To: Jeremy Gunn
From: Phil Golrick
CC: David Marwell, Sheryl Walter, Tom Samoluk
Date: January 24, 1995
Re: FBI Informant Issues

This memorandum summarizes and critically analyzes the FBI's contentions regarding postponement of information relating to confidential sources, and makes some preliminary recommendations as to how the Analysis and Review Staff may approach this issue.

I. "INFORMANTS" AND OTHER SOURCES OF INFORMATION

In materials provided to the Review Board, the FBI has described several types of persons who have provided information to the FBI and whose identities the FBI seeks to keep confidential.[1] These are:

A. Criminal Informants, who provide information in aid of law enforcement investigations. In years past (probably including when most assassination records were generated), the FBI initially characterized such persons as "Potential Criminal Informants" or "PCIs." Once the FBI had sufficiently established the reliability of a PCI, he was promoted to Criminal Informant (CI) status and assigned an identifying "symbol number." Thenceforward, when describing contacts with the informant (even in

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[1] For the sake of simplicity, this memorandum will use the term "sources" to refer generically to persons in any of the five categories described in the text.

internal documents), the FBI protected his identity by using his symbol number instead of his name. The FBI maintained a separate file for each PCI and CI.

B. National Security Informants, now referred to as "assets," but previously called "Security Informants" or "SIs." SIs provided information in aid of the FBI's foreign counterintelligence and domestic security activities. SIs also went through a probationary period as "Potential Security Informants" ("PSIs") until they had proven their reliability. The FBI assigned a symbol number only upon upgrading a PSI to SI status. The FBI maintained a separate file for each PSI and SI.

C. Cooperating Witnesses, or "CWs," are a recently-created category of sources. The FBI asserts that it expects CWs (but not CIs and SIs[2]) to testify in criminal prosecutions when the time comes; however, the FBI asserts that their identities are confidential unless and until they give public testimony. Assassination records probably contain relatively little information from CWs.

D. Others expressly promised confidentiality in exchange for information. Such persons may include neighbors or other acquaintances of a subject of investigation, as well as employees of state and local governments, financial institutions, airlines, hotels, etc., who insisted on an assurance of confidentiality. According to the FBI,

> "Where such a promise is given, documents containing such information will contain the name

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[2] But see note 8 infra.

> of the person providing the information as well as language specifically setting forth the fact that confidentiality was requested. No file is opened on such persons and no symbol numbers are assigned to protect their identities."

FBI Memorandum, FBI Informant/Confidentiality Postponements ("FBI Memorandum"), p. 3.

E. Persons providing information under circumstances that, in the FBI's view, give rise to an implied promise of confidentiality. These would include employees of banks, phone companies, and similar institutions from whom the FBI obtained non-public information without the benefit of a subpoena. The FBI asserts that, "[r]egardless of the frequency with which they provided such information, [such persons] would have done so only with the understanding that they were doing so on a confidential basis, even where that understanding is not specifically articulated in FBI documents." Id. The FBI also would include in this category all persons who provided information to the FBI in a private capacity "before passage of provisions of the Freedom of Information/Privacy Act in the mid-1970s allowing access to FBI investigative files," on the theory that at such time no one could have foreseen public access to such files. Id.

II. THE FBI'S ARGUMENTS FOR CONTINUED CONFIDENTIALITY

The principal reasons adduced by the FBI for postponing information relating to sources are:

A. Value of Sources: The FBI considers sources indispensable to its law-enforcement and security activities. As evidence of the paramount importance of sources, the FBI notes that it devotes substantial time and effort to cultivating and maintaining them; that they often have long useful lives; and that frequently a source that has not provided useful information for a considerable time may prove valuable to an investigation unrelated to his previous contributions.

B. Risk of Retaliation: Public identification could put CIs, PCIs, SIs, and PSIs in grave physical danger, either from vengeful criminals or hostile intelligence services. The FBI further asserts that identifying other sources could put them in comparable danger. Where the source has died, the FBI contends that the risk of retaliation against family members justifies continued confidentiality.

C. Risk of "Tipping Off" Subjects of Investigation: Identification of sources could compromise the FBI's criminal and domestic-security investigations by alerting subjects of investigations to the nature and extent of the FBI's efforts against them.

D. "Chilling Effect" on Future Sources: The FBI asserts that its assurance of confidentiality is crucial to its ability to recruit informants, which in turn is crucial to meeting its law-enforcement and national-security responsibilities. In the FBI's view, breaches of confidentiality, whatever the circumstance or justification, will devalue future assurances of confidentiality, thereby deterring potential sources from providing information and seriously impeding the FBI's work.

