

Dear Sam,

9/15/92

Thank for sending me the pages from Public Citizen for Sept/Oct 1992 relating to the misbegotten suit the Nader people have filed for what even the lawyer handling the case cannot make clear in this story that she herself wrote. The one thing that the story does make clear is that she is taken by the ^{JFK assassination} nutty theories and knows nothing else. I add cares about nothing else. Her client is not a subject expert and without expertise in the subject matter itself has only an improper interest in sensation.

Amato's irresponsibility is illustrated by some of what she says in this article, like that the undescribed "autopsy records" are "widely acknowledged to be crucial evidence." How can she or anyone else know without describing what she is talking about? Throughout her article she confuses constantly between "autopsy records" and "autopsy photographs and X-rays."

Her line that some allege the photos have been altered comes from the incorrect and dishonest conspiracy theories.

The film cannot do as Amato says, "reveal about the lone- assassin ²⁰ theory-whether Lee Harvey Oswald was involved in the shooting, whether he acted alone or was part of a conspiracy that involved others." (What else can a conspiracy do?) She is even ignorant of the autopsy examination itself, saying that the doctors "performed" it through the day after JFK was shot when in fact they completed it 11 p.m. the night of the day he was shot.

These people, all of them added together, don't know a damned thing about the assassination itself or the autopsy records and worse, they don't care, or they'd have been in touch with me to learn. I made a specialty of it and published extensively on it and the Nader law gang knows it. They with characteristic irresponsibility assume the accuracy of the Oliver Stone exploitation and commercialization and it is part of their argument. And how can they sue for information they cannot even describe, other than the film, which one can't tell from the lawyer's own account is either part of what they seek or all of it?

If they were to get in touch with me I'd refuse to help them and, another impossibility, if the government were, I would help it and think I can.

The guy who heads Nader's law group or at least as of my last knowledge did is as arrogant and self-important as Nader himself and like Nader has done a considerable amount of good. He developed an intense dislike for me without even talking to me. I presume it was passed on by his lawyers under whom I approached them in 1973 or early 1974 to ask them either to represent me or join in a suit or file an amicus curiae brief, I've forgotten which. In the course of the conversation they told me they had made a deal with Gerald Ford, then President, for him to agree to a deal on amending FOIA. I told them they were going to get screwed, that Ford did not dare make any deal of the kind they described and that he would renege on it. I also told them that he would be defeated and that the Act would be amended. It was, with one of my early suits cited as reflecting the need for

that amending of the investigatory files exemption. They found it intolerable that someone could tell them in advance that they were wrong and worse that when the act was amended, they were not the cause and the one for whom they developed this dislike was.

The records they cite in this article I brought to light by my own FOIA work and they have been both widely misused and not understood, including by Amato in her article. She also uses them incompletely. There are earlier records she could have used to make a better case. She does not even know the law on the film, which I used in 1969. There is a special and separate law on the film I do not here go into by my interpretation of it was validated by a court in 1969. It is called "The Pittsburgh code."

There was much hankypanky with the autopsy and related records about which I published so extensively that in my current writing about them, to make a point, I use them and add nothing new. These people know nothing about that. They have not even troubled, in their quest for a cheap sensation, to learn what they should know for a serious lawsuit.

There are some autopsy records for which any privacy claim under the law, and privacy is a very legitimate claim, has been waived. If they seek records, and even the lawyer can't make that clear!

If they are talking about the film alone I oppose that even though what the government did with the film is illegal and wrong. I was the one who brought that special contract with the family to light by publishing it in facsimile in 1975. I was the first to ask for access to the autopsy film and was rejected. Later, when they started letting some doctors see it, as prescribed by the agreement, beginning with a rightwing anti-Semite named Lattimer, a urologist, the Archives solicited my making a request to have a doctor with the proper credentials examine the film for me. I declined, in writing, saying that if I did it would be used as anti-Kennedy propaganda and I would not be part of that. And it was so used by the government, beginning with Lattimer.

Today I have copies of leaked prints of the black-and-white autopsy film and have never used it and in the current book will not. It is not necessary for the alleged Katz/Nader purpose, which it cannot possibly serve in any event, and it has already been used to make the victimized family suffer more and all over again.

