

DRAFT MEMORANDUM TO BRIAN

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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 by the IRS 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.C. 6103 tax information confidentiality under 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 (the "JFK 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."

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.

26 U.S.C. 6103(a) (general rule) (attachment #2). In providing for taxpayer confidentiality, Congress did not make confidentiality absolute. Rather, Congress “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 JFK Act does not take precedence over 26 U.S.C. 6103, regulations promulgated by the IRS under authority of Section 6103 provide a mechanism for limited disclosure of tax return information “as authorized by [its] title.” 26 U.S.C. 6103(a); see 26 U.S.C. 6103 (c-p) (authorized disclosures); 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. Application of Treas. Reg. 301.6103(a)-1 to the tax information of Lee Harvey Oswald.

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 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).

Tax return and tax return information of Lee Harvey Oswald may be disclosed “on behalf of” the Warren Commission by NARA under the guidelines of Treas. Reg. 301.6103(a)-1. Oswald’s tax information was initially disclosed by the IRS in 196x, thereby falling within the date restriction of Treas. Reg. 301.6103(a)-1. The 196x disclosure occurred between the IRS and the Warren Commission, a Commission which consisted of more than one “officer or employee of a Federal agency” within the meaning of Treas. Reg. 301.6103(a)-1. Disclosure to the Warren Commission was “for a purpose not involving tax administration,” namely an investigation into the assassination of President Kennedy.

The extent of current disclosure of Oswald’s tax information 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

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).

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**].

Barriers to the issuance of an Executive Order include the feasibility of obtaining such an Order, and the probability that the current Treas.Reg.301.6103(a)-1 enables action under prior Executive Orders but does not permit issuance of new Orders. In that the current regulation makes specific mention of the validity of any prior “order of the President under section 6103 or rules and regulations thereunder prescribed by the Secretary or his delegate and approved by the President” governing the disclosure of previously disclosed tax information, it is not likely that the regulation also means to allow new Presidential orders, rules, and regulations. See, Treas.Reg.301.6103(a)-1.

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

Although no instances of executive orders permitting complete public disclosure exist, and issuance of a new executive order may not be feasible or permissible, several prior executive orders (and rules and regulations) were promulgated 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.

It may be argued that just as the opportunities for new Presidential rule-making are not

permitted by the current Treas.Reg.301.6103(a)-1, opportunities for new applications and inspections of Oswald's tax information should not be permitted: that subsequent disclosures of previously disclosed tax information should be reserved for agencies (such as the Warren Commission and the NARA) which had already been authorized to inspect Oswald's tax information prior to the Tax Reform Act of 1976. But the current regulation authorizes prior disclosures "for any purpose authorized by such section [6103] (or such [executive] order or rules and regulations) before such amendment." Treas.Reg.301.6103(a)-1. It seems likely that "any purpose authorized" can include the usage of prior regulations which outline procedures for tax information inspections and authorize such inspections.

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 consider releasing tax information to the public, through its own channels, once it gains permission via subsection (f) to inspect the information. 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." But the public disclosure of Oswald's tax information probably does not constitute any manner of evidentiary function; because it does not, the ARRB will have no authority under subsection (f) to release the information after it gains possession of the information via permission to inspect. **[but compare cases allowing courts to make tax info. public].**

Without authority via subsection (f), or any other prior rules or regulations, to make Oswald's tax information public, the notion of an ARRB release of such information goes against precedent. 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. *Ass'n of American Railroads* also noted that protections under Section 6103 were excepted “under Presidential Order or pursuant to published regulations,” *Id.* at 371 F.Supp. 117. This might substantiate the theory that if the ARRB sought 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 would be permissible. But without an evidentiary function, use of subsection (f) for public disclosure fails, and Section 6103 protections prevail.

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. In 1976, protections under 26 U.S.C. 6103 encompassed “Publicity of returns,” but made no mention of tax return information.³ See 26 U.S.C. 6103 (1976). Moreover, the term “return” was differently defined:

For purposes of section 6103(a), the term “return” includes-

- (a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and
- (b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision.

Treas.Reg.301.6103(a)-1(a)(3)(i)(a-b) (attachment #6).

Most significantly, the current protections over “any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return” were

³ The prior section 6103 mentioned “disclosure of information as to persons filing income tax returns.” 26 U.S.C. 6103(f) (1976). However, the section referred not to the protection of tax return information as currently defined, but instead provided guidelines “upon inquiry as to whether any person has filed an income tax return.” 26 U.S.C. 6103(f) (1976).

missing under the prior law. While current law clearly protects information “prepared by” the IRS, prior law only protects information “received” or “taken” by the IRS. The limits to tax information protections prior to the Tax Reform Act of 1976 may therefore hinge on the meaning of the term “taken.” Whether “taken” includes information actually created and/or recorded by the IRS (i.e. “The IRS has *taken* down the following information as a result of its investigations”), or is restricted to an actual transfer of possession (i.e. “The IRS has *taken* away the following documents from Oswald”) may determine if IRS-created documents relating to Oswald and IRS investigations of Oswald are excluded from confidentiality provisions.**[find a case instead of lecturing on a word]**. Should it be the case that the latter meaning of “taken” prevails, then IRS-created documents, along with documents created by other parties and in the possession of the IRS, are excluded from Section 6103 protections, and consequently available for public disclosure.

[The courts previously noted that “statutory protection would be meaningless if such protection were not extended to copies of tax returns and to the pertinent data and information in the hands of the taxpayer,” perhaps suggesting that IRS-created documents are indeed protected information. *Ass’n of American Railroads* 371 F.Supp. 114 (1974).]