

DRAFT MEMORANDUM

July 21, 1997

To: T. Jeremy Gunn, Esq.
General Counsel

From: Farand Kan

Subject: Authority of the Assassination Records Review Board Under Treas. Reg. § 301.6103(a)-1 and I.R.C. § 6103 to Receive Disclosure of IRS Documents Collected by the Warren Commission.

The National Archives and Records Administration (“NARA”) is currently in possession of Internal Revenue Service records obtained by the Warren Commission during its investigation into the assassination of President John F. Kennedy (the “Warren Commission IRS Documents”). The Assassination Records Review Board (“ARRB”) seeks to inspect and disclose the Warren Commission IRS Documents to the public.

There is a general prohibition against the release of tax returns and tax return information as provided by I.R.C. § 6103, and as would seem to be reflected in Section 11(a) of the John F. Kennedy Records Collection Act of 1992 (“JFK Act”). *See* I.R.C. § 6103(a), 26 U.S.C. § 6103(a) (1994); *see also* 44 U.S.C. § 2107-11(a) (Supp. V 1994). However, there may be an exception to the general prohibition where, as here, the tax records being sought for disclosure were previously disclosed by the IRS to a Federal agency prior to January 1, 1977. *See* Treas. Reg. § 301.6103(a)-1(a) (as amended by T.D. 7723, 1980-45 Fed. Reg. 65564).

Under Treas. Reg. § 301.6103(a)-1(a), subsequent disclosures of previously disclosed tax records are permitted pursuant to the authority of I.R.C. § 6103 as it stood prior to January 1, 1977 (the “former I.R.C. § 6103”). An analysis of the former I.R.C. § 6103 indicates that tax records were previously of public record, and available for inspection by Federal Agencies upon written application to the IRS. *See* Treas. Reg. § 301.6103(a)-1(f) (1976). Thus, the Warren Commission IRS Documents can probably be inspected by the ARRB pursuant to prior law, in compliance with the current Treas. Reg. § 301.6103(a)-1(a). However, case law prior to 1977 suggests that even if the ARRB has authority to inspect the Warren Commission IRS Documents, such documents may nonetheless be restricted from public disclosure.

1. **I.R.C. § 6103 Presents an Obstacle to Disclosure Under the JFK Act of the**

Warren Commission IRS Documents.

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 information “shall be confidential.”¹ I.R.C. § 6103(a) (1994) (General Rule) (attachment #1). Congress, however, did not make tax record confidentiality absolute, and noted that I.R.C. § 6103 left some room for disclosures. *See* 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”). By providing for exceptions, 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).

To coordinate the balance between a Federal agency’s need for information and the citizen’s right to privacy, regulations have been promulgated by the IRS under the authority of I.R.C. § 6103, providing a mechanism for limited disclosure of tax return information “as authorized by this title.” I.R.C. § 6103(a) (General Rule); *see* I.R.C. § 6103(q) (1994) (“Regulations -- The Secretary is authorized to prescribe such other regulations as are necessary to carry out the provisions of this section.”) One such regulation permits subsequent disclosures of tax records released prior to the enactment of the Tax Reform Act of 1976, and may consequently allow for disclosure of the Warren Commission IRS Documents. *See* Treas. Reg. § 301.6103(a)-1.

2. The Warren Commission IRS Documents can be Disclosed Under the Provisions of Treas. Reg. § 301.6103(a)-1, a Regulation Promulgated Under the Authority of I.R.C. § 6103.

In conformity with the provisions of I.R.C. § 6103 and the Tax Reform Act of 1976,

1

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 section, a return or return information (including taxpayer return information), as defined in section 6103(b)(1), (2), and (3) of the Internal Revenue Code, disclosed by the Internal Revenue Service before January 1, 1977, to an officer or employee of a Federal agency (as defined in section 6103(b)(9)) for a purpose not involving tax administration (as defined in section 6103(b)(4)) pursuant to the authority of section 6103 (or any order of the President under section 6103 or rules and regulations thereunder prescribed by the Secretary or his delegate and approved by the President) before amendment of such section by section 1202 of the Tax Reform Act of 1976 (Pub. L. 94-455, 90 Stat. 1667) may be disclosed by, or on behalf of, such officer, employee, or agency after December 31, 1976, for any purpose authorized by such section (or such order or rules and regulations) before such amendment.

