

DRAFT MEMORANDUM

ATTORNEY-CLIENT  
PRIVILEGED AND CONFIDENTIAL

July 2, 1996

To: T. Jeremy Gunn, Esq., General Counsel

cc: Laura Denk, Esq.

From: Robert Arreola

Subject: JFK Act Statutory Interpretation of Responsibility of the NARA (and Presidential Libraries) to Transmit to the JFK Collection Records It Holds In Which Private Individuals May Have an Ownership Interest

The *President John F. Kennedy Assassination Records Collection Act of 1992* (“JFK Act”) requires each Government office to “review, identify and organize each assassination record in its *custody or possession* for disclosure to the public, review by the Review Board, and transmission to the Archivist.”<sup>1</sup> 44 U.S.C. § 2107.5(c)(1) (Supp. V 1994) (emphasis added). The JFK Act defines “assassination record” as “a record<sup>2</sup> that is related to the assassination of President John F. Kennedy that was created or made available for use by, obtained by, or otherwise came into the *possession* of ... the National Archives and Records Administration [“NARA”]... [and] any Presidential library.” 44 U.S.C. §§ 2107.3(2)(G) and (H) (Supp. V 1994) (emphasis added). Similarly, “Government office” is defined as “any office of the Federal Government that has *possession or control* of assassination records, including ... the National Archives as custodian of assassination records that it has *obtained or possesses*.” 44 U.S.C. § 2107.3(5)(D) (Supp. V 1994) (emphasis added).

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<sup>1</sup> The JFK Act provides for the establishment of a collection of records at the National Archives to be known as the John F. Kennedy Assassination Records Collection (“the Collection”). 44 U.S.C. § 2107.4(a)(1) (Supp. V 1994).

<sup>2</sup> The JFK Act defines a “record” as “a book, paper, map, photograph, sound or video recording, machine readable material, computerized, digitized, or electronic information, regardless of the medium on which it is stored, or other documentary material, regardless of its physical form or characteristics.” 44 U.S.C. § 2107.3(11) (Supp. V 1994).

On its face, the JFK Act and relevant provisions do not define the nature of “custody” or “possession” which would compel a Government office to transmit a record for inclusion in the Collection, raising the question of whether or to what extent the JFK Act applies to Government-held records in which private individuals have an ownership interest.<sup>3</sup> Nor is the term “Government records” explicitly defined within the JFK Act. A narrow reading of these terms might limit the scope of the JFK Act to only those records over which a Government office has full ownership and control in the absence of any competing private ownership interests. A broad reading indicates that a Government office must transmit to the Collection *any* assassination records within its walls regardless of such private interests. It is the conclusions of this memo that, read with the plain language of the JFK Act, the Act’s legislative history, similarly worded statutes, and caselaw that (a) the JFK Act’s purposes support a reading inclusive of privately owned but government-held records, (b) the JFK Act was intended to be limited to the collection of “Government records,” and (c) “Government records,” as defined in the JFK Act through references to government “possession” and “custody” *does* include government-held records in which there is a private ownership interest.

## I. PURPOSES OF THE JFK ACT

The JFK Act’s language suggests that Congress intended the Act to apply to a broad range of records now held by Government offices. The JFK Act’s “Findings and Declarations” state that “*all Government records* related to the assassination of President John F. Kennedy should be preserved for *historical* and governmental purposes” and “should be eventually disclosed to enable the public to become fully informed about the *history* surrounding the assassination.” 44 U.S.C. §§ 2107.2(a)(1) and (2) (Supp. V 1994) (emphasis added). First, questions regarding the application of the JFK Act’s semantics are to be read broadly.

The terms as, or, any, all, and the plural and singular forms of nouns shall be understood in their broadest and most inclusive sense and shall not be understood to be terms of limitation.

*Guidance on Interpreting and Implementing the President John F. Kennedy Assassination Records Collection Act of 1992*, 60 Fed. Reg. 33,345, 33,350 (1995).

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<sup>3</sup> For example, the NARA currently holds and maintains within its walls the famous Zapruder film of the assassination of President Kennedy. The film certainly falls within the JFK Act’s definition of “assassination record” but the Zapruder family retains an ownership interest in the film and receives compensation when the film is used (typically for media purposes).

