

## MEMORANDUM

September 14, 1998

To: Laura A. Denk  
Executive Director

Tracy Shycoff  
Deputy Director

From: Ronald G. Haron  
General Counsel

Subject: Disposition of Records of the Review Board

This memorandum has been prepared to provide legal guidance and recommendations regarding disposition of records of the Assassination Records Review Board ("Review Board") in light of the termination of the Board's operations on September 30, 1998.

The memorandum first reviews the legal obligations imposed by the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 ("JFK Act"), and the Federal Records Act (to the extent not superseded by the JFK Act). This memorandum then recommends, for your consideration, guidelines for the disposition of our records.

### A. Legal Background

The JFK Act states that the JFK Collection "shall include . . . all Review Board records as required by this Act." JFK Act § 4(a)(2). The JFK Act also states that

Upon termination and winding up, the Review Board shall transfer all of its records to the Archivist for inclusion in the Collection, and no records of the Review Board shall be destroyed.

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JFK Act § 7(o)(3). The JFK Act makes no distinction between substantive records relating to our work and administrative records regarding the day-to-day operations of the Review Board. I found no legislative history explicating the JFK Act provision requiring the transfer of Review Board records to the National Archives. *See, e.g.,* S. Rep. No. 328, 102d Cong., 2d Sess. 37, 43 (1992). A literal reading of the JFK Act would appear to require that all records be transferred to the National Archives without exception. The term “record” is defined in the JFK Act.<sup>1</sup>

However, it would also be reasonable to interpret the JFK Act in light of the Federal Records Act, which governs records disposition for U.S. agencies. “Record” is defined under the Federal Records Act to encompass those records that are “appropriate for preservation by [the federal] agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.” 44 U.S.C. § 3301. “Records,” within the meaning of the Federal Records Act, do not include

(1) library or museum material preserved for reference; (2) “extra copies of documents preserved only for convenience of reference;” and (3) stocks of publications and processed documents. *Id.* These latter materials are so-called “non-records,” and a federal agency has no obligation to retain such materials.

Under the Federal Records Act, “records” include permanent records that have historical value, as well as temporary (administrative) records with no or little historical value. Temporary records can be destroyed so long as it is done in accordance with general records schedules established by NARA or with the permission of NARA after requesting appropriate authorization. *See* 36 C.F.R. § 1228 (Disposition of Federal Records). Irrespective of the JFK Act, it appears that the Review Board cannot discard even administrative records unless done in accordance with NARA regulations under the Federal Records Act.

It is unclear whether the JFK Act, in requiring transfer of all records to NARA, supersedes the ability of the Review Board to schedule temporary records for destruction in accordance with NARA regulations. In light of this ambiguity, I recommend that we undertake the following approach set forth below.

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<sup>1</sup> Records are defined in the JFK Act as “includ[ing] 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.” 22 U.S.C. § 2107 (3) (11).

B. Recommendations

As we organize our records for transfer to the NARA, I recommend that we group our records into the following categories: (1) records of permanent, historic value that consist of "assassination records" within the meaning of the JFK Act and other records that reflect the work of the Review Board; (2) administrative records that relate to day-to-day operations of the Review Board, but do not contain information about the substantive work or decisions of the Review Board; and (3) "non-records," such as duplicate copies of documents or personal papers, that need not be retained for transfer to NARA.

1. Review Board Records for the JFK Collection

There is little debate as to the nature of the core files of the Review Board to be transmitted to the JFK Collection. Without listing all of the key record groups, they will include the Review Board's centralized files (both paper and electronic), as well as work files for senior and other staff. Unique work files, notebooks, or collections of documents should be preserved even if they contain duplicates.

As we box our records, I suggest that we identify separate any third agency records in our possession that (1) should part of the open or protected JFK Collection or (2) that will need further processing to be opened up for the Collection.

2. Administrative or Temporary Records

It is unclear whether the JFK Act requires administrative records to be preserved as permanent records by the National Archives. Even if the JFK Act were inapplicable, however, administrative records can only be destroyed in accordance with NARA's general record schedules or if NARA grants permission. We could send this material to the Federal Records Center to be disposed of under the general records schedules or we could seek NARA's authorization, pursuant to a formal request, to destroy this material. Given the JFK Act's provision not to destroy any documents, however, I recommend that this material be separately identified and boxed for transfer to NARA's custody for ultimate preservation and/or disposition. Similarly, we should separately identify those computer files that are administrative in nature.

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To the extent that NARA may want discretion not to include administrative/temporary records in the JFK Collection, we may want to have the Review Board make a formal determination that administrative records are not "assassination records" within the meaning of the JFK Act and that they need not be permanently preserved as part of the JFK Collection.

With respect to personnel files, employee copies of personnel papers ( *e.g.*, insurance forms) should be returned to employees. The balance of the file, including resume and any personnel reports, should probably be included in the JFK Collection as assassination records. We should request that the Board postpone release of home phone numbers and addresses.

Copies of the background investigation reports prepared by the Office of Personnel Management ("OPM") should be returned to OPM for handling under their procedures for such files.

### 3. Non-Records

I believe we can view the Federal Records Act as operative, notwithstanding the JFK Act. Thus, it would be reasonable to assume that we would have discretion to discard materials that would not be considered "records" under the Federal Records Act, such as duplicate copies maintained for reference, purely personal materials, and certain published materials. However, we should preserve duplicate copies if they are kept in a distinct file or as a unique collection, particularly if maintained by a decision maker, such that they would assist someone in understanding the information or in discerning the work of the Review Board. For example, work books that organize material should be preserved. If there is any doubt as to whether a duplicate copy should be preserved, we should err on the side of preservation.

### 4. Electronic Records

The standards governing paper records apply to electronic records. I have reviewed with Chet all of the databases that have been maintained by the Review Board. We have determined that certain databases can be deleted because they have no substantive information regarding the work of the Review Board -- they may simply be operating systems or "templates" which were used as a basis for creating a database. In addition, I recommend that Chet segregate administrative databases from those that should clearly be part of the JFK Collection (Attachment A is the list of databases and their proposed disposition).

I recommend that each staff person's word perfect file be included as part of the records for the JFK Collection. Electronic files may contain documents not replicated elsewhere and, thus, should be

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preserved. *See Armstrong v. Executive Office of the President*, 1 Fed. 3d 1274 (D.C. Cir. 1993). We should inform staff that they may, however, delete any purely personal documents they may have created.

Chet and I discussed the issue of whether individual staff's e-mail systems should be retained. Each person's e-mails are also found on the master e-mail system. This includes all inter-office e-mails, as well as e-mails sent outside the agency. The only exception is that incoming e-mails from outside the office are not replicated on the master system. Because most of the incoming e-mails from outside the agency were not agency-related, and thus would be personal, I recommend that we not save each person's e-mail drive. The only exceptions I would make would be Eileen Sullivan since she receives public inquiries, by e-mail, regarding our work. If there is anyone else who might receive public inquiries, then we should consider preserving their e-mail as well.