E. FBI's Legal Analysis: The FBI observes that, in the light of these policy concerns, the courts have recognized a privilege against disclosure of the identities of confidential law-enforcement sources in litigation. However, the public-disclosure requirements of the President John F. Kennedy Assassination Records Collection Act ("the Act") expressly "take precedence over any other law . . ., judicial decision construing such law, or common law doctrine that would otherwise prohibit such . . . disclosure." Act, Section 11(a). The FBI therefore must justify protection of source information under the disclosure and postponement provisions of the Act.[3] In attempting to do so, the FBI states that its postponement criteria are

> "clearly consistent with the language of of Section 6 (subsection 4) . . . that permits the postponement of relationships currently requiring protection when public disclosure would be so harmful that it outweighs the public interest. That is because unless a confidential relationship has already been disclosed, and regardless of whether the source is

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[3] The FBI's discussion of the common-law privilege is instructive insofar as it concedes that the protection of confidential sources afforded by the courts is less sweeping than the protection the FBI seeks from the Review Board. For example, to invoke the "informants privilege" in litigation, "the government must show that its interest in effective law enforcement outweighs the litigant's need for the information." The Governmental Privileges, p. 14 (Department of Justice memorandum excerpted and attached to FBI Memorandum); see also id., p. 15 ("privilege expires when the need for secrecy ceases to exist").

active or even still living, the relationship must remain confidential for the protection of

> the source and/or his or her family, as well as to sustain the viability of the FBI's source development efforts."

FBI Memorandum, p. 11.

Upon these arguments, the FBI rests its conclusion that it should "absolutely protect the identities of informants and others with whom a confidential relationship exists," regardless of the passage of time. Id., p. 12.

III. THE FBI'S SPECIFIC POSTPONEMENT CRITERIA

To implement its policy of protecting source confidentiality, the FBI has developed specfic criteria for postponements under the Act. In applying these criteria, the FBI distinguishes between assassination records in its so-called "core" files (the FBI's term for files "relating to Lee Harvey Oswald, Jack Ruby, and the JFK Assassination Investigation," id., p. 8), and assassination records contained in other files. In reviewing core files, the FBI has applied the following postponement criteria for sources:[4]

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[4] These criteria are set out in the FBI Memorandum, a document apparently prepared for the Review Board. The FBI has also provided Review Board staff with copies of (some, if not all of) its internal memoranda and other instructional materials regarding postponement criteria. In certain particulars, these instructions conflict with each other and with the criteria set out above. The Board and its staff presumably will become more familiar with the FBI's actual application of postponement

A. "All information received from informants or other sources was released so long as the information was not so singular as to clearly identify the source. . . . Any information considered central to the investigation of the assassination would have been released even at the risk of exposure to the informant." Id., p. 9.

B. "Informant symbol numbers were released when no positive information was attributed to them and no characterization (description) of the source was provided." Id.

C. "The names of informants, as well as their identifying symbol number and file number when those informants are either providing positive information or are characterized, have been postponed . . . . The information provided was postponed when so singular that certain identification of the informant would result from its release." Id.

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criteria in the course of records review.

D. "The identities of those persons expressly requesting confidentiality were, in general, protected and the information that they provided was released. . . . In some cases, the names of persons giving information in the course of their jobs (i.e., police officials giving arrest records to the FBI), even if requesting confidentiality, were released. The FBI has attempted to balance the risk of harm to the person or to the informant program in these judgment calls." Id., p. 9-10.

E. As to persons providing information "without a specific request for confidentiality . . ., the identities of most of these sources were released, but, once again, the FBI has attempted to balance the need to maximize released information with the potential harm to the individual source." Id., p. 10.

F. "[T]he FBI has postponed informant symbol numbers wherever that informant is providing positive information. . . . The release of these symbol numbers, in combination with the information already released, could very well lead to the identification of a number of FBI informants." Id. The FBI uses the term "mosaic theory" to refer to the possibility that an informant-specific symbol, combined with the information provided by that informant on one or more occasions, could allow someone to identify the informant.

In processing "non-core" assassination records, the largest category of which is information provided to the House Select Committee on Assassinations ("HSCA"), the FBI "has been more protective of all types of sources, but particularly organized crime and national security informants." Id. Because, in the FBI's estimation, "it is not readily apparent how

[these records] might figure in a conspiracy to assassinate JFK," the FBI has weighted its review of these records "in favor of postponement of any information which might tend to identify a source." Id.