The compelled transmission of such a monetarily valuable record to the Collection could raise a Fifth Amendment “Takings Clause” issue, but that is not our focus here.

Thus, “all governmental records” applies to a broad range of potential documents. Second, the public disclosure and history-oriented focus of the JFK Act’s purposes further implies that a broad reading of the applicable scope is appropriate. The legislative history of the JFK Act clearly directs such an interpretation.

[The JFK Act] creates a process to publicly disclose *all* records related to the assassination of President John F. Kennedy. ... [T]he Act creates a presumption of disclosure upon the government ... The Act creates numerous requirements to ensure that the public will be enabled to make its own observations, judgments, and determinations with regard to the history of the assassination and related matters.

S. Rep. No. 102-328, 102d Cong., 2d Sess. 17-18 (1992) (“Senate Report”) (emphasis added).

[T]he Committee believes that historians, scholars, researchers, journalists, and the American public must draw their own conclusions about the assassination from the vast volumes of evidence *collected* by government investigating bodies *and others* over the past 29 years.

H. Rep. No. 102-625, 102d Cong., 2d Sess. 10 (1992) (“House Report”) (emphasis added).

Such history indicates that the JFK Act was not intended to initiate a new government investigation of the assassination, but rather to allow the public to draw its own conclusions from the wealth of information currently held by government agencies.<sup>4</sup>

Again, the probability of a broad intended scope is indicated by the reference to documents beyond those which have been created by government agencies to include those records simply *collected* by these agencies. Thus, the JFK Act’s history leads to the initial conclusion that the drafters were less concerned about ownership interests and rather focused on informing the public.

## II. “GOVERNMENT RECORDS”

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<sup>4</sup> Indeed, the House Report plausibly surmised that the public would probably be no more trusting of a new government investigation than it has been of those in the past. House Report at 10.

Having recognized the broad legislative intent, it is appropriate to analyze a facial reading of the JFK Act itself. Nowhere in the JFK Act is the term “Government records” explicitly defined, despite frequent references<sup>5</sup> and the insight such a definition may have provided. The relevant questions become (1) Was the JFK Act intended to be limited *only* to the collection of “Government records” and (2) What is the scope of “Government records” ?

### A. The “Government Records” Limitation

First, there is no doubt that the JFK Act is meant to apply to government records. Congress indicated that “[T]he [Governmental Affairs Committee] believes that all government records related to the assassination of President Kennedy should be preserved.” Senate Report at 2968. This intention is reflected within the language of the JFK Act itself. *See, supra*, 44 U.S.C. §§ 2107.2(a)(1) and (2) (Supp. V 1994).

Second, the history and drafting of the JFK Act support a reading of the limitation to “Government records.” The House version of the JFK Act at first appears to assert a difference between “government records” and other types of “materials”. Compare section 2(a)(2) (“There is a compelling public interest that all *government records* be eventually made available to the public.”) with section 2(a)(3) (“There is a compelling public interest that all *materials* concerning the assassination of President John F. Kennedy be made available to the public at the earliest possible date.”). House Report at 1(emphasis added). But, as in the final draft, the House Report version proceeds to refer to “materials” in the context of governmental restrictions on disclosure, implying that the House intended “Government records” and “materials” to be used interchangeably.

Third, relevant caselaw supports such a limitation of the the reading of the JFK Act.

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<sup>5</sup> References to “Government record(s)” may be found in sections 2(a)(1) and (2), section 4(a)(1), section 7(b)(1), and sections 9(c)(1)(A) and (B) of the JFK Act.

One court ruled that neither the text nor the legislative history of the JFK Act suggest that the Act was intended to supercede the Freedom of Information Act (“FOIA”), 5 U.S.C. §552. *Assassination Archives & Research Ctr. v. United States Dept. of Justice*, 828 F.Supp. 100 (DC Dist Col 1993). Given this ruling, it is helpful to examine cases addressing the limitations of FOIA. *Kissinger v. Reporters Comm. for Freedom of the Press* remarks that FOIA vests jurisdiction in federal district courts to enjoin an “agency from withholding agency records and to order the production of any agency records improperly withheld.” 445 U.S. 136, 139 (1980) (quoting 5 U.S.C. §552(a)(4)(B)). *Kissinger* makes clear that the FOIA applies *only* to agency records and goes on to determine whether some documents of the former Secretary of State fall within the scope of “agency records.”<sup>6</sup> *Forsham v. Harris* similarly notes,

Since the enforcement provision of [FOIA], §552(a)(4)(B), refers only to “agency records” it is certain that the disclosure obligations imposed by § 522(a)(3) were only intended to extend to agency records. That limitation is implicit throughout the Act.

