)-1 gives qualified permission for subsequent disclosures of tax returns and tax return information by Federal agencies when such information has been previously disclosed by the Internal Revenue Service to a Federal agency. Reg. 301.6103(a)-1(a) (General rule) (attachment #1). This memorandum explores whether the prior disclosure of Lee Harvey Oswald's tax returns and tax return information to the Warren Commission and the National Archives [**lookup R.Hrubec, 49 F3d 1269**] permits a subsequent disclosure to the ARRB and/or the general public.

1. **Treatment of 26 U.S. 6103 tax information confidentiality within the JFK Act.**

Tax confidentiality provisions enacted under 26 U.S.C. 6103 have been singled out as one area of law where the power of the JFK Assassination Records Collection Act does not have overriding authority: "The JFK Assassination Records Collection Act takes precedence over any other law *except* Section 6103 of the Internal Revenue Code." 44 U.S.C. 2107-11(a) (emphasis added). The general purpose of 26 U.S.C. 6103, as substantially amended via the Tax Reform Act of 1976, is to ensure that tax returns and tax return information¹ "shall be confidential." 26 U.S.C. 6103(a) (general rule) (attachment #2).

¹ Tax return information is defined as (A) "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payment... received by, recorded by, prepared by, furnished to, or collected by the Secretary" or (B) "any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b))**lookup this section!**". 26 U.S.C. 6103(b). While it is the ARRB's position that the JFK Act empowers the ARRB to inspect IRS documents and determine whether they are indeed tax return information as defined and protected by 26 U.S.C. 6103, that is a separate issue not addressed in this memorandum.

In providing for taxpayer confidentiality, Congress did not make confidentiality absolute, but instead “strove to balance the particular office or agency’s need for the information involved with the citizen’s right to privacy and the related impact of the disclosure upon the continuation of compliance with our country’s voluntary tax assessment system.” General Explanation of the Tax Reform Act of 1976, prepared by the Staff of the Joint Committee on Taxation 314. Although the ARRB is explicitly limited from overstepping the provisions of 26 U.S.C. 6103, the statute provides several exceptions “as authorized by [its] title.” 26 U.S.C. 6103(a); see 26 U.S.C. 6103 (c-p) (exceptions); P.L. 94-455 Sec.1202, 90 Stat 1667 (“returns and return information are to be confidential and not subject to disclosure except as provided by statute”) (1976). The tax information of Lee Harvey Oswald, previously released to the Warren Commission and the National Archives, may fall under an authorized exception for subsequent disclosures of tax information released prior to the enactment of the Tax Reform Act of 1976. See Reg. 301.6103(a)-1 (attachment #3).

2. **Treas. Reg. 301.6103(a)-1: Disclosures after December 31, 1976, by officers and employees of Federal agencies of returns and return information disclosed to such officers and employees by the Internal Revenue Service before January 1, 1977, for a purpose not involving tax administration.**

The release of Oswald’s tax information to the Warren Commission constitutes disclosure by the Internal Revenue Service to a Federal agency within the meaning of Treas. Reg. 301.6103(a)-1. In conformity with the provisions of 26 U.S.C. 6103 and the Tax Reform Act of 1976, Treas. Reg. 301.6103(a)-1 provides an exception to confidentiality, and permits subsequent disclosures, of tax information released prior to the enactment of the Tax Reform Act of 1976:

Except as provided by paragraph (b) of this section² a return or return information, disclosed by the Internal Revenue Service before January 1, 1977, to an officer or employee of a Federal agency for a purpose not involving tax administration pursuant to the authority of section 6103 before amendment of such section by section 1202 of the Tax Reform Act of

²Paragraph (b) pertains to “an administrative or judicial proceeding” as described in 26 U.S.C. 6103(i)(4). Reg. 301.6103(a)-1(b) (Exception). This exception deals only with “judicial or administrative proceeding[s] pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture” and does not encompass the issue at hand. U.S.C. 6103(i)(4).

1976 may be disclosed by, or on behalf of, such officer, employee, or agency after December 31, 1976, for any purpose authorized by such section before such amendment. Reg. 301.6103(a)-1 (parentheticals omitted); see also 45 FR 65564 (1980) (explanation of Reg. 301.6103(a)-1) (attachment #4).

Under this regulation, the extent of disclosure permissible is determined through examination of section 6103 prior to the 1976 reforms, “for any purpose authorized by such section”. Treas. Reg. 301.6103(a)-1.

3. Inspection and/or Disclosure of tax information under 26 U.S.C. 6103 and Treas. Reg. 301.6103(a)-1 prior to the Tax Reform Act of 1976.