Treas. Reg. § 301.6103(a)-1; *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 #2).

The Warren Commission IRS Documents can probably be disclosed under the provisions of Treas. Reg. § 301.6103(a)-1, because five main requirements seem to be satisfied: 1) the Warren Commission IRS Documents consist of tax return or return information as defined in I.R.C. § 6103; 2) the Warren Commission IRS Documents were disclosed by the Internal Revenue service before January 1, 1977 to an officer or employee of a Federal agency; 3) the prior disclosure of the Warren Commission IRS Documents was made for a purpose not involving tax administration; 4) the prior disclosure of the Warren Commission IRS Documents was made pursuant to the authority of I.R.C. § 6103 as it stood before its amendment by the Tax Reform Act of 1976 (“the Pre-Reform I.R.C. § 6103); 5) a subsequent disclosure of the Warren Commission IRS Documents would be for a purpose authorized by the Pre-Reform I.R.C. § 6103.

A. *The Warren Commission IRS Documents Constitute Tax Returns and Tax Return Information.*

Tax “returns” consist of “any tax or information return, declaration of estimated tax, or claim for refund . . . and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.” I.R.C. § 6103(b)(1) (attachment #3). Thus actual tax forms within the Warren Commission IRS Documents, such as those filled out and submitted to the IRS by Lee Harvey Oswald, Jack Ruby, and other subjects to the Warren Commission investigation, are within the scope of I.R.C. § 6103 and Treas. Reg. § 301.6103(a)-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 with respect to a return . . .” and (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)) which is not open to public inspection under section 6110.” I.R.C. § 6103(b)(2) (1994) (*see* attachment #3).

“Written determinations” include a “ruling, determination letter, or technical advice memorandum.” I.R.C. § 6110(b) (1994). “Background file documents” mean “the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.” I.R.C. § 6110(b).

While these terms are broad in scope, I.R.C. § 6103 specifies that the terms do not extend beyond individual identities: “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). Further, “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 seems possible that of the three boxes and over two hundred Warren Commission IRS Documents held by hunder NARA, some documents consist of neither tax returns, nor tax information that can identify a particular individual.² Warren Commission tax records that do not consist of

² The NARA database of Warren Commission IRS Documents indicates that several files do not relate to tax returns or tax return information. Among the files: “Ruby, Jack, File in Background Folder”; “Baker, Mollie, Voluntary Sworn Statement Of”; “Ruby, Jack, Affiliations,

tax returns and tax return information as defined by I.R.C. § 6103 are, of course, exempt from I.R.C. § 6103 confidentiality provisions and thus available for public disclosure in accordance with the JFK Act.³ *See generally* 44 U.S.C. § 2107 (Supp. V 1994).

B. The Warren Commission IRS Documents Were Disclosed Before January 1, 1977 to an Officer or Employee of a Federal Agency.

The IRS previously disclosed the Warren Commission IRS Documents during the course of the Warren Commission investigation, which was initiated on November 29, 1963 and concluded September 24, 1964. While the exact date of each IRS document disclosure has not been determined (the documents were apparently disclosed in clusters), the NARA database has not recorded dates of transfer that exceed 1964, and all prior disclosures certainly occurred before 1977, as required by Treas. Reg. § 301.6103(a)-1.

Organized Crime”; “Note Last Page Investigation By Secret Service Was Terminated 12-19-63”; “Goldstein, Frank, San Francisco Police Department, Criminal Record”; Senator, George, Memorandum of Interview With.”

