

MEMORANDUM TO THE PRESIDENT

Assassination Records Review Board
Surreply
to the United States Secret Service Appeal
of the
April 13, 1998 Formal Determinations

June 15, 1998

This memorandum responds to the new evidence and arguments raised by the Secret Service's June 1, 1998 letter to Charles F.C. Ruff ("USSS June 1 letter").¹ The Review Board believes that the Secret Service has now shifted its analysis to account for the fact that its prior representations to the Review Board are inaccurate and that much of the information it had sought to protect is already open to the public.

The Secret Service originally suggested that the information at issue is very sensitive and that serious harm would result from its release. *See* USSS Appeal at 1. Although the Secret Service persists in these arguments, the evidence continues to mount that the information is not as sensitive as the Secret Service originally represented; indeed much of it is already open to the public. And, even though the Review Board has shown that this supposedly sensitive information is already public, the Secret Service has failed to show that any of the predicted harms has in fact occurred.

¹The Review Board's principal arguments are found in its May 22 Reply, to which it continues to adhere. Although the Review Board disputes many of the statements contained in the June 1 letter, it will address only those that are germane to the Appeal.

In its June 1 letter, the Secret Service agreed to withdraw its appeal of two of the four records previously at issue.² Because the Secret Service has agreed to release all information in the remaining contested records -- except for the names of individuals -- the only issue now facing the President is whether these names should be released under the standards of the JFK Act. With all due respect to our sister agency, the new evidence and reformulated arguments supplied in its June 1 letter do not alter the basic fact that the Secret Service has failed to show, by the required "clear and convincing evidence," that these names should not be released. Indeed, we observe that the fundamental problem in the Secret Service's briefing of the issues is that it fails to link its many points to the fact that the sole issue now facing the President is the release of names in two documents.³

I. The Arguments on Privacy Fail to Satisfy the Requirements of the JFK Act.

a. The Secret Service exaggerates the sensitivity of the information at issue.

The Secret Service originally advised the Review Board, as far back as April 1996, that the information now at issue is so sensitive that the Secret Service scrupulously protected it and limited its distribution solely to those who had a need to know within the intelligence division itself. In its own words, the Secret Service stated that it:

carefully safeguards the confidentiality of its protective intelligence files. These records have consistently been segregated from all other criminal investigative files of the Secret Service, and data therefrom is not co-mingled in the Service's criminal investigative computer database, is not shared with other law enforcement agencies through shared databases, is not maintained by the investigating Secret Service field offices as are other Secret Service criminal investigative files, is not generally

²See Merletti to Ruff, June 1, 1998 at 1. The records now at issue are attached as Exhibits 3 and 4 of the Review Board's May 22, 1998 memorandum. Technically, there were five records originally at issue -- although two of the records were essentially duplicates. See ARRB Reply, May 22, 1998, at 1, 4.

³For example, the Secret Service implies that the issue on appeal is, in part, the release of privileged communications rather than the release of names of persons who were kept on file by the Protective Research Section during the latter part of 1963. See, e.g., USSS Appeal at 7; USSS June 1 letter at 4. The Secret Service has failed, however, to identify even one privileged communication in the records at issue.

available to the subjects of those records, and is not generally available to Secret Service employees outside the controlling headquarters division.

Letter from Jane Vezeris to David Marwell, April 15, 1996 at 3 (emphasis added).⁴

In response to the Secret Service's assertion that it carefully segregates and restricts, on a need-to-know basis, the information at issue in this appeal, the Review Board provided uncontradicted evidence that the Secret Service in fact publishes this same information and distributes it throughout its offices nationwide. See ARRB Reply at 7-9 and ARRB Ex. 6. Unlike its prior representations, which asserted that this information is closely held to those with a need to know at Headquarters, *The Record* apparently was available to all Secret Service employees, including those in such irrelevant areas as the Counterfeit Division and the Financial Crimes Division. Once its original representation was shown to be inaccurate, the Secret Service simply changed its position in the June 1 letter and

⁴The Secret Service enclosed a copy of this letter with its original appeal. See USSS Appeal Ex. 11, Attachment 3.

The Secret Service made a similar representation regarding their supposed segregation of mental health information from the Protective Research Section ("PRS") files a few months later:

As will become immediately apparent, significant dialogue within the mental health community revolves around a patient's right to privacy and within the Secret Service, it revolves around the sensitivity we demonstrate towards safeguarding mental health records. Clearly, the access we enjoy is a direct result of care our personnel have exhibited at the Headquarters and field office levels, over a protracted period, *by isolating and guarding against the release of sensitive personal data found in our protective intelligence records for purposes other than our protective intelligence mission.*

Letter from Jane Vezeris to David Marwell, November 13, 1996 at 9 (emphasis added). The Secret Service included a copy of this letter as an exhibit to its Appeal. See USSS Appeal Ex. 12.

The Review Board anticipates that the Secret Service might now state that the descriptions above apply to the PRS *investigative files* and not to the summary types of information in the documents at issue in this appeal or in its internal publication entitled *The Record*. If the Secret Service were to make such an assertion, it would be in flat contradiction to its repeated suggestions, both to the Review Board and to the mental health community, which asserts the equivalence of the information in the PRS files and those that the Review Board voted to release.

asserted that it was appropriate to distribute this formerly “highly sensitive” and compartmented information to its offices throughout the country.

The Secret Service cannot have it both ways. It should not be able to assert that the proof of the sensitivity of this information is the fact that it is kept carefully compartmented, and when that assertion is exposed as inaccurate, then suggest that the real issue is whether the information was disseminated outside the Secret Service. The Review Board believes that if this information can be published and distributed to all Secret Service offices and agents throughout the United States -- including those who have no need to know about psychiatric information -- then it can and should be fully subject to the demanding standards of the JFK Act.⁵

b. The Secret Service itself opened *The Record*.

The Secret Service replies to the Review Board’s additional argument that *The Record* is now open-in-full at the National Archives by suggesting that the National Archives erred in opening the documents without the permission of the Secret Service. In order to pass the blame to the Archives, the Secret Service ignores the unavoidable fact that its authorized representative, on March 4, 1981, signed a Standard Form 258 and agreed to open in full *The Record* for the years 1938 through 1959 without marking either box that would have placed restrictions on them. See ARRB Ex. 8 (boxes 5C and 5D).⁶ The Secret Service’s suggestion to the Archives that it now close *The Record* or return it to the Secret Service is certainly inconsistent with the spirit of the President’s own Executive Order 12958.⁷

c. The Secret Service failed to provide evidence of actual harm to individuals.

⁵The Secret Service has provided no evidence that it has taken any steps whatsoever to ensure that copies of *The Record* were kept in its offices or that there has ever been any attempt to ensure that employees did not take copies home with them or give them to others.

⁶The Secret Service is apparently suggesting that letters written in 1978, three years before it agreed to open *The Record* in full, should be taken to supersede the later document. The Review Board is aware of no theory of contract interpretation or interpretation of a last will and testament -- probably the two closest analogies -- that would support revising a document that is clear on its face and that has been uncontested for 17 years, based upon prior inconsistent statements.

⁷“Information may not be reclassified after it has been declassified and released to the public under proper authority.” Section 1.8(c).

Prior to the Review Board's April 13 vote, the Secret Service was afforded the opportunity to submit specific evidence regarding persons who might be harmed by the release of their names. Unlike the FBI and the CIA, the Secret Service decided to rely on policy arguments and declined to provide any specific information that would show that any particular person would be harmed by the release of his or her name.⁸

By following this risky strategy, the Secret Service essentially obligated itself to provide "clear and convincing" evidence that the release of such information is, as a matter of policy, an "an unwarranted invasion of personal privacy, and that the invasion of privacy is so substantial that it outweighs the public interest." JFK Act

⁸In the FBI's first appeals to the President, more than two years ago, it also relied on policy arguments rather than specific evidence. After being advised by Judge Mikva that such arguments were not sufficient, and after thorough briefing on the issues, the FBI withdrew its appeals. The FBI now provides the Review Board with specific information on persons whose identity it wishes to protect. The Secret Service was advised of this prior to the time it made its decision to appeal.

§ 6(3). The Secret Service attempted to prove the existence of such a policy not by citing any relevant law, but by attaching letters from the mental health community.⁹ Although the Secret Service argued that as a matter of policy and practice such information was not available to the public, the Review Board provided several examples of where such information is already a matter of public record.

Now, six weeks after the Board voted on the records at issue, the Secret Service -- in its June 1 letter -- finally decided to provide a sketchy piece of information about one individual whom it alleges would be harmed by the release of his name in the context of an activity he undertook as a child. *See* USSS June 1 letter at 6. Such information is exactly the type of information that the Review Board encouraged the Secret Service to make available before it voted, but which the Secret Service declined to provide. The extremely vague manner in which the evidence is presented in this peculiar case, and the very late date at which it is presented, makes it impossible to be evaluated objectively.

d. Commitment-hearing information may be open to the public.

In its Appeal, the Secret Service originally suggested that mental health records, of the type at issue here, are kept confidential and are not available to the public. *See, e.g.*, USSS Appeal at 6. The Review Board, with only a few hours work, was able to locate several civil commitment records in the District of Columbia -- the single most relevant jurisdiction -- on several of the very people whose names are at issue in this appeal. *See* ARRB Reply at 9-11. The information in these public records was more revealing than the sketchy information included in the records on appeal, a fact that the Secret Service has not yet denied. Thus, the core assumption on which the Secret Service initially relied, was contradicted in the very jurisdiction where the President lives and the Secret Service is headquartered.

Having had its original broad argument fall short in its home jurisdiction, the Secret Service now argues that “[i]n some [unspecified] states, the records are sealed by the court and may only be disclosed upon court order.” USSS June 1 letter at 5. Although the Review Board agrees that this is likely true in some states, this fact, in and of itself, does not begin to satisfy the Secret Service’s obligation to provide the evidence that the law in any of these unspecified states is relevant to any of the persons at issue in this appeal. Because the Secret Service has not even alleged that the laws in any of the unspecified states actually apply to individuals at issue in the two documents, it has not begun to satisfy its burden of proof.

⁹The Secret Service did refer to some privacy law which, as our Reply showed, is irrelevant under Section 11(a) of the JFK Act. *See* ARRB Reply at 6. Wisely, the Secret Service did not renew this argument in its June 1 letter.

II. The Names at Issue are Relevant to the Assassination

In its opening brief, the Review Board stated that the names at issue were those of the individuals who were identified as potential threats to President Kennedy and that two prior investigations of the assassination (the Warren Commission and the HSCA) believed that these names and documents were relevant for their investigations. *See* ARRB Reply at 1, 12-13.¹⁰ The Secret Service wisely did not dispute or challenge the Review Board's evidence on the prior interest of the Warren Commission and the HSCA. Rather, the Secret Service only challenged the Review Board's initial description of these records.¹¹ The Secret Service responded that "[i]t is important to note that upon investigation, the majority of these individuals were evaluated as not of protective concern." USSS June 1 letter at 2 (emphasis omitted). In making this argument, the Secret Service attempts to downplay the significance of the names. There are three problems with this attempted minimization:

First, as stated above, the Warren Commission and the HSCA, which were charged with investigating the assassination, previously rejected this position and examined the underlying records. *See* ARRB Reply at 12-13. The JFK Act itself defines those records that were made available to the Warren Commission and the HSCA as "assassination records" that should be transferred to the National Archives with the presumption that they be opened in full. JFK Act, § 3(2); ARRB Reply at 5-6. The Review Board, like the Warren Commission and the HSCA, believes that the fact that a information on a school child was in the Secret Service's PRS files -- and that information on Lee Harvey Oswald was not -- is relevant to the assassination and a fact worth noting.

Second, the Secret Service elsewhere -- albeit inadvertently -- characterizes this same information quite differently from how it describes it here. When discussing the purpose of *The*

¹⁰Not only did these individuals come to the Secret Service's attention, they were located among the files of the PRS. In 1964, Robert Bouck testified before the Warren Commission that one of the functions of PRS was "the responsibility of attempting to detect persons who might intend harm to the President, and to control those persons or take such corrective measures as we can take security-wise on them" *Investigation of the Assassination of President Kennedy: Hearings Before the President's Commission on the Assassination of President Kennedy*, Vol. IV, at 297 (1964) (testimony of Robert Bouck).

¹¹The Review Board described them unremarkably as records that "identify people whom the Secret Service's Protective Research Section ("PRS") considered to be potential threats to President Kennedy" ARRB Reply at 1.

Record, the Secret Service explains that it was “used as a means of communicating . . . *significant cases of interest* . . .” USSS June 1 letter at 4 (emphasis added). The Review Board does not understand how the Secret Service can plausibly argue that the information routinely published in *The Record* can pertain to “significant cases of interest” prior to the assassination, but that it became “insignificant” after President Kennedy was murdered.

Third, in making its argument that it has determined that many of the people identified were not involved in the assassination, the Secret Service is asking the Review Board and the American people to believe that its judgment regarding who was or was not involved in the assassination should be taken as dispositive. Under the JFK Act, it is neither the responsibility of the Review Board nor the Secret Service to identify the person or persons who ultimately were responsible for the assassination of President Kennedy. The Review Board is officially agnostic on this issue. It is, however, the business of the Review Board to identify the types of records that are “relevant” to the assassination. And, *using the very words employed by the Secret Service to describe the types of records at issue here*, these were “significant cases of interest” to the PRS and should be included in the JFK Collection.

Conclusion

The Review Board respectfully requests that, in the spirit of the JFK Act, the President agree to release in full the two records now at issue. Not only has the Secret Service failed to meet its burden of proving, by clear and convincing evidence, that the information cannot be released, it has repeatedly “revised” its earlier representations about the sensitivity of the records and whether such information is already in the public domain.

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