IV. ANALYSIS OF THE FBI'S POSTPONEMENT CRITERIA

Any analysis of postponement issues under the Act must begin with the express statutory directives that:

> "all Government records concerning the assassination of President John F. Kennedy should carry a presumption of of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination;"

and

> "most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records."

Act, Section 2(a)(2), (7). Accordingly, the release of an assassination record or any information within an assassination record may be postponed only if the Review Board finds "clear and convincing evidence" that one of the specified grounds for postponement is present. Id., Sections 6,

9(c)(1).[5]

Two subsections of Section 6 set forth the requirements for postponing confidential source information. They permit postponement 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; [or]
> . . . .
> (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."

Id., Section 6(2), (4).

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[5] Where only part of the information in an assassination record qualifies for postponement, the Review Board must "provide for the disclosure of segregable parts, substitutes, or summaries of such a record." Id., Section (9)(c)(2)(A).

The FBI's postponement criteria are flatly inconsistent with the letter and purpose of the Act. Every part of every assassination record[6] -- including information regarding sources -- carries a presumption of immediate disclosure. An agency seeking postponement of any part of an assassination record must provide clear and convincing evidence[7] that the particular information in question qualifies for postponement. In the case of source information, the FBI must demonstrate by clear and convincing evidence that a particular name, source symbol or other piece of information meets the requirements of Section 6(2) or 6(4).

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[6] The FBI evidently does not contest that documents in its "core" files, as well as any documents provided to the HSCA, are "assassination records." However, to some extent the FBI has postponed release of particular information within assassination records on the grounds that the information is "not assassination-related." Where such a determination is the sole basis for postponement, this practice is contrary to Section 9(c)(1), which requires immediate disclosure "in the absence of clear and convincing evidence that . . . a Government record is not an assassination record; or . . . a Government record or particular information within an assasssination record qualifies for postponement of public disclosure under this Act."

[7] Congress "carefully selected" this standard because "less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation's stated goal" of prompt, full release, while "the most exacting standard -- evidence proving a proposition beyond a reasonable doubt -- would effectively preclude a meaningful review and protection of other legitimate interest (sic)." H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 25 (1992).

Section 6(2) allows postponement only where disclosure of information "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" (emphasis added). Plainly, the FBI cannot justify postponement under this provision unless it can demonstrate, clearly and convincingly, that its source of information is still alive; that its source was assured confidentiality; and that identification of the source would presently pose a substantial risk of harm to that person. By its plain terms, the Act excludes asserted danger to other persons, or anticipated difficulties in recruiting future sources, as grounds for postponement under Section 6(2).

Section 6(4) allows postponement where disclosure of information "would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual . . ., and public disclosure would be so harmful that it outweighs the public interest" (emphasis added). Under this provision, the FBI as a threshold matter must clearly and convincingly demonstrate that there presently is an understanding of confidentiality currently requiring protection. If the FBI fails to make such a showing, then Section 6(4) provides no basis for postponement, regardless of how the FBI would balance the public interest in disclosure against any resulting harm.

The legislative history strongly reinforces this plain reading of the Act. The House Committee on Government Operations concluded in its Report:

> "There is 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 must be judged on its own merits, and every record will ultimately be made available for public disclosure."

H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 16 (1992) (emphasis added). In response to the same concerns that the FBI has expressed to the Review Board, the Committee

> "recognize[d] that law enforcement agencies must to some degree rely on confidential sources . . . . However, the Committee specifically rejects the proposition that such confidentiality exists in perpetuity. . . . [I]n weighing whether an informant's identify (sic) must still be protected, the Review Board must look beyond a law enforcement agency's blanket assertion of confidentiality. Claims of implicit confidentiality or blanket assertions that all sources of information are confidential informants do not satisfy the requirements" for postponement.

Id., p. 30 (emphasis in original). The Committee also rejected "claims that known informants or deceased informants should be protected." Id.

Interestingly, in testimony to the Senate Governmental Affairs Committee, FBI Director William S. Sessions conceded that the FBI could not rely on the sort of wholesale justifications for postponement that it puts forward now. Although he urged that it was "most critical" to keep "confidential those confidential sources that have asked for confidentiality because it is based upon that promise that the information was secured in the first place," the Director also stated:

> "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., pp. 64, 66 (1992) (statement of William S. Sessions) (emphasis added). It would be contrary to law to hold the FBI to a lesser standard.

VI. PRELIMINARY GUIDELINES

What follows is a preliminary outline of how the Analysis and Review Staff ("the Staff") could approach various postponement issues likely to arise regarding source information. Undoubtedly, changes and refinements will be appropriate in the light of experience with particular records and guidance from the Review Board.