445 U.S. 169, n. 8 (1980).

Finally, the findings and declarations of the JFK Act further indicate that the JFK Act was likely intended to be limited to the collection of such records. Sections (2)(a)(5) - (7) of the JFK Act, although making reference only to “records”, refer to such records in the contexts of the FOIA, Executive Order No. 12356, and government protection generally. The FOIA and the like typically would not apply to privately owned records which the owner would presumably be free to sell, market, or publicize without government interference. Thus, at first blush, the JFK Act’s “Declarations” support an inference of limitation to “Government records.”

Further, a facial reading of section 10 of the JFK Act, entitled “Disclosure of Other Materials,” appears to indicate the scope of the JFK Act beyond simply the “Government records” described theretofore. The Senate Report’s description of this section indicates that this provision provides a limited extension on the compulsion of the JFK Act.<sup>7</sup> The House Report’s description leads to the

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<sup>6</sup> The court determined that recorded and transcribed telephone conversations of Secretary Kissinger were *not* agency records considering that the legislative history of FOIA indicates that the Office of the President is not an agency subject to FOIA. At the time the conversations were recorded, Kissinger was acting in his capacity as Assistant to the President.

<sup>7</sup> “Section 10 provides guidance regarding the release of assassination records outside the immediate purview of the Review Board.” Senate Report at 2996.

same inference.<sup>8</sup> Read exclusively, the failure of Congress to mention agency-held records in which there is a private ownership interest indicates either that the JFK Act was not intended to cover such records or else such records were covered elsewhere in the JFK Act -- perhaps intended to be included within the scope of "government records" itself.

## **B. The Scope of "Government Records"**

A narrow reading of "Government records" may indicate that the JFK Act has no power over those records collected by government agencies and government investigating bodies in which a private party has an ownership interest. On the other hand, a broad reading may indicate that for the purposes of full disclosure in the Collection, the JFK Act affects those records merely held by agencies regardless of extra-governmental interests.

### **1. The Relevance of "Assassination Records"**

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<sup>8</sup> "[Then] Section 9 authorizes the Review Board to seek the release of relevant records not otherwise included in the scope of this joint resolution." House Report at 32.

First, it is worthy of note that privately owned records, such as the Zapruder film, fall squarely within the definition of “assassination records” in the JFK Act, provided they were “created or made available for use by, obtained by, or otherwise came into the possession of” one of the presidential commissions or congressional committees which investigated the assassination of President Kennedy or any of a variety of government agencies including the NARA and the Presidential libraries.<sup>9</sup> 44 U.S.C. §2107.3(2) (Supp. V 1994). Note that this definition does not discriminate amongst records on the basis of ownership. To the contrary, Congress intended “assassination records” to be read broadly, stating that the term

... was not more specifically defined by the Committee because to do so before more is known about the universe of records would have been premature, and would have further injected the government between the records and the American public. ... [I]t is intended that the Review Board issue guidance to assist in articulating the scope or universe of assassination records as government offices and the Review Board undertakes [sic] their responsibilities.

Senate Report at 2970.

The JFK Act and its legislative history also make clear that assassination records which have already been available to the public are to be included in the Collection.

The Collection will include all publicly available assassination records at the National Archives at the time of enactment. ... As the public is already familiar with previously released records, it is essential that the fullest

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<sup>9</sup> Some of the enumerated government entities include the Warren Commission, the Rockefeller Commission, the Church Committee, the Pike Committee, the House Assassination Committee, the Library of Congress, any Executive agency, and any independent agency. 44 U.S.C. § 2107.3(2) (Supp. V 1994).

possible disclosure of these records be obtained by the public as early as possible.<sup>10</sup>

*Id.* at 2967, 2993-4.

