

DRAFT

January 24, 1995

TO: David Marwell
cc: Jeremy Gunn, Tom Samoluk
FROM: Sheryl Walter
RE: Draft guidelines for privacy postponements

Per yesterday's conversation, set out below is some draft guidance for the staff's analysis/review and the Board's consideration of agency recommendations for

privacy

and

2.. that invasion of privacy is so substantial that it outweighs the public interest.

Thus, the analysis applicable to postponement of information on privacy

grounds is a two-step process that establishes a higher threshold before postponement than that the information simply raises personal issues traditionally treated as private. The "unwarranted invasion of personal privacy" requirement suggests that the nature of the postponed material must be such that in ordinary circumstances (absent its categorization as an "assassination record" to which a presumption of disclosure applies), no excuse or grounds would justify its release. The second step in the analysis emphasizes again the high degree of encroachment upon the individual's privacy that must result from release, and that to prevent its release the public's interest in knowing the information is, on balance, less important than continued preservation of the individual's interest in

keeping the information secret.

In applying this analysis, it is useful to remember that the Act's postponement standards do contemplate that all information in "assassination records" postponed on privacy grounds will eventually become public no later than 25 years from date of enactment (which is the year 2017). See Section 5 (g)(2)(D) (specifying the 25 year sunset date and excluding, sub silentio, privacy grounds from the grounds available for Presidential certification for continued postponement of information from assassination records after that date by limiting it to information raising "identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of

foreign relations"). Arguably, then, any gaps in the historical record that might occur from the Board's decision to affirm an agency's privacy postponement recommendation will be cured over time by virtue of this sunset provisions.

Based on documents the staff has reviewed already, the type of information agencies recommend be postponed on privacy grounds tends to reveal intimate details of personal conduct, often sexual in nature -- precisely the sort of information that, if made public, would commonly be considered an extreme invasion of personal privacy. The information may additionally relate to or reveal identities of persons peripheral to the assassination or investigations of the

assassination. One way to strike a balance between the Act's strong presumption in favor of eventual release of all privacy-postponed material, now or later, and possible concerns that release of certain intimate information would unfairly violate an individual's reasonable expectations of privacy (unless the individual is so central a figure to the assassination that the public's interest in disclosure of the material is profound), might be to adopt the following approach:

that information of an intimate private nature can continue to be postponed if the person is known to be still alive or if determining whether the person is alive or dead is unduly

burdensome. In the period between the Board's determination to continue postponement and the information's mandated release in 2017, names and information postponed on privacy grounds may be re-reviewed and released upon a showing of the individual's assent to release (by a notarized affidavit) or death (by, for example, submission of a death certificate or obituary).

This approach is similar to how agencies often treat requests for an individual's records under the Freedom of Information Act. In such situations, agencies often will not release records containing information about individuals absent a privacy waiver

from the individual, if alive, or documented proof of death. Whether or not one agrees that privacy rights expire at death, for the Act's purposes the clear and convincing evidence standard arguably would much more strongly tip the privacy balance analysis towards disclosure after the individual's death. Further, release of some or all of the privacy information at issue, without release of the name or other identifiers but with a summary document that explains that only identities are withheld, may serve as an additional means for the Board to adhere closely to the Act's presumption of disclosure without causing undue harm to individuals.

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Per yesterday's conversation, set out below is some draft guidance for the staff's analysis/review and the Board's consideration of agency recommendations for privacy postponements where the material postponed can be characterized as revealing intimate personal details about an individual. This draft is not intended to craft definitive guidance on this issue but to serve as a springboard for analysis and discussion. Please let me know your suggestions, comments, or revisions.

Privacy Postponements

Our statute provides in section 6(3) that "[d]isclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of the Act if

1. there is clear and convincing evidence
 - that the public disclosure of the assassination record
 - could reasonably be expected to constitute
 - an unwarranted invasion of personal