A. Postponement Under Section 6(2)

The actual names of sources appearing in assassination records may be postponed under Section 6(2) only if questions 1 through 4 below are all answered affirmatively.

Source symbols, source numbers, and similar source-specific designations appearing in assassination records may be postponed under Section 6(2) only if questions 1 through 5 are all answered affirmatively.

The information provided by sources and appearing in assassination records may be postponed under Section 6(2) only if questions 1 through 5 are all answered affirmatively. Such postponement will be extremely rare and should be limited to the specific information likely to reveal the identity of the source.

1. Is the Source Still Living?: If the FBI cannot establish that a particular source is still alive, there can be no postponement under Section 6(2).

2. Was the Source Assured Confidentiality?: The Act does not specify how to determine whether the requirement of confidentiality is met, but the legislative history offers the following guidance:

> "[T]he Review Board should consider: Whether there is an express written confidentiality agreement, whether that agreement is express or implied, whether it is written or unwritten, and the

> exact restrictions regarding the scope and duration of confidentiality; . . . and whether the government is seeking postponement purely because it believes all such records should be withheld, or because of the informant's express desire that the understanding not be made public."

S. Rep. 328, 102d Cong., 2d Sess., p. 29 (1992).

Clearly, the Act requires an actual understanding of confidentiality, so that the unsubstantiated claim that "everyone back then must have expected confidentiality" (see Section I.E supra) is insufficient. The FBI has asserted that, whenever a source who was not designated a CI, PCI, SI or PSI expressly requested confidentiality, any "documents containing . . . information [from that source] will contain the name of the person providing the information as well as language specifically setting forth the fact that confidentiality was requested." FBI Memorandum, p. 3. It therefore should be easy to determine from the face of records whether informal sources expressly requested confidentiality. If no such request is evident, there should be immediate disclosure.

Similarly, the use of symbol numbers or other code names for CIs, PCIs, SIs, and PSIs can be regarded as evidence that a confidential relationship existed. However, for each such source, the Staff should request the pertinent informant file and any other documentation that might shed light on the confidentiality issue.[8]

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[8] The Staff also should attempt to obtain contemporaneous evidence (procedural manuals, etc.) of exactly how "confidential" various

On balance, it is probably not appropriate to require a written confidentiality agreement (as distinguished from other contemporaneous writings evidencing confidential treatment) in each case. Arguably, sources with the greatest need for confidentiality (double agents placed in hostile intelligent services, criminal informants connected with organized crime) would be the least likely to want their cooperation with the FBI memorialized in writing.

3. Has Confidentiality Been Maintained, I.E., Is the Source Unexposed?:

In one sense, it would be practically impossible for the FBI to prove, "clearly and convincingly," the negative proposition that a once-confidential source has not been exposed, in some way or another, in the intervening years. Strictly requiring such proof in every case could result in immediate disclosure even in some of the "rarest" of cases where a source may still deserve protection. Accordingly, the Staff should not require such proof. However, the Staff should review any readily-retrievable information (e.g., an informant-specific file or index of informants who have testified publicly) for indications of exposure before recommending postponement.

4. Does Identification Pose a Substantial Risk of Harm?: It is

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classes of sources were. See, e.g., A. Buitrago & L. Immerman, Are You Now or Have You Ever Been in the FBI Files?, p. 69 & n. 37 (1981) (citing "a 1968 memo" of J. Edgar Hoover stating that, "'as a general rule, all of our security informants are considered available for interview by Department Attorneys and for testimony if needed'").

incumbent upon the FBI to demonstrate by clear and convincing evidence that identifying the source will place him in substantial physical peril. The FBI should be required to establish that, upon learning that the source provided the FBI with particular information, specifically identified parties with a documented propensity for violence will have sufficient motive and ability to seek vengeance.

In evaluating motive, the Staff should consider the relationship of the source to the ostensible "revenge-seeker" (e.g., trusted confidant or virtual stranger), as well as the nature of the information provided. For example, even the most cold-blooded

gangster would have insufficient motive to hunt down a clerk who advised the FBI how many nights he stayed at a given hotel in 1963.

5. Is There a Genuine, Non-Speculative Likelihood That Disclosure Will Identify the Source?: Once again, the FBI must clearly and convincingly demonstrate that the particular information it wishes to postpone is likely to allow someone to identify the source.

