

January 16, 1997

VIA FACSIMILE AND FIRST-CLASS MAIL

Donald Squires, Esq.  
Office of Chief Counsel, Disclosure Litigation  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20535

Re: John F. Kennedy Assassination Records Collection Act of 1992 and Internal Revenue Code, Section 6103

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Dear Mr. Squires:

In anticipation of the upcoming meeting on January 22, 1997, I thought it would be appropriate to raise by letter a question regarding the confidentiality of Section 6103 records and the effect of the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (Supp. V 1994) ("JFK Act") on Section 6103 records.

As you know, the Assassination Records Review Board has requested that the IRS make available to the Review Board all tax returns of Lee Harvey Oswald and Marina Oswald for the years 1962 and 1963 ("Oswald records"). *See* Letter from David G. Marwell to Donald Squires, December 16, 1996. We understand that, in the ordinary course, these Oswald records would fall under Section 6103 of the Internal Revenue Code and would not be available for outside review. This letter sets forth our preliminary legal analysis suggesting why we believe that the Review Board may be entitled to conduct a confidential inspection of the Oswald records.<sup>1</sup>

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<sup>1</sup>We know that you are familiar with the JFK Act and that you were involved with legislative analysis when the Act, including Section 11(a) "Precedence over other law," was under consideration. On our part, we are aware of the important public policy issues regarding confidentiality of tax return records that fall within Section 6103.

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Under our preliminary analysis of the JFK Act, we believe that the Review Board may be empowered to inspect the Oswald records to the extent that they are “assassination records” as defined by the Act and by the Board’s guidelines published at 36 CFR 1400. However, we also acknowledge that the JFK Act does *not* authorize transfer to the National Archives of assassination records that fall within the scope of Section 6103. In short, we believe the Board may be fully entitled to inspect the Oswald records, but that the records would not need to be transferred to the National Archives or otherwise be made available to the public.

The Review Board believes that the JFK Act entitles it, without any stated restriction or limitation, to examine assassination records and to request probative information from all government agencies regarding information related to the assassination. *See* JFK Act Sections 5 and 7.<sup>2</sup> The Act broadly empowers the Review Board to “direct a Government office to make available to the Review Board . . . additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under [the JFK Act.]” 44 U.S.C. § 2107.7(j)(B)(ii). *See also* 44 U.S.C. § 2107.5(c)(2)(H) (Government agencies “shall . . . make available to the Review Board any additional information and records that the Review Board has reason to believe it requires. . .”). These provisions do not make any exceptions for records otherwise protected by Section 6103.

The only provision of the JFK Act that restricts the processing or handling of Federal assassination records in the possession of the IRS is Section 11(a), which provides that: “When this act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except Section 6103 of the Internal Revenue Code . . .).” 44 U.S.C. § 2107.11(a). Section 11(a) thus applies only to the specific circumstance where a record has already been identified as an “assassination record” that otherwise would be made public or be transferred to the National Archives. Therefore, Section 11(a) does not restrict, in any way, the authority of the Board to conduct a confidential examination of the tax returns that have been requested.

Thus, the JFK Act would appear to allow the Review Board access to *all* assassination records, but precludes the transferring of Section 6103 records to the National Archives.

To the extent that the IRS believes that Section 6103 of the IRS Code would prohibit the Review

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<sup>2</sup>The Review Board’s interpretation of any ambiguities in the JFK Act is entitled to substantial deference under the rule of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provided that the interpretation is “a permissible construction of the statute.” *Id.* at 843.

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Board from examining the records, our agencies would need to turn to the principles of statutory construction to determine which of the two laws supersedes the other. The canons of statutory construction provide, in the ordinary course, that whenever the pertinent provisions of two different statutes are inconsistent, the provision of the later-enacted statute supersedes that of the prior-enacted statute. *Sutherland* articulates this position as follows: "When two statutes are repugnant in any of their provisions, the later act operates to the extent of the repugnancy to repeal the first." 1A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 23.09 (5th Ed. 1992). This has long been the rule recognized by the Supreme Court. *See, e.g., United States v. Yuginovich*, 256 U.S. 450, 463 (1921) ("It is . . . well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactment."). It is also true, however, that the test for resolving such conflicts has become progressively more complicated. *See, e.g., Chemical Mfrs. Ass'n v. E.P.A.*, 673 F.2d 507 (D.C. Cir. 1982). In any case, after detailed statutory and legislative analysis of possibly conflicting provisions of the IRS Code and the JFK Act, the JFK Act might well be found to contain later and superseding provisions.

We hope that you concur with this preliminary analysis and we very much look forward to receiving your response to this letter and your own understanding of the relevant law.

Thank you for your continuing cooperation with our work.

Sincerely,

T. Jeremy Gunn  
General Counsel