Rough thoughts on FBI's 9/19/95 submission on informant issues
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I. Mosaic Theory: Of the three documents that remain contested, none contains the name of an informant. They only contain symbol numbers, informant file numbers, and information provided. Accordingly, sustaining these postponements requires a finding of clear and convincing evidence that the identities of these informants will be compromised via the mosaic theory. The FBI has failed to show that such is the case; its recent submission ignores this problem entirely. The staff does not perceive that, by virtue of the release of these documents, the true identities of the informants in question are particularly likely to be "mosaiced." If the Board agrees, it would be appropriate to reject these postponements for this reason alone.

II. Current Need to Protect/Harm Outweighing Public Interest in Disclosure: Even if one *assumes* that releasing these documents would compromise the identities of these informants, Section 6(4) allows postponement only if the informants currently require protection and the harm from compromising the informant would outweigh the public interest in disclosure. The FBI has demonstrated:

(a) *some* of the informants in the contested documents are alive; and

(b) the informants or surviving family members would prefer that their informant status not be revealed.

The FBI has demonstrated what was already obvious: that informants prefer that their informant status not be publicized. But the FBI has provided no plausible evidence of any risk of harm that outweighs the compelling public interest in disclosure. There is no evidence, for example, of any risk of physical retaliation against these informants (*e.g.*, indication in these documents or from their informant files that they witnessed or reported on violent crimes).

Any risk of reputational harm is significantly attenuated by the fact that these documents do not contain the names of these informants. For there to be any reputational harm at all, someone must first identify the informant by the mosaic theory and then call his informant status to the attention of other members of the community. This scenario is based on the remotest of speculation, not clear and convincing evidence.

III. Burden Argument: over 300 man-hours, diversion from "drug task force"

-- Obviously inefficient use of resources, even to compile precisely the information submitted.

-- How much of this was devoted to the pointless exercise of attempting to contact second- and third-generation descendants of the informant they are agreeing to release? (FBI has told our staff orally that they devoted substantial efforts to doing this, but couldn't find anyone.)

They knew -- because the Review Board had told them -- that this informant has been dead for 16 years, and therefore that the likelihood of finding clear and convincing evidence of a current need to protect him was infinitesimal -- but they went through the motions anyway to pad their burden claim.

-- Argument that further releases will slow to a trickle if FBI continues in this fashion is a blackmail attempt that the FBI has scarcely tried to veil. The FBI is already over two years (and counting