The JFK Act appears to state, though, that the filters through which a record must pass before falling within the powers of the Review Board are first, it must be a government record and second, it must be an assassination record.

The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that a *Government record is not an assassination record*.<sup>11</sup>

44 U.S.C. §2107.9(c)(1)(A) (Supp. V 1994).

The above provision leaves little doubt that not all Government records are assassination records and not all assassination records are Government records. So what makes an assassination record also a Government record? That question is answered throughout the JFK Act via frequent references to records in the “possession”, “custody”, or “control” of a government office.<sup>12</sup> Indeed, the term “government office”, for the purposes of the JFK Act, is defined as “any office of the Federal Government that has *possession or control* of assassination records.” 44 U.S.C. §2107.3(5) (Supp. V 1994). But to answer the question of “Government records” with “records in the possession or custody of a government office” begs the question: What *is* “possession” or “custody”?

## 2. “Custody” or “Possession”

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<sup>10</sup> The JFK Act states “No assassination record made available or disclosed to the public prior to the date of enactment of this Act [Oct. 26, 1992] may be withheld, redacted, postponed for public disclosure, or reclassified.” 44 U.S.C. §2107.5(a)(3) (Supp. V 1994).

<sup>11</sup> Note that the strict “clear and convincing” evidence standard further evidences Congressional intent that disclosure is adamantly preferred to non-disclosure.

<sup>12</sup> Provisions where “possession”, “custody”, or “control” are used in reference to the state of assassination records at Government offices which are affected may be found in section 3(2), section 3(5)(D), section 5(c)(1), section 5(d)(3), section 5(f), and section 9(a) of the JFK Act.

Black's Law Dictionary defines "custody" as "the care and control of a thing or person. ... Immediate charge and control, and *not the final absolute control of ownership*, implying responsibility for the protection and preservation of the thing in custody." *Black's Law Dictionary* (6th ed.), West Publishing Co. (St. Paul, Minn. 1990) (emphasis added).<sup>13</sup> "Possession" is defined as "having control over a thing with the intent to have and to exercise such control."<sup>14</sup> *Id.* These dictionary definitions reveal a common usage of the terms "custody" and "possession" which are broad in scope and may or may not encompass an actual ownership interest. But, the common usage of statutory language is helpful only in the capacity of general insight, while to discover the meanings as used in legislation, terms must be viewed in light of a reading of the entire Act.

The fact that section 5(c)(1) and other relevant sections<sup>15</sup> of the JFK Act refer to government agencies that have "possession or custody" of assassination records implies that Congress had intended the terms to have somewhat different meanings. If not, the use of both terms rather than just one would yield the phrase meaningless. Maxims of statutory construction clearly indicate that statutory text should never be interpreted as though it were meaningless.

'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be constructed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake and error.

2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, § 46.06, at 119-120 (5th ed. 1992).

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<sup>13</sup> Dictionary variations on "custody" include: "Care, supervision, and control exerted by one in charge." *American Heritage Dictionary* (3d ed.), Houghton Mifflin Co. (New York 1992); "immediate charge and control exercised by a person or an authority." *Webster's Seventh New Collegiate Dictionary*, G & C Merriam Co. (Springfield, Mass. 1972).

<sup>14</sup> Dictionary variations on "possession" include: "Something owned or possessed; Actual holding or occupancy *with or without rightful ownership*." *American Heritage Dictionary* (3d ed.), Houghton Mifflin Co. (New York 1992) (emphasis added); "the act of having or taking into control; control or occupancy of property *without regard to ownership*." *Webster's Seventh New Collegiate Dictionary*, G & C Merriam Co. (Springfield, Mass. 1972) (emphasis added).

<sup>15</sup> *See, supra* note 12.

The definition of “custody” may actually be gleaned from the JFK Act itself. In the section entitled “Custody of records reviewed by Board,” the JFK Act provides

“Pending the outcome of the Review Board’s review activity, a Government office shall retain *custody* of its assassination records for purposes of preservation, security, and efficiency unless -- the Review Board requires the *physical transfer* of records for reasons of conducting an independent and impartial review.”

