

BY HAND

September 11, 1996

Patrick W. Kelley, Esq.  
Chief, Administrative Law Unit  
Office of the General Counsel  
Federal Bureau of Investigation  
10th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Dear Pat:

I am writing in response to your letter of September 4, 1996, to William Leary of the National Security Council. There are four points that I wish to make.

*First*, it appears that there is a misunderstanding regarding our informal agreement with respect to appeals to the President. When I originally proposed the possibility of an agreement, I suggested that when *both* the FBI and the Review Board believed that further briefing would serve no useful purpose, we would have a "standstill" agreement without prejudice to either side. However, should the FBI wish to brief any issue on any appeal, the Review Board would have no objection and would respond accordingly. Similarly, should the Review Board believe that an issue noticed for appeal is ripe for the President's decision, it would be fully entitled to place that issue on the President's agenda. In short, the agreement was to avoid briefings when *both* agencies concluded that further briefing would serve no practical purpose, not when one agency unilaterally decided whether and when the merits of an issue could be addressed. The Review Board believes that records 124-10073-10270, 124-10073-10271, and 124-10073-10284 should be on the President's immediate agenda, and, accordingly, we have addressed the merits of your appeal in our letter to the President (enclosed).

*Second*, with respect to those three new appeals, you suggest that although the information is indeed in the public domain, it may not have been as a result of an official FBI disclosure. (You even intimated that the FBI was contemplating an inquiry regarding at least one of the authors.) However, if you examine the sources the authors used, you will of course see that the first official source cited by Haines and Langbart was a document jointly generated by the FBI and the National Archives. This source, which the FBI reviewed before making it public, disclosed virtually all of the relevant information. See "Appraisal of the Records of the Federal Bureau of Investigation" dated November

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9, 1981 (amended on January 8, 1982), submitted by the FBI in *American Friends Service Committee v. William H. Webster*, Civ. No. 79-1655 (D.D.C.) (excerpts are included as Attachment C to enclosed letter to the President).

*Third*, I wish to reiterate that, by referring to prior official disclosures of information appealed by the FBI, the Review Board in no way undertakes to prove that *all* appealed information has already been officially disclosed or is otherwise known to the public. The FBI does not satisfy its burden of proof under Section 6 of the JFK Act merely by asserting that information has not been the subject of previous official disclosures. Where, as here, the FBI appeals records without having first determined whether the information it wishes to be classified has been previously disclosed, we will continue to research these matters so that the appeals can be resolved with the benefit of as much relevant information as possible. It is not the Review Board's responsibility to prove that appealed information has been previously disclosed; rather, it is the FBI's responsibility to prove that, in light of previous disclosures, there are genuine secrets that genuinely need to be protected.

*Fourth*, with regard to the timeliness of your appeal, we understand that inadvertent mistakes can be made and we fully accept the Bureau's representations that the delay was the result of an honest mistake. Nevertheless, you should also recall that the Review Board attempted to discourage the Bureau from filing these late appeals. We made several telephone calls and met with Bureau staff in an attempt to show the Bureau that these three records did not seem to be appropriate candidates for appeal -- *particularly* when they were so late. For you to suggest that our plea that the deadline provisions of the statute be respected was merely "exalt[ing] form over substance" seems ungracious in light of our attempt to discourage the Bureau from making what we honestly believed to be an embarrassingly weak appeal. Moreover, given that the Review Board in fact did address the substance, and that the FBI has yet to address the substance while seeking further delays, your rhetoric seems misdirected.

I urge the FBI, if it still wishes the President to overturn the Review Board's formal

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determinations regarding Records 124-10073-10270, 124-10073-10271, and 124-10073-10284, to provide its reasons in support of the appeal.

Sincerely,

T. Jeremy Gunn  
General Counsel

Enclosure

cc: Mr. William Leary  
Senior Director, Records and Access Management  
National Security Council

The Honorable Jamie S. Gorelick  
Deputy Attorney General  
U.S. Department of Justice