3.1. Public Examination pursuant to Executive Order.

While all taxpayer return information is now “confidential” and subject to disclosure only upon statutory exception under the current 26 U.S.C. 6103, such tax information was previously of “public record.” 26 U.S.C. 6103 (1976) (attachment #5). Section 6103 formerly provided that all tax information “shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.” 26 U.S.C. 6103(a)(2) (1976). Accordingly, the Oswald tax information might be made open to the public if a new Executive Order authorizes such disclosure. Previous Executive Orders only authorized inspections by federal agencies and employees [**check to make sure there are no instances of EO’s permitting complete public disclosure**] and did not permit complete public disclosure. E.g. Executive Order 11859 (permitting inspections of tax information by the Senate Committee on Governmental Operations) (1975); Executive Order 10619 (permitting inspections of individual Income tax returns for any period by the Dept. Of Health, Education, and Welfare) (1955). However, the language of 26 U.S.C. 6103(a)(2) indicates that the “extent” of public inspection was to be determined by the President, and mentions no other restrictions [**check to make sure there are no other restrictions**]. Should the President issue a new Executive Order authorizing the complete public disclosure of Oswald’s tax information, it seems that the I.R.S. would be compelled to release the records.

3.2. Agency Inspection pursuant to Treas.Reg. 301.6103(a)-1(f).

Although no instances of executive orders permitting complete public disclosure exist, several executive orders (and rules and regulations) were made pursuant to Section 6103 so that by 1976, “virtually every Federal agency had access to tax returns, usually on the written request of the head of the agency. See Mertens Law of Fed. Income Tax’n

Sec.47.02. The broad authority for inspection of tax returns by Federal agencies was promulgated via the former Treas. Reg. 301.6103(a)-1(f) (1976) (Inspection of returns by executive departments other than the Department of the Treasury and by other establishments of the Federal Government) (attachment #6). This subsection permitted any establishment of the Federal Government to inspect tax return information “in the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue... upon written application signed by the head of the executive department or other Government establishment desiring the inspection. As governed by this regulation, the Oswald tax information is of public record, and can be inspected by Federal agencies upon written application and approval by the IRS. However, IRS approval is not guaranteed, and any application by the ARRB for inspection of tax information will be subject to the “discretion” of IRS officials.

While an application and IRS approval under Treas. Reg. 301.6103(a)-1(f) would probably permit the inspection of Oswald’s tax information by the ARRB, full public disclosure might not be authorized. Subsection (f) indicates that it is reserved for situations where “the head of an executive department... or of any other establishment of the Federal Government, desires to inspect, or to have some other officer or employee of his department or his establishment” inspect tax information. The regulation also requires that “the name and the official designation of the person by whom the inspection is to be made” be set forth in written applications for inspections, perhaps implying that a Federal agency may not use subsection (f) for release to the general public.

Though subsection (f) might not initially permit full public disclosure, the ARRB may have authority to release tax information to the public, through its own channels, once it gains permission to inspect the information. In a case between the Interstate Commerce Commission and a conglomeration of private railroad corporations, the courts compared “the right of a government agency to obtain income tax information as distinguished from the right of that same agency to disclose such information to the public.” *Ass’n of American Railroads v. United States*, 371 F.Supp. 114, 116 (DC 1974). The court held that while the I.C.C. had “broad powers to require submission of particular data under 49 U.S.C. 20(1),” the statute did not “require information so obtained to be made public,” and further held that public disclosure of such data would violate the protection of 26 U.S.C. 6103. *Id.* at 371 F.Supp. 116-117. But whereas the I.C.C. in *Ass’n of American Railroads* was prevented from asserting its own powers over the protections of 26 U.S.C. 6103, the prospect of finding exceptions within 26 U.S.C. 6103 was never raised. Moreover, *Ass’n of American Railroads* noted that protections under Section 6103 were excepted “under Presidential Order or pursuant to published regulations.” *Id.* at 371 F.Supp. 117. Because the ARRB seeks to use the exception of Treas.Reg. 301.6103(a)-1(f) to permit public disclosure in lieu of 26 U.S.C. 6103, and not to assert its own agency powers over the protections of 26 U.S.C. 6103, public disclosure pursuant to subsection (f) may be permissible.

Subsection (f) goes on to state that “The information obtained from inspection pursuant to this paragraph may be used as evidence in any proceeding, conducted by or before any department or establishment of the United States, or to which the United States is a party.” Should the ARRB obtain Oswald’s tax information for inspection under subsection (f), public disclosure will be permitted to the extent that such disclosure is the use of the information as evidence in any governmental proceeding. Thus, if the public disclosure of Oswald’s tax information can constitute any manner of evidentiary function, the ARRB will have authority to release the information after it gains possession of the information via permission to inspect. **[cite cases allowing courts to make tax info. public].**

3.3. Limits to protections of tax return information prior to the Tax Reform Act of 1976.

The current 26 U.S.C. 6103 broadly protects almost all tax and tax related information held by the IRS. [fn1]. But whereas Treas.Reg. 301.6103(a)-1 subjects previously disclosed tax information to the law of 26 U.S.C. 6103 “pursuant to the authority of section 6103... before amendment of such section by section 1202 of the Tax Reform Act of 1976” the extent of tax information protected may be substantially diminished.

4. Conclusion

Under Treas. Reg. 301.6103(a)-1, Oswald’s tax information can be disclosed via the authority of tax rules and regulations prior to the Tax Reform Act of 1976, because Oswald’s tax information was previously disclosed to the Warren Commission. Oswald’s tax information was of public record under the tax rules and regulations prior to the Tax Reform Act of 1976, and so they are of public record today. These records may be inspected upon written request by the head of the ARRB and approval by the IRS.