

## MEMORANDUM

August 2, 1995

To: Review Board

cc: David G. Marwell

From: T. Jeremy Gunn

Re: Public Comments on Sunshine and FOIA Regulations

The proposed Sunshine Act regulations were issued for comment in the Federal Register on June 26, 1995 and the proposed FOIA regulations were issued on June 30, 1995. Copies of the proposed regulations were sent to six federal agencies (the CIA, FBI, Department of Justice, the National Archives, the Office of Management and Budget, and the Administrative Conference of the United States (ACUS)). In addition, the staff sent copies of the regulations directly to fifteen individuals who have shown a particular interest in the work of the Review Board. Several of the individuals are closely connected with public interest groups that had the opportunity to distribute the copies more widely to their membership.

We received a total of five comments (some comments addressed both sets of regulations). (All of the comments have been copied and distributed to the Review Board.) The Administrative Conference of the United States responded to the Sunshine Act rules and NARA responded to both sets of rules. In addition, we received comments on behalf of the Coalition on Political Assassinations and two individual members of the public.

Most of the suggestions were technical, and, to the extent possible, have been incorporated in the redline drafts of the regulations that have been distributed to the Review Board. In the redline draft, the person or entity proposing the change has been identified within brackets adjacent to the suggestion.

### Sunshine Act Regulations

ACUS was concerned that staff briefings, which are excluded from the definition of "meetings," might evolve into deliberations by the Review Board.

The redline draft adopts the ACUS proposal (p. 6) and adds a phrase instructing the General Counsel to monitor staff briefings and provide caution to the Board if briefings begin to evolve into deliberations. In addition, ACUS proposed that the Review Board should approve deletions in subject matters from the agenda. This area of the law is somewhat unclear, but it seems appropriate to adopt the suggestion of ACUS and the change is included (p. 13). Finally, ACUS believes that the proposed regulations are unclear regarding the standard to be used for access to the Review Board's records once they become part of the collection at NARA. The redline draft attempts to clarify the question by stating that it is the Review Board's position that the JFK Act standards should be used for governing access to the Review Board's own records (p. 13).

COPA noted that the Review Board should bear in mind that the public interest should be taken into account when the Review Board is considering whether to close a meeting. The comment by COPA is appropriate, and its suggestion is added (p. 7-8). However, given the nature of the subjects that are being considered during the review process, the Board presumably will need to keep such meetings closed.

One member of the public "protested" restrictions (e), (g), and (h) of Section 1405.4 (pertaining to reasons for which the Review Board may properly close meetings). These restrictions are authorized by the Sunshine Act. If the commentator's suggestions were to be adopted, the Review Board would lose its discretion to close a meeting for these purposes. Accordingly, I advise against adopting these suggestions. The Review Board may, of course, open a meeting in its sound discretion when these subjects are being discussed -- but it will not be compelled to do so. This member of the public also requested that Section 1405.5(b) be abolished. This section provides that a member of the public who may be directly affected by matters that the Review Board would discuss at an open meeting may request that the meeting be closed. Once again, this provision gives the Review Board discretion, and I advise against its adoption. Finally, this member of the public requested that notice of meetings be published in the Federal Register two weeks (rather than one week) in advance. I believe this raises a legitimate concern (sufficient notice), but I would advise that it be addressed in a different manner. Because agenda items frequently change, additional notice of the particular items to be addressed cannot always be known two weeks before meetings. But in order to address the concern, I would advise that the Review Board provide as much advance notice as it can of the dates of Review Board meetings and that such information be distributed through the mailing lists. This will provide the public with notice of Board meetings months in advance of the time they will be held, but gives the Board flexibility to change the particular agenda items as circumstances develop.

### FOIA Regulations

The only substantive changes in the regulations have been made to the definition to "Review Board record" (Section 1410.10(a)). The staff proposes a new sub-section (3) to exclude from FOIA requests records that the Review Board receives as donations from the public to be added to the JFK Collection at NARA. This amendment is designed to clarify that papers that have been donated to the United States -- and which will be transferred promptly to the JFK Collection -- not be subject to FOIA. It is the staff's belief that it is in the best interest in openness in government and public access to records that this provision be adopted. Otherwise, FOIA requests could interfere with a prompt transfer of records to NARA. The purpose and value of FOIA would be best served by making the records fully available to the public rather than delay transfer in order to respond to FOIA requests (p. 7).

NARA sought clarification on the exclusion of research materials from FOIA requests. NARA's request has been addressed (p. 6). NARA also suggested that members of the public be told that even though Federal records under review are not subject to FOIA at the Review Board, requests may still be made to the originating agencies. This suggestion has been included (p. 7). NARA also made a suggestion for a technical change to substitute "agency" for "Review Board" in Section 1410.20(e) in order to track more closely the language of the statute. NARA's suggestion is adopted (p. 9). NARA also proposed that the regulations clarify that they are not designed to exclude pre-existing statistical data from being subject to FOIA in Section 1410.25(e). This clarifying suggestion is adopted in the redline version. (p. 13).

NARA and COPA requested that the regulations be clarified to note that the

*Review Board has the discretion to release records in the public interest even when the Board might otherwise raise a valid FOIA exemption. This proposal has been adopted (p. 8).*

*A member of the public requested certain changes that would add newer forms of news media into the definition of "Representative of the news media" in Section 1410.35. The suggestions have been adopted in part. The definition has been broadened to include cable casters and disseminators of on-line computer newsletters, provided that the services that publish information in this way genuinely are "organized and operated" to do so (p. 17).*