In simplification, there is right and there is wrong. What these sensationalists are up to is exploitation and cheap sensation. That is wrong and I oppose it. That the government did wrong and misused the Kennedy family in doing its wrong is a separate matter. And I believe that under the law, where there is a legitimate privacy claim, it should be respected for the great as for the small. I believe that what was not officially disclosed remains private and this includes the film. It does not include the records about which these commercializers of the tragedy are ignorant and those records were supposedly disclosed and were not. Excuse the haste but I wanted to respond and make a record as soon as I could. I'll read and correct this later. I hope my haste has not resulted in a confused or confusing record. Best to all,

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A further explanation. Under the law "any person" is entitled to copies of non-exempt government records. The requester of technical information need not be an expert. By and large I agree that is a good provision. So why, if the request is for copies of the autopsy film do I oppose that?

I believe the privacy exemption covers the film if the family asserts the claim or not. It is not a party in the case. It may or not be or have been consulted. The person who represents it in the private agreement with the government is the counsel to the executors of the JFK estate.

But there is also the sensational uses intent. That is wrong and for this requester nothing else is possible. That kind of use does and has to involve transgressing against privacy because Katz does not know enough even to be able to evaluate the film, *and can't see it any other way.* In and of itself the film has and can have no relationship to Oswald as either an assassin or a conspirator. Katz is not able to use the film to show there had been a conspiracy if it does show that, which I doubt.

He can't even use it to show that the government's explanation of the crime is wrong. In short, I can't think of a single legitimate use he can make of it.

It was legally wrong for the government to give the film to the Kennedys. But the Kennedys have returned it to the government, so the government has it, albeit the component not required to have kept and preserved it, *The Navy.*

If there were not what I regard as a proper privacy concern and thus an exemption under the Act I would still oppose this because it is wrong.

It also is not necessary in any study of the JFK assassination, which Katz is not engaged in anyway, and it cannot be used for study or research without an understanding of a great volume of information of which he is entirely ignorant. And has no interest in.

The Nader lawyer writes that this is a test case, to establish a new precedent. I do not believe her first because I do not believe that is the intent and second because it will not establish a new legal precedent.

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Whose Records Are These Anyway?

On the Trail of JFK's Autopsy Records

by Theresa A. Amato

If a government agency creates records with agency personnel, equipment, and time, all paid for with taxpayers' dollars, and an agency keeps the records, who owns them?

Sound like a sophisticated riddle? Not exactly. Normally, the United States government says that it owns the records and copies are to be made available promptly to anyone who requests them, with nine limited exceptions, under the terms of the Freedom of Information Act (FOIA). Unless we are talking about the autopsy records of President John F. Kennedy.

Film director Oliver Stone and others describe President Kennedy's assassination as the crime of the century—it has caught the imaginations of many, including members of Congress. Controversy generated by the 1991 movie *JFK* prompted Congress to hold hearings and introduce House Joint Resolution 454 to "provide for the expeditious disclosure of records relevant to the assassination of President John F. Kennedy."

But the bill doesn't provide for release of his autopsy records, even though they are widely acknowledged to be crucial evidence. Pathologists, forensic specialists, researchers, and the 1978 House Select Committee on Assassinations have focused on the autopsy photos, and some who have seen the records allege they have been altered. These records are highly controversial because of the debate over what they may reveal about the validity of the lone assassin theory—whether Lee Harvey Oswald was involved in the shooting, whether he acted alone or was part of a conspiracy that involved others.

The Warren Commission, which investigated Kennedy's death to calm a shocked nation, didn't look at the actual photographs and concluded that one bullet—from Oswald's rifle—killed the President and wounded Texas Governor John Connally. But Stone's

movie attempts to portray the lingering doubts about the single-bullet theory and suggests that organized crime, the Central Intelligence Agency, or others may have been involved.

The importance of this case extends further to officials who remove government documents improperly. Removal deprives the government and the public of information needed to understand how policies were developed.

Whose records are they? And why can't the public see them? That is the subject of Public Citizen's case.