³ Moreover, it is the ARRB’s position that the JFK Act empowers the ARRB to inspect the Warren Commission tax records in order to assist in the process of determining whether such records consist of tax returns and tax return information as defined and protected by I.R.C. § 6103.

The Warren Commission (officially, the “President’s Commission on the Assassination of President Kennedy”), as receivers of the IRS document disclosure, must have included “an officer or employee of a Federal agency” in order to fall under the provisions of Treas. Reg. § 301.6103(a)-1. “Federal agency” is defined as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include - (A) the Congress; (B) the courts of the United States.” 5 U.S.C. § 551(1) (attachment #4); *cf.* I.R.C. § 6103(b)(9) (“The term “Federal agency means an agency within the meaning of section 551(1) of title 5, United States Code.”) While the Warren Commission was certainly an “authority of the Government of the United States,” one might object that the Warren Commission was not a Federal agency because it consisted of members of Congress and members of the Federal judiciary.⁴ But 5 U.S.C. § 551(1) does not seem to exclude individual members of Congress or Federal courts; rather, it excludes whole entities: “the Congress” and “the courts of the United States.” Thus the Warren Commission can be distinguished as a Federal agency consisting of members of Congress and the Federal judiciary; those members (of non-agencies), when receiving documents from the IRS, were acting as appointees to the Warren Commission and not as judges or Congressmen, thereby constituting officers of a Federal agency as required by Treas. Reg. § 301.6103(a)-1.

C. *The Warren Commission IRS Documents Were Disclosed for a Purpose not Involving Tax Administration.*

The Warren Commission was created by President Lyndon B. Johnson to “ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination.” Exec. Order No. 11,131, 28 Fed. Reg. 12789 (1963) (attachment #5). The official purposes of the Commission were quite apart from tax administration:

The purposes of the Commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further

⁴ The original appointees to the Warren Commission were: The Chief Justice of the United States Earl Warren, Chairman; Senator Richard B. Russell; Senator John Sherman Cooper; Congressman Hale Boggs; Congressman Gerald R. Ford; The Honorable Allen W. Dulles; The Honorable John J. McCloy. *See* Exec. Order No. 11,131 (1963).

investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to [President Johnson] its findings and conclusions.

Exec. Order No. 11,131.

D. *The Warren Commission IRS Documents Were Disclosed Pursuant to the Authority of the Former I.R.C. § 6103.*

The former I.R.C. § 6103 stated in part that tax documents were open to inspection “only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President. I.R.C. § 6103(a)(1) (1976) (attachment #6); see Section 3, *supra* (further discussion of the former I.R.C. § 6103). No executive order explicitly instructed the IRS to disclose tax documents to the Warren Commission, thus an objection may be raised that the prior disclosure of the Warren Commission IRS Documents was not made pursuant to the former I.R.C. § 6103. See I.R.C. § 6103 (1976) (Table of Executive Orders authorizing inspection of returns, none relating to the Warren Commission). However, Executive Order 11,130 which originally formed the Warren Commission, gave broad powers to the Commission - presumably including the power to ascertain IRS documents.

The Warren Commission was empowered to “prescribe its own procedures and to employ such assistants as it deems necessary,” and President Johnson ordered that “All Executive departments and agencies are directed to furnish the Commission with such facilities, services and cooperation as it may request from time to time.” Exec. Order 11,130. As indicated in its purposes (*supra* at 2.3) the Commission was instructed to examine “any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable.” Whereas the former I.R.C. § 6103 did not specify that explicit mention of IRS disclosures had to be made in executive orders granting authority to inspect tax records, the wording of Executive Order 11,130 was probably sufficient. Moreover, if Executive Order 11,130 did not sufficiently authorize the disclosures of the Warren Commission IRS Documents, it is likely that “rules and regulations prescribed by the Secretary or his delegate and approved by the President,” whether formally or informally approved, authorized the disclosures. See I.R.C. § 6103(a)(1) (1976).

