DRAFT

April 12, 1195

TO: Assassination Records Review Board

FROM: Sheryl Walter

RE: Public release of Informant Identities --
Additional background and analysis

This memorandum supplements materials you have received in the past on the question of the public release of informant identities under the Assassination Records Collection Act (ARCA) or of information that allegedly would lead to the identification of the informant providing the information. This is not a comprehensive treatment of the question, but is geared to providing some sense of whether and in what contexts informant names have been publicly released.

Informant Postponements under the ARCA

Under Section 6 the ARCA, postponement by the Review Board of informant information may be allowed only where there is "clear and convincing evidence" that

> "(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a

substantial risk of harm to that person;"

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"(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest."

Thus, certain preconditions for postponement are established that must be demonstrated by clear and convincing evidence. The statute requires a showing that the individual in question is still alive, that confidentiality was explicitly assured or understood, and that release of the informant's identity would pose a substantial risk now or in the future. No mention is made in the ARCA or its legislative history of a danger posed to other persons or of a potential hindrance to law enforcement agency recruitment of informants in the future. Even if there is a demonstrated understanding of confidentiality, the statute requires evidence of the need to continue to currently honor it. The legislative history also makes it clear that Congress saw:

"no justification for perpetual secrecy for any class of records. Nor can the withholding of any individual record be justified on the basis of general confidentiality concerns applicable to an entire class. Every record will be judged on its own merits and every record will ultimately be made available of public disclosure."

FBI's Position on Public Release of Informant Identities

As the Review Board is already aware from the briefings and materials provided by the FBI, that agency believes that regardless of the passage of time it must "absolutely protect the identities of informants and others with whom a confidential relationship exists." [1] The FBI advances the following primary reasons why informant information must be postponed:

- Informant sources are invaluable to its law enforcement mission and they often have useful ties to the agency that span many years;
- Public identification could put informants in danger.
- Subjects may become aware of the fact and extent of investigations.
- Future potential sources will be deterred from becoming informants because they will not believe FBI assurances of confidentiality if the identities of informants are revealed here.

Legal Standards Governing Disclosure of Informant Identities

The FBI's reliance on what is commonly known as the informer's privilege "in reality is the government's privilege to keep its sources of information confidential."[2] The basis of the privilege is to promote and protect the public's interest in effective law enforcement and is designed to protect that public interest in credible government process, not primarily to

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[1] *FBI Memorandum* (prepared for its December 14, 1994 briefing for the Review Board) at 12.

[2] 8 J.Wigmore, *Evidence* §2374 (McNaughton rev. 1961).

protect the individual informant.[3] The focus in these situations is often on "the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers and, by preserving their anonymity, encourages them to perform that obligation.[4]

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[3] *Government's Privilege to Withhold Disclosure of Identity of Informer*, 1 LED. 2d 1998 (1995).

[4] *Government privilege*, supra note 3 at §1.

However, this privilege is not absolute and dissolves under certain circumstances, such as when disclosure of the informant's identity is necessary to prevent false testimony or to ensure a fair trial. Even in cases where the Supreme Court has permitted the government to keep an informant's identity secret, it has relied on circumstances in which "we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege."[5] These cases do not establish an absolute rule against disclosure, nor do they foreclose the possibility that, in a particular circumstance based on unique facts, disclosure of an informant's identity is necessary for fairness. In these situations it rests with the final decisionmaker to decide whether disclosure is required, as the scope of the privilege is limited by its underlying purpose to maximize the integrity of government procedures.[6]

Thus, despite the FBI's arguments in support of an absolute ban on disclosing informant identities, the Supreme Court has said that even in the context of an ongoing criminal case "no fixed rule with respect to disclosure [of an informant's identity] is justifiable and established a balancing test in which the privilege to withhold informant's identities falls away if that information is "relevant and helpful to the defense of an accused or is essential to a fair determination of a cause." [7]

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[5] McCray v. Illinois, 386 U.S. 300 (1967) (in context of attempt to suppress evidence before trial).

[6] Roviaro v. U.S., 353 U.S. 53 (1933).

[7] Id. at 60-61. The Supreme Court also held in Roviaro that the content of the informant's communication is not privileged, except to

The balance struck in such situations often weighs, on the one side, the general need to maintain anonymity of informants, the reality that for effective law enforcement the use of informants is essential, and that many informants condition their cooperation on confidentiality. Tipping the scales on the other side is the danger that failing to disclose the information will result in a subversion of the judicial process.[8]

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the extent it may reveal the informant's identity, and previous disclosure of the identity preclude the privilege claim.

[8] In comparison, ordinary rules of evidence do not require disclosure of an informer's identity if is not relevant to the matters involved in the litigation in which disclosure is sought. Government's privilege, supra note 3 at n.5.

Useful analyses of the need in a particular situation to keep an informant's identity secret often focus on the effect of the release of the information to a fair determination of a particular cause rather than attempting to determine the informant's degree of involvement in that matter. Similarly, police informers have been found to have no constitutional protection since their testimony is available to the public when desired by grand juries or at criminal trials, so that the identity of an informant cannot be concealed when it is relevant to getting at the truth. [9]

In articulating a rule that gives due weight to these competing concerns, one approach finds disclosure is necessary except when what is at issue "can be fairly determined without such disclosure."[10] In the criminal context, "the most important limitation on the government's nondisclosure privilege is based on notions of fundamental fairness, so that where disclosure of an informant's identity is relevant and helpful to the defense or is essential to a fair determination of the cause, the privilege must give way." [11]

Under the ARCA, the issue is of course not whether a fair trial is at stake but the effect on the historical record of the release or postponement of the information. The analysis established by the statute includes a balancing test that takes into account the public interest only in the context

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[9] See Branzburg v. Hayes, 408 U.S. 665 (19xx).

[10] Model Code of Pre-Arraignment Procedure, § SS 290.4 (1975).

[11] Government's privilege, supra note 3 at §2a.

of a "compromise [of] the existence of an understanding of confidentiality currently requiring protection." (Where there is clear and convincing proof of a substantial risk of harm to a living person who acted as a confidential informant, no balancing test applies.)