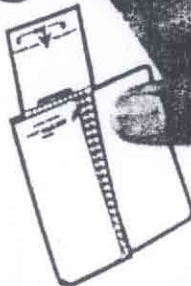


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Whose Records Are These Anyway?

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. [redacted] 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.

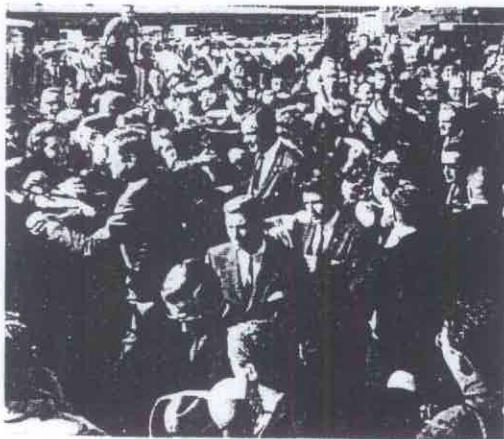
Moreover, although the Kennedy family's desire to limit access to the records is well-documented, and the government claims it had an "understanding" with the Kennedy family, these intentions do not make the records personal rather than agency records. Agency records do not lose their status on the basis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

Theresa A. Amato is an attorney with Public Citizen's Litigation Group and the Director of the Freedom of Information Clearinghouse, a project of Ralph Nader's Center for Study of Responsive Law.



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).