E.

Under the provisions of Treas. Reg. § 301.6103(a)-1, the Warren Commission IRS Documents “may be disclosed by, or on behalf of [the Warren Commission] after December 31, 1976, for any purpose authorized by such section [6103] (or such order or rules and regulations) before such amendment.” Treas. Reg. § 301.6103(a)-1. Thus, NARA can probably disclose the Warren Commission IRS Documents on behalf of the Warren Commission. The extent of disclosure permissible of the Warren Commission IRS Documents depends upon an analysis of the former I.R.C. § 6103, “for any purpose authorized by such section.” Treas. Reg. § 301.6103(a)-1.⁵

⁵ The authority of Exec. Order 11,131 probably cannot be used for a subsequent disclosure of the Warren Commission IRS Documents, because the “purpose authorized” under the order was specific to the Warren Commission.

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.” *Compare* I.R.C. § 6103 (1976) (*see* attachment #6) *with* I.R.C. § 6103 (1994). 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).⁶ Pursuant to the former I.R.C. § 6103, several rules and regulations were promulgated 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).

3. Treas. Reg. § 301.6103(a)-1(f) (1976)..

The broad authority for inspection of tax returns by Federal agencies was promulgated via Treas. Reg. § 301.6103(a)-1(f) (Inspection of Returns by Executive Departments Other Than the Department of the Treasury and by Other Establishments of the Federal Government):

Except as provided in paragraphs (d) and (g) of this section, if the head of an executive department (other than the Department of the Treasury), or of any other establishment of the Federal Government, desires to inspect, or to have some other officer or employee of his department or establishment inspect, a return in respect of any tax described in paragraph (a)(2) of this section in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue or the delegate of either, be permitted upon written application signed by the head of the executive department or other Government establishment desiring the inspection.⁷

⁶ Treas. Reg. § 301.6103(a)-1 probably would not permit issuance of a new executive order authorizing the disclosure of the Warren Commission IRS Documents. The regulation only mentions the validity of past executive orders made before the enactment of the Tax Reform Act of 1976, thus implying that present executive orders will not be honored. *See* Treas. Reg. § 301.6103(a)-1.

⁷ Paragraphs (d) and (g) respectively refer to inspections by states, and inspections by U.S. attorneys or attorneys of the Department of Justice.

Treas. Reg. § 301.6103(a)-1(f) (prior to the Tax Reform Act of 1976) (the “former Treas. Reg. § 301.6103(a)-1(f)”) (attachment #6).

3.1. Requirements of Treas. Reg. § 301.6103(a)-1(f) 1976).

Inspection of the Warren Commission IRS Documents by the ARRB is probably authorized under the former subsection (f) and the former I.R.C. § 6103 because the essential requirements of the regulation are met: 1) inspection is desired by the head of the ARRB, an “establishment of the Federal Government”; 2) the desired inspection is with respect to taxes “described in paragraph (a)(2)” of the former Treas. Reg. § 301.6103(a)-1 (attachment #7); and inspection is in connection with the disclosure principles of the JFK Act, a “matter officially before” the head of the ARRB.

It should be recognized that under paragraph (a)(2) of the former Treas. Reg. § 301.6103(a)-1, the definition of taxes is somewhat narrower than the present definition under I.R.C. § 6103. Most notable is the absence of “return information” under former protections.⁸ This difference in definitions may lead to the argument that only “returns” can be disclosed to the ARRB under the authority of the former Treas. Reg. § 301.6103(a)-1. Alternately, it may appear that since the definition of protected information was narrower prior to the Tax Reform Act of 1976, the ARRB should be allowed to inspect all “return information” previously left unprotected. A third view, most consistent with the wording of the present Treas. Reg. § 301.6103(a)-1, is that the present definitions of tax returns and tax return information should be applied to the prior regulation. Otherwise, if prior definitions were supposed to govern the authority of the present regulation, there would have been no purpose in bothering to specify a definition within Treas. Reg. § 301.6103(a)-1.