Sometimes, this question may be affirmatively answered on the face of the assassination record, as where a source's address is stated. In other cases, the FBI will seek to rely on the mosaic theory, and contend that the information it wishes to postpone, in combination with other public information, will allow an interested party to identify the source. The Staff should not accept the "mosaic theory," unless the FBI can specify what particular combination of information could unmask the source. General admonitions that "you can never be too careful" or "you can never tell how someone will put the puzzle together" should not suffice.

Rarely, if ever, should the symbol for a source who reported no information -- in FBI jargon, a "negative contact" -- be postponed on the mosaic theory.

B. Postponement Under Section 6(4)

The actual names of sources appearing in assassination records may be postponed under Section 6(4) only if questions 1, 2, 3, 4, and 6 below are answered affirmatively.

Source symbols, source numbers, and similar source-specific designations appearing in assassination records may be postponed under Section 6(4) only if questions 1 through 6 below are answered affirmatively.

The information provided by sources and appearing in assassination records should be disclosed unless questions 1 through 6 are all answered affirmatively. Legitimate postponement of such information will be extremely rare, and any postponement should be limited to the specific information likely to reveal the identity of the source.

1. Is the Source, or Any Member of the Source's Family, Still Living?: To obtain postponement under Section 6(4), the FBI must establish that the source, or a specifically identified member of the source's family, is presently alive.

2. Was the Source Assured Confidentiality?: Same analysis as question 2 for Section 6(2).

3. Has Confidentiality Been Maintained, I.E., Is the Source Unexposed?: Same analysis as question 3 for Section 6(2).

4. Does Identification Pose a Substantial Risk of Harm?: To the extent that the purported "harm" is harm to the source, then the analysis is the same as for question 4 for Section 6(2). If the FBI asserts that a specifically identified member of the source's family may be harmed by disclosure, then it must make the same showing with respect to the family member, i.e., it must demonstrate by clear and convincing evidence that identifying the source will place the family member in substantial physical peril.

If the FBI claims that the "harm" that would result from disclosure is the "tipping off" of the subject(s) of a criminal or security investigation, then it must demonstrate by clear and convincing evidence either that the source is still "active," or that postponement is otherwise necessary to conceal an ongoing investigation of which the subject(s) are unaware.

If the FBI can demonstrate no specific harm from disclosing particular information, other than its systemic concern that disclosure will marginally impede recruitment of future sources, postponement under Section 6(4) is not appropriate.

5. Is There a Genuine, Non-Speculative Likelihood That Disclosure Will Identify the Source?: Same analysis as question 5 for Section 6(2).

6. Would Disclosure Be "So Harmful That It Outweighs the

Public Interest?": Underlying this question is a thorny theoretical issue: whether (and how much) the "public interest" in disclosing particular information contained in an assassination record varies in relation to how directly the information bears on President Kennedy's assassination?

Section 3(10) of the Act defines "public interest" as "the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination." (Emphasis added.) The Review Board, if it so chooses, could reasonably construe the phrase "history surrounding the assassination" to include most, if not all, of the information in assassination records, including those requested by the HSAC. Legislative history indicating that the "public interest" extends to the conduct of official investigations supports this

interpretation,[9] as does the policy objective of making available as much raw data as possible, so that a fully-informed public may draw its own conclusions. Finally, this interpretation could simplify the review process by minimizing the need to make discretionary and debatable assessments of relevance. On the other hand, a "sliding-scale" approach to weighing the public interest in disclosure may facilitate greater flexibility in postponement decisions.[10]

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[9] The House Committee on Government Operations recognized

> "that the House Assassinations Committee as well as other official investigations explored numerous leads which did not identify any facts concerning the assassination. Yet the absence of a causal connection to the assassination does not preclude the Review Board from determining that it is nevertheless relevant. The mere fact that an official investigation explored an avenue of inquiry may be important to the public, historians and scholars, and therefore relevant."

H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 24 (1992).

[10] In any event, the Act never <u>requires</u> postponement of information in an assassination record: even if the statutory criteria for postponement are met, postponement remains "discretionary, not compulsory." S. Rep. No. 328, p. 27 (1992).

Regardless of how the Review Board resolves this theoretical issue, it is unlikely to arise in more than a few cases under Section 6(4). The Review Board will be required to weigh the public interest in disclosure against any resulting harm only in cases where the FBI has proven the other requirements of Section 6(4) -- a confidential relationship, currently requiring protection, that would be harmfully compromised by disclosure of particular information -- by clear and convincing evidence. Only in the rare cases where this burden is met, <u>but</u> postponement is unavailable under Section 6(2), will it be necessary to weigh public interest against resulting harm.