On the evening of President Kennedy's assassination—November 22, 1963—and through the next day, government doctors at the U.S. Naval Hospital in Bethesda, Md., performed an autopsy on Kennedy's body. For law-enforcement purposes, agency personnel photographed the forensic evidence.

Navy personnel gave the records to the Secret Service. At least four agency personnel witnessed and signed the letter intended to memorialize the transfer of possession from the Navy to the Secret Service. By letter dated April 22, 1965, Senator Robert F. Kennedy wrote to Vice Admiral George G. Burkley, the President's physician who had accompanied him on his fateful trip to Dallas, purporting to authorize him to release to the Senator's custody "all of the material of President Kennedy, of which you have personal knowledge, and now being held by the Secret Service."

The letter requested that Burkley turn the material, still in the possession of the Secret Service, "over for safekeeping to Mrs. Evelyn Lincoln [the President's former secretary] at the National Archives, with the instructions that this material is not to be released to *anyone* without [Senator Kennedy's] written permission and approval." (Emphasis in original.)

Four days later, Burkley wrote to Lin-

coln at the National Archives, in Washington, D.C., on White House stationery: "In accordance with authorization dated April 22, 1965 from Senator Robert F. Kennedy, the items on the attached list relating to the autopsy of the late President John F. Kennedy [which included the autopsy records] are herewith transferred to the Archives for your custody. . . ." Three agency personnel witnessed the letter.

On April 26, Robert I. Bouck, Secret Service Special Agent in Charge, wrote on agency stationery that "the indicated materials and documents [of the autopsy] were inventoried by Admiral Burkley, Inspector Kelley, SAIC [Special Agent in Charge] Bouck, ASAIC [Assistant Special Agent in Charge] Miller, and AA [Administrative Assistant] Duncan." Burkley and Bouck then transported the records to the National Archives and turned them over to Lincoln. At least five agency personnel witnessed and signed the record memorializing the transfer of the footlocker containing the autopsy records.

On October 29, 1966, the Kennedy estate executed a deed transferring "all of their right, title, and interest in all of the personal clothing of the late President now in the possession of the United States Government . . . and in certain X-rays and photographs connected with the autopsy of the late President. . . ."

In January 1992, D. Mark Katz, author of two photoanalyses of other historical figures, sent a FOIA request to the National Archives for the autopsy photographs. His request was denied on the grounds that the Kennedy family's deed limited access to the autopsy photographs to persons authorized to act for a Congressional committee, a Presidential commission, or another official agency authorized to investigate the assassination, and to recognized experts of pathology or related areas of science and technology whose applications the Kennedy family representative approved.

The autopsy records could have gone around the world and back, but they are still agency records.

The importance of this case goes beyond the particular records at issue. Certain government documents that belong to the people, such as the documents that Marine Corps Lt. Col. ... money for the Contras in Nicaragua.

The denial letter concluded: "As the photographs you seek are donated historical material, it is this deed of gift, rather than the FOIA, that governs questions of access."

Katz appealed; the National Archives denied his appeal.

In April, Public Citizen filed suit on Katz's behalf. Unlike other unsuccessful legal attempts to obtain copies of the records, the question Public Citizen's lawsuit asks is whether the autopsy records are agency records within FOIA's meaning. If the records are not agency records, then the FOIA does not apply, and the government can restrict access in accordance with the terms of the deed. But if, as Public Citizen contends, they are agency records, then they must be disclosed unless the National Archives is entitled to withhold them by properly invoking one of FOIA's nine exemptions.

The Supreme Court's legal test for determining what is an agency record for FOIA purposes has two parts: (1) the records must be "created or obtained" by an agency; and (2) they must come into the "possession or control" of an agency in the course of its legitimate duties. Public Citizen maintains that the photographs are agency records because they meet this two-part test.

The government disagrees. The logical extension of the government's argument that these are personal records,

however, is that any time the government takes or obtains a photo of a crime, they belong to the victim—as a personal record. This, of course, is incorrect. Indeed, the government recognizes that records very similar to those in dispute here are agency records. Anyone, for example, can buy from the FBI color photos of Lee Harvey Oswald's autopsy.

Moreover, although the Kennedy family's desire to limit access to the records is well-documented, and the government claims it had an "understanding" with the Kennedy family, these intentions do not make the records personal rather than agency records. Agency records do not lose their status on the basis of "understandings" between the government and private parties.

On the contrary, federal laws, many of which were in effect before the Kennedy Administration, prohibit the government from giving away important historical records. Even if the Kennedy family obtained the photographs, they retained their agency status. The records could have gone around the world and back, but they are still agency records because no federal official properly authorized the transfer of title to the records from the government to a private party.

Finally, the government argues that the terms of a private citizen's deed prevents them from disclosing the records and, therefore, the National Archives is not improperly withholding the records. With good reason, the government says that it must be allowed to respect the disclosure conditions or other wishes of "donors," or else people will have no incentive to give historical records and artifacts to the government.

Fair enough. The problem, however, is that these are government records. Ordinarily, citizens are not in the position of donating the government's original records to the government. The government is not permitted to release original documents to a private citizen and then have them "deeded" back to the government under conditions that purport to limit the disclosure of the documents to the public. On the contrary, the government has the power to take back its property. Indeed, the government has fought ferociously in forfeiture and condemnation cases to preserve its ownership over other assassination artifacts, including those it did not create, such as Oswald's rifle.

In addition, the Supreme Court has enforced limits on agency discretion to



Government officials are notorious for walking away with or destroying original documents. Oliver North shredded records relating to the investigation of the arms sale to Iran to raise

give up the government documents. In *United States Department of Justice v. Tax Analysts* (1989), the Court explained that Congress passed the FOIA to curb agency discretion to determine what to disclose because this discretion was often abused. In this case, a government agency seeks to replace the FOIA with its discretion, which is precisely the danger the Supreme Court said served as the inspiration for the FOIA. Worse, the agency here wants to use its discretion to replace Congress's judgment with the judgment of a private "donor."

The autopsy records, however, are agency records because a federal agency created them, the government retained their title, and an agency still has them. Therefore, unless the agency can properly claim one of the nine FOIA exemptions to justify the continued withholding of these documents, the public must be allowed to have access to what have become some of the most controversial records the government ever created.

The importance of this case goes be-

yond the particular records at issue. Certain government officials are notorious for walking away with or destroying original documents that belong to the people. Marine Corps Lt. Col. Oliver North, for example, was an aide on the National Security Council at the White House who shredded documents relating to the investigation of the arms sale to Iran to raise money for Contras in Nicaragua. Former President Richard Nixon is still claiming in federal court that he owns the papers he generated while in office. He wants the government to pay him just compensation under the Presidential Recordings and Materials Act, a statute passed largely in response to his desire to destroy tape recordings made during his Administration.

These high-profile cases are just the tip of the iceberg. The problem is far more serious. A 1991 United States General Accounting Office study of eight agencies concludes that "[c]urrent internal controls do not adequately ensure that government records and information are properly

protected" because "documents, including original documents and classified information, were removed without agency knowledge. . . [and] in some cases, the agencies did not know what was removed or taken. . . ." As a result, the government is deprived of information needed to understand what actions have been taken and how policies have developed.

The government's records are supposed to be controlled by complex statutory regulations that govern how, when, why, and by whom records are to be retained or destroyed. When the government fails to abide by these laws, citizens must be vigilant and demand enforcement by the courts. •

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The Freedom of Information Clearinghouse is a project of Ralph Nader's Center for Study of Responsive Law. It is administered by Public Citizen and provides technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies. The Freedom of Information Clearinghouse is available for consultation by phone or mail.

The Clearinghouse also litigates a number of cases each year to protect the public's right to access government information. It is a nonprofit organization and welcomes tax deductible contributions. Further information, including copies of Public Citizen's brief in *Katz v. National Archives & Records Administration*, Civil Action No. 92-1024 (GHR), is available from: Freedom of Information Clearinghouse, P.O. Box 19367, Washington, D.C. 20036. Tel. (202) 833-3000. Public Citizen's brief is available for \$5 (includes postage and handling).