44 U.S.C. § 2107.9(a)(1) (Supp. V 1994) (emphasis added).

“Custody” as such is referenced with regard to the *physical* disposition of assassination records.<sup>16</sup> A facial reading of this provision appears to indicate that custody is relinquished by the mere act of physically handing over records, hence, conversely, custody is retained for purposes of the JFK Act when a government office *physically holds* an assassination record.<sup>17</sup>

This “physically held” interpretation finds support throughout the JFK Act’s legislative history. The Senate indicated that “Government offices *holding* assassination records are required to begin organizing and reviewing such records upon enactment.” Senate Report at 2967. Similarly, the House stated, “[T]he purpose of [the JFK Act is] to provide for the full release of *all Federal Government-held* assassination materials.” House Report at 20.

The board would have the authority to examine *any material held by a federal agency or the Congress* that the board determines is related to the assassination of President Kennedy. The board would then decide whether the material should be transferred to the National Archives to be made available to the public.

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<sup>16</sup> Section 5(f) of the JFK Act, entitled “Custody of postponed assassination records” reads “An assassination record the public disclosure of which has been postponed shall, pending transmission to the Archivist, be *held* ... by the originating body.” Here, again, “custody” is equated with being physically “held”.

<sup>17</sup> “The Collection shall include all assassination records that have been *transmitted* to the National Archives ... prior to the date of enactment of this Act [Oct 26, 1992].” 44 U.S.C. § 2107.4(a)(2)(A)(I) (Supp. V 1994) (emphasis added). Here, again, the JFK Act reveals that physical transmission to the NARA is sufficient for a record’s inclusion in the Collection.

House Report a 25 (statement of James L. Blum) (emphasis added).

Finding an intent that the JFK Act applies to those assassination records *held* by Government agencies regardless of ownership interests<sup>18</sup> and vesting the Review Board with the authority to decide what to do with those records is in keeping with the broad interpretation commanded by the JFK Act's purposes discussed above, as well as the Congressional deference to the authority of the Board itself.<sup>19</sup>

Further, the JFK Act seems to speak directly to the point with the provision "No assassination record created by a person or entity *outside government* ... shall be withheld [by a Government office]." 44 U.S.C. § 2107.5(a)(4) (Supp. V 1994) (emphasis added). One interpreting the JFK Act must presume that Congress considered that records *created* by persons outside the government might involve a private ownership interest, but, in keeping with the intended broad scope, made the JFK Act applicable nonetheless.

A look at similar statutory construction leads to the same conclusion. For example, *The Presidential Recordings and Materials Preservation Act* states "Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area." 44 U.S.C. § 2111.103, note (1988) ("PRMPA"). This provision clearly references "custody" in terms of *physical location*. Thus, since Congress mandated the transmission of assassination records in the "custody" of government offices and since no exception was made for records with a private ownership interest, such records were intended to be affected by the JFK Act.

An analysis of the use of "possession", although unnecessary in light of the implications of "custody", leads to the same conclusion. At first blush, a facial reading of the use of "possession" within the JFK Act appears more limited in scope than physical "custody".

Assassination records which are in the *possession* of the National Archives

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<sup>18</sup> There may be an argument that, where a private ownership interest exists, a record copy will suffice for the Collection. But, in the instances of recordings such as the Zapruder and Whelan films, originals, preferred for their clarity, quality, and for the proffered purposes of historical posterity, are required for the Collection wherever possible. "In the case of sound and video recordings, the original recording, *whenever available* ... may be placed in the JFK Assassination Collection." *Guidance on Interpreting and Implementing the president John F. Kennedy Assassination Records Collection Act of 1992*, 60 Fed. Reg. 33,345, 33,350 (1995) (emphasis added). Obviously, where a government agency *holds* such a recording in its custody, such a record is "available" for the collection.

<sup>19</sup> Consider section 7(n): "The Review Board may issue interpretive regulations."

on the date of enactment of this Act [Oct. 26, 1992], and which have been publicly available in their entirety *without redaction*<sup>20</sup>, shall be made available in the Collection without any additional review by the Review Board.

44 U.S.C. § 2107.5(d)(3) (Supp. V 1994) (emphasis added).

Here, “possession” is used in the context of records which have been available “without redaction.” Considering that redaction is ordinarily performed only on documents *created*, hence owned, by the government, it is unlikely that “possession” was intended to apply to privately owned records held by agencies. A record privately owned is usually available to the public from the private owner with the government having little or no opportunity or need to perform redaction. Reading this provision as pertaining to such records would yield the reference to “redaction” superfluous. *See, supra*, Singer at 119-120.

But, assuming, *arguendo*, such a limitation on “possession”, the potential broad scope of “custody” and the general ambiguity of “possession” require that privately-owned government-held records be affected by the JFK Act. In a series of catch-all provisions in direct reference to section 5(c)(1), the JFK Act mandates Government offices to

“[O]rganize and make available to the Review Board *any* record concerning which the office has *any uncertainty* as to whether the record is an assassination record *governed* by this Act [and] make available to the Review Board *any* additional information and records that the Review Board *has reason to believe* it requires for conducting a review under this Act.

44 U.S.C. §§ 2107.5(c)(2)(F) and (H) (Supp. V 1994) (emphasis added).

Once again, no reference is made to any exemptions from the JFK Act based on varying potential ownership interests in assassination records. Even in its most narrow reading, these provisions indicate Congressional intent that the NARA and other government agencies make the records they now hold available for the Collection despite any internal concerns regarding ownership interests. The legislative history of the JFK Act examined above supports this broad interpretation. A cursory glance at relevant caselaw seems to support a narrower scope, but upon closer review, the caselaw is not germane to this context. Again examining court interpretations of the scope of the

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<sup>20</sup> “Redaction” is typically the editing or blacking out of certain lines and/or references contained within a document for security or privacy purposes.

FOIA, we find

“We simply decline to hold that the physical location of the notes of telephone conversations renders them ‘agency records.’ The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department’s files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an ‘agency record’ Kissinger’s personal books, speeches, and all other materials stored in his office would have been agency records subject to disclosure under the FOIA.”

*Kissinger*, 445 U.S. at 157.

This application of the FOIA may easily be distinguished from the application of the JFK Act to privately owned records such as the Zapruder film in that the relevant records *were* used by the Government in the course of investigating the assassination of President Kennedy. Unlike Secretary Kissinger’s personal records, these assassination records were collected and used by the Government for a legitimate purpose. *See*, 44 U.S.C. § 2107.3(2) (Supp. V 1994). Thus, *Kissinger* offers little insight if not to indicate that the FOIA limitations therein defined do not apply to the JFK Act in this context.

In light of *Kissinger’s* deficiency, a refreshed examination of the implications of *Assassination Archives v. U.S. Dept. Of Justice*, 828 F.Supp. 100 (1993), is in order. There, the court stated

“Nothing in the [JFK Act] requires or even suggests that the standards the Archivist will use in releasing JFK material should replace the preexisting FOIA exemptions. ... [T]he court need not consider the legislative history of a statute unless the plain meaning of the language is ambiguous. [cite omitted]. In this case, the language of the JFK Act is unambiguous and a resort to the legislative history is unnecessary.”

*Assassination Archives*, 828 F.Supp. at 102.

This case dealt with a denial of a request by the Review Board for documents of a private and sensitive nature pertaining to a particular individual which were created by and in the possession of the Federal Bureau of Investigation. The scope of the ruling, as indicated by the phrase “in this case,” is limited to such a set of facts. The ruling offers no aid in discovering the JFK Act’s application to privately-owned government-held records and, considering that the language of the JFK

Act *is* ambiguous in this regard, the above examination of its legislative history is appropriate.

### III. CONCLUSION

The provisions and history of the JFK Act make no explicit reference to the scope of the JFK Act with regard to government-held assassination records in which there exists a private ownership interest. It is certainly clear, however, that Congress intended the JFK Act to be interpreted broadly and with deference to the Review Board for the greater purposes of facilitating historical analysis and alleviating public cynicism regarding the assassination of President Kennedy. Although the JFK Act appears limited in scope to the collection of “government records,” which is left undefined, references to records in the “possession” or “custody” of government offices and an analysis of those terms reveals that “government records” was intended to and *does* apply to privately-owned records provided they fall within the definition of “assassination record” and are physically government-*held*.