DRAFT LETTER TO FBI
TJG DRAFT 2

April 17, 2017

Mr. Terry O'Connor
JFK Task Force
Sixth Floor
Federal Bureau of Investigation
J. Edgar Hoover FBI Building
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Terry:

During its meetings on May 2 and 3, 1995, the Review Board continued its discussions on the appropriate procedures to follow with respect to its review of the Bureau's postponement recommendations -- particularly those relating to informant issues. The Review Board recognizes the Bureau's concerns on this issue, and appreciates the several briefings and detailed memoranda that you have provided. The Review Board is mindful of the Bureau's general policy that seeks to keep names and symbol numbers confidential.

As you are aware, the Act requires the Review Board to make its postponement decisions on a document-by-document basis. As the Board begins its review, I thought that it might be helpful to provide an explanation of the how the Review Board currently intends to proceed under the requirements imposed on us by the Act.

The Review Board understands that the vast majority of the Bureau's postponements are, at least with respect to the core files, based upon Sections 6(2) (confidential informant) and 6(4) (understanding of confidentiality) of the Act. As the Board reviews assassination records and the postponement recommendations by the Bureau, it will weigh, as one factor, the Bureau's general policy that informant names and symbol numbers should not be disclosed. In addition, the Review Board will be considering the factors specifically identified by the Act:

Restriction 2: Confidential Informant. Section 6(2) of the JFK Act provides that:

> Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is *clear and convincing evidence* that . . .
> (2) the public disclosure of the assassination record would reveal the name or identity [a] *of a living person* who provided [b] *confidential information to the United States* and would pose [c] *a substantial risk of harm to that person* . . . . (emphasis added).

Given the express terms of the statute, the Review Board initially presumes that in order for the Bureau's postponement to be upheld under the second restriction, the Bureau would need to provide clear and convincing evidence that: (a) the informant whose identity is being protected *is still living;* (b) the informant provided confidential information to the Bureau (or some other agency of the U.S. government); and (c) the disclosure of the informant's identity would cause a substantial risk of harm *to the informant.*

After having reviewed a number of FBI records, it is the Review Board's preliminary assessment that the language in the record itself is likely to provide sufficient evidence for the Bureau to prevail under the second component (information given in confidence).

With respect to the first and third components, however, the Bureau will need to provide *clear and convincing evidence* that the informant *is still alive* and that the disclosure of the informant's identity will cause *a substantial risk of harm to that informant.* The Act thus requires the Bureau to demonstrate to the Review Board (or Staff) information demonstrating that the informant is still living and that there is an actual risk of harm should his or her identity be disclosed. (I note parenthetically that Director Sessions, in his testimony to Congress, acknowledged that the Bureau was willing and prepared to meet the obligation to make such evidentiary showings on a case-by-case basis.[1])

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[1] "I would stand on the general proposition that has been expressed so openly here this morning that we in the FBI should be prepared with particularity to defend a particular piece of information and the necessity of it not being divulged." *Hearing Before the Senate Comm. on Governmental Affairs on S.J. Res. 282 to Provide For the Expeditious Disclosure of Records Relevant to the Assassination of President John F. Kennedy*, 102d Cong., 2d Sess., p. 64 (1992) (statement of William S. Sessions). See also pp. 66 and 68 (recognizing that the evidentiary burden of justifying a postponement would fall on the Bureau).

Restriction 4: Understanding of Confidentiality. Section 6(4) of the JFK Act provides that:

> Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is ***clear and convincing evidence*** that . . . (4) the public disclosure of the assassination record would compromise the existence of an **[a]** ***understanding of confidentiality*** **[b]** ***currently requiring protection*** **[c]** between a Government agent and a cooperating ***individual or a foreign government***, and **[d]** ***public disclosure would be so harmful*** that it outweighs the public interest . . . . (emphasis added).

With respect to the first and third components of Section 6(4), the Review Board's preliminary assessment is that the record itself is likely to contain sufficient evidence to satisfy the Bureau's burden. It now appears that the Bureau would be able to satisfy its burden under the ***first component*** of Section 6(4) (understanding of confidentiality) when the informant is identified in the record by an informant symbol number, by an appropriate designation (*e.g.,* PCI or PSI), or when the record discloses that the identity of the informant is to be protected (*e.g.,* "PROTECT IDENTITY" included in the informant description). When the record does not provide any of these identifying indicia, however, the Bureau would need to submit additional evidence to demonstrate that there was in fact an understanding of confidentiality. With respect to the ***third component*** (relationship between the government and an individual or foreign government), the Review Board's preliminary assessment is that the record itself is likely to provide sufficient evidence to satisfy the Bureau's burden.

The Review Board believes, however, that under the ***second component*** (currently requiring protection) and the ***fourth component*** (harm of disclosure), the statute requires the Bureau to make a particularized showing, on a case-by-case basis, that there is clear and convincing evidence that the confidence *currently requires protection* and that the disclosure of the information would be so *harmful* that it outweighs the public interest.

We recognize that the Act imposes an important obligation on the Bureau. In some instances, the burden will be easy to satisfy; in others, it may be more difficult. We are of course willing to attempt to work with you to develop an orderly process to allow you a full opportunity to present the requisite evidence to us. As a first step, we will be sending forms to you that will provide a mechanism for you to supply your evidence in support of the postponements that you have identified. We are willing to work with you in order to identify some other mechanism to provide the evidence to the Review Board. Because our review process is now underway, we will need to develop

promptly the procedures to be followed.

Please do not hesitate to contact me so that we can discuss further implementation of the Act.

Sincerely yours,

David G. Marwell
Executive Director

cc: Assassination Records Review Board

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