In order to inspect tax documents, written application and approval by the IRS was formerly required. *See* Treas. Reg. § 301.6103(a)-1(f) (1976). However, the current Treas. Reg. § 301.6103(a)-1 indicates that disclosure is permissible for “any purpose authorized” by pre-tax reform regulations, and does not suggest that prior regulatory procedures for inspections are to be reinstated. Treas. Reg. § 301.6103(a)-1 (1996).

⁸ Though “return information” is not specifically mentioned under the former Treas. Reg. § 301.6103(a)-1, subsection (b) included “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.” Thus the documents protected under former regulations are only slightly less than at present.

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, disclosures might not be subject to the “discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue,” because this would again reinstitute prior regulatory procedures. It may appear that an ARRB request to inspect tax information is subject to the “discretion” of the IRS, because a “purpose authorized” by prior regulations hinges on actual authorization via IRS approval. But in the alternative, the ARRB, as an establishment of the Federal Government, can inspect tax information under the authority of the former Treas. Reg. § 301.6103(a)-1(f) as the former regulation exists in whole, even without the former procedural requirement of IRS approval.

3.2. Disclosure Under Treas. Reg. § 301.6103(a)-1(f) (1976).

While the former subsection (f) would probably permit the inspection of the Warren Commission IRS Documents by the ARRB, full public disclosure might not be a valid “purpose authorized by such section.” Treas. Reg. § 301.6103(a)-1 (1996). The former Treas. Reg. § 301.6103(a)-1(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 Treas. Reg. § 301.6103(a)-1(f) for release to the general public.

Though the former Treas. Reg. § 301.6103(a)-1(f) might not initially permit full public disclosure, the ARRB may consider releasing the Warren Commission IRS Documents to the public, through its own channels, once it gains those documents for agency inspection. The former Treas. Reg. § 301.6103(a)-1(f) contains guidelines for the use of disclosed 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). Thus, public disclosure is permissible if such a disclosure under the JFK Act will constitute “evidence” in a “proceeding”.

Whereas the purpose of the JFK Act is “(1) to provide for the creation of the President John F. Kennedy Assassination Records Collection at the National Archives and Records Administration; and (2) to require the expeditious public transmission to the Archivist and public disclosure of such records,” the disclosure of the Warren Commission IRS

Documents probably constitutes a proceeding. 44 U.S.C. § 2107-2(b) (Supp. V 1994); *see also* 60 Fed. Reg. 33346 (describing the JFK Act as “establishing a process for public disclosure”). However, the JFK Act does not refer to documents disclosed under its authority as “evidence” but instead as “records”. *e.g.* 44 U.S.C. § 2107 (Supp. V 1994). Distinctions between these terms may ultimately prevent the ARRB from public disclosure of inspected Warren Commission IRS Documents.

Another obstacle to public disclosure of the Warren Commission IRS Documents is prior case law indicating 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.” *Id.* at 371 F.Supp. 116. The JFK Act, in contrast to the I.C.C. statute, does require that certain information be made public, but this distinction may not be sufficient to allow for public disclosure: the court further interpreted I.R.C. § 6103 to mean that even in the case of agency inspections, “protection against public disclosure was assured when the information was placed in the hands of government officials.” *Id.* at 371 F.Supp. 118. Under this interpretation of I.R.C. § 6103, disclosure of the Warren Commission IRS Documents via the former Treas. Reg. § 301.6103(a)-1(f) might ultimately be limited to agency inspection.

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 “the purpose of [FOIA] is to increase public access to information of legitimate concern, yet at the same time to prevent wholesale disclosure.” *Ass’n of American Railroads*, 371 F.Supp. at 117. 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). If analogous to FOIA restrictions under I.R.C. § 6103, restrictions to the JFK Act may serve to prevent full public disclosure of the Warren Commission Documents.