DRAFT LETTER TO FBI
March 20, 2017

Date

Mr. John Harding [Terry O'Connor]
JFK Task Force
Federal Bureau of Investigation
Washington, D.C.

Dear John:

I am writing to provide you with what I hope will be helpful guidance for the Bureau on the Review Board's anticipated approach to handling confidential informant matters under Sections 6(2) and 6(4) of the JFK Assassination Records Collection Act. Although the Board ultimately will be making decisions on a document-by-document basis, I thought it might be helpful for you to be aware of the approach the Board currently intends to take with respect to reviewing these matters. We have very much appreciated the Bureau's oral briefings as well as the written materials that have been provided to us. We have considered them with a great deal care and we are very mindful of your concerns.

It is the Board's understanding that the vast majority of the Bureau's postponements are, at least with respect to the core files, based upon a combination of restriction numbers two and four. I thus believe that it might be useful to outline our current understanding of the two restrictions. The Bureau would, of course, be able to prevail in having its postponements sustained if it were to prevail under either of the two restrictions.

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 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.

At this point, it is the Board's preliminary assessment that the language of 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.* These statutory terms thus impose on the Bureau the requirement of demonstrating 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.

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 statute 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. Because our review process is now underway, we will need to develop promptly the procedures to be followed. Please let me know how you think that we can best make arrangements that will allow you to present the evidence to us as we continue to review your records.

Sincerely yours,

David G. Marwell
Executive Director

cc: Assassination Records Review Board

e\...\review\fbi.lt1