

DRAFT MEMORANDUM

July 14, 1997

To: T. Jeremy Gunn, Esq.
General Counsel

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.

The National Archives and Records Administration (“NARA”) is currently in possession of records used by the Warren Commission during the investigation into the assassination of President John F. Kennedy. Included within these records are tax records that were obtained by the Warren Commission from the Internal Revenue Service (“IRS”). The Assassination Records Review Board (“ARRB”) seeks to disclose these tax records to the public.

There is a general

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 (the “IRS”) to a Federal agency. *See* Treas. Reg. § 301.6103(a)-1(a) (as amended by T.D. 7723, 1980-45 FR 65564) (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 Commission¹ and the National Archives permits a subsequent disclosure to the Assassination Records Review Board (the “ARRB”) and/or the general public.

¹ The issue of whether release of the Warren Commission Reports made any of Oswald’s tax information public, and thus exempt from the confidentiality provisions of 26 U.S.C. 6103, is not explored in this memorandum. Courts have differed as to whether prior public disclosures in judicial proceedings can release tax information from confidentiality protections. *See generally*, J. Hudson Duffalo, The Buttoned Lip: The Controversy Surrounding the Disclosure of Tax Return Information, 53 Alb. L. Rev. 931 (1989); *compare* *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir. 1983) (holding that when a disclosure is not specifically authorized by statute, it is unlawful, regardless of prior public disclosures) *with* *Lampert v. United States*, 854 F.2d 335 (9th Cir. 1986) (concluding that when tax return information was made public in court proceedings, subsequent disclosures by government were permissible).

1. **Treatment of I.R.C. § 6103 Tax Information Confidentiality Under the JFK Act.**

Tax confidentiality provisions enacted under I.R.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) (Supp. V 1994) (emphasis added).

The general purpose of I.R.C. § 6103, as substantially amended via the Tax Reform Act of 1976, is to ensure that tax returns and tax return information² “shall be confidential.” I.R.C. § 6103(a) (1986) (General Rule) (attachment #2). However, in providing for taxpayer confidentiality, Congress did not make confidentiality absolute; 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.” Staff of Joint Comm. on Taxation 314, General Explanation of the Tax Reform Act of 1976 (Comm. Print 1976).

Although the JFK Act does not take precedence over I.R.C. § 6103, regulations promulgated by the IRS under authority of I.R.C. § 6103 provide a mechanism for limited

² 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 with respect to a return” 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))” I.R.C. § 6103(b)(2) (1986). The term “return information” does not include “data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.” I.R.C. § 6103(b)(2). The term “taxpayer identity” is limited to “the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.” I.R.C. § 6103(b)(6) (1986).

It is the ARRB’s position that much of the Oswald tax information held by NARA is not encompassed by the above definitions, and that the JFK Act empowers the ARRB to inspect IRS-held tax information to determine whether such information is indeed tax return information as defined by I.R.C. § 6103. This memorandum focuses on a separate question of whether regulations promulgated under I.R.C. § 6103 provide an outlet for disclosures of Oswald’s tax information, even under the assumption that such information does fall under the provisions of I.R.C. § 6103.

disclosure of tax return information “as authorized by [its] title.” I.R.C. § 6103(a) (General Rule); *see* I.R.C. § 6103 (c-p) (authorized disclosures); H.R. Conf. Rep. No. 94-1515, 4180 (1976) (“The Senate amendment provides that returns and return information are to be confidential and not subject to disclosure except as provided by statute”). Under these regulations, 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* Treas. Reg. § 301.6103(a)-1.

2. Application of Treas. Reg. § 301.6103(a)-1 to the tax information of Lee Harvey Oswald.

In conformity with the provisions of I.R.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 section³ 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.

Treas. Reg. § 301.6103(a)-1 (parentheticals omitted); *see also* Disclosures of Returns and Return Information, T.D. 7723, 45 Fed. Reg. 65,564 (1980) (explanation of provisions governing Treas. Reg. § 301.6103(a)-1) (attachment #3).

Tax return and tax return information of Lee Harvey Oswald can probably be disclosed “on behalf of” the Warren Commission by NARA under the provisions of Treas. Reg. § 301.6103(a)-1: Oswald’s tax information was initially disclosed by the IRS in 1964, thereby falling within the date restriction of Treas. Reg. 301.6103(a)-1; the 1964

³Paragraph (b) pertains to “an administrative or judicial proceeding” as described in I.R.C. § 6103(i)(4). Treas. Reg. § 301.6103(a)-1(b) (1980) (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. I.R.C. § 6103(i)(4) (1986).

disclosures 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. *See* Treas. Reg. § 301.6103(a)-1.

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

Pursuant to the provisions of Treas. Reg. § 301.6103(a)-1, the extent of disclosure of Oswald’s tax information currently permissible is determined through an examination of I.R.C. § 6103 as it stood prior to the Tax Reform Act of 1976, “for any purpose authorized by such section.” Treas. Reg. § 301.6103(a)-1. Prior to the Tax Reform Act of 1976, which ensured that all tax return information would be “confidential” and subject to disclosure only upon statutory exception, tax information was of “public record.” I.R.C. § 6103 (1976) (the “former section 6103”) (attachment #4). The former section 6103 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.” I.R.C. § 6103(a)(2) (1976).

3.1. Public Examination Pursuant to Executive Order.

It may be argued that the Oswald tax information can be made open to the public if a new executive order, in accordance with the guidelines of the former I.R.C. § 6103, will authorize such disclosure. However, even if obtaining an executive order were feasible, it is probable that the current Treas. Reg. § 301.6103(a)-1 does not permit issuance of new orders. 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. Treas. Reg. § 301.6103(a)-1. Thus it is not likely that the regulation also means to allow new Presidential orders, rules, and regulations.

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 rules and regulations were promulgated pursuant to the former 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 generally* Mertens Law of Fed. Income Tax’n § 47.02

(1997).

The broad authority for inspection of tax returns by Federal agencies was promulgated via 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) (the “former subsection (f)”) (attachment #5). The former subsection (f) 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.” Treas. Reg. § 301.6103(a)-1(f).

As governed by this regulation, the inspection of Oswald’s tax information by the ARRB would be permissible. Thus ARRB inspection seems to be of a “purpose authorized” by the former section 6103, and meet the requirements of Treas. Reg. § 301.6103(a)-1.

It may be argued that in order to inspect Oswald’s tax information, a written application by the ARRB to the IRS would be required under the former subsection (f). *See* Treas. Reg. § 301.6103(a)-1(f) (1976). However, the current regulation indicates that disclosure is permissible for “any purpose authorized” by pre-tax reform regulations, and does not suggest that prior regulatory procedures for inspections must be renewed. Treas. Reg. § 301.6103(a)-1 (1980). Since the ARRB, regardless of purpose, would be “authorized,” albeit not guaranteed, the right to inspect tax information in the pre-tax reform era, inspection seems permissible. Similarly, an ARRB request to inspect tax information is probably not subject to the “discretion” of the IRS, because the authority to inspect tax information existed under the former subsection (f) even though actual inspection was subject to IRS approval.

3.3. Full Public Disclosure under Treas. Reg. § 301.6103(a)-1(f) (1976).

While the former subsection (f) would probably permit the inspection of Oswald’s tax information by the ARRB, full public disclosure might not be a valid “purpose authorized by such section.” Treas. Reg. § 301.6103(a)-1 (1980). The former 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. Treas. Reg. § 301.6103(a)-1(f) (1976). 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 could not use the former subsection (f) for release to the general public.

Though the former subsection (f) might not initially permit full public disclosure, the

ARRB may consider releasing Oswald's tax information to the public, through its own channels, once it gains permission via the former subsection (f) to inspect the information. However, the former subsection (f) contains guidelines for the use of such information: "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." Treas. Reg. § 301.6103(a)-1(f) (1976). 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 the former subsection (f) to release the information after it gains possession of the information via permission to inspect.

Although the former subsection (f) does not specifically restrict public disclosure of tax information, prior case law suggests that a Federal Agency's authority to inspect tax information was treated differently from an agency's authority to publicly disclose tax information. In *Ass'n of American Railroads v. United States*, 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 mandate of 26 U.S.C. 6103. *Id.* at 371 F.Supp. 166-117. Although the JFK Act, in contrast to the I.C.C. statute, does require certain information to be made public, it appears that the exceptions for information protected by I.R.C. § 6103 ultimately limit disclosure of such information to Federal Agency inspection, even under pre-Tax Reform Act of 1976 principles. *See* 44 U.S.C. 2107-11(a).

It was also noted in *Ass'n of American Railroads* that the Freedom of Information Act could not be used to compel the disclosure of tax information, because FOIA disclosures did not apply to matters "specifically exempted from disclosure by statute." 5 U.S.C. 522(b)(3); *Ass'n of American Railroads*, 371 F.Supp. at 116. In general, I.R.C. § 6103 has been interpreted, both prior to the Tax Reform Act of 1976 and afterwards, as specifically exempting tax return and tax return information from public disclosure under FOIA. *See, e.g.,* Tax Management Inc., Portfolio 632, A-1 to A-23, Access to IRS Information Pursuant to Disclosure Statutes (1997). Similar to FOIA disclosure restrictions, the JFK Act probably cannot be used to compel the public disclosure of tax information protected under I.R.C. 6103, even though ARRB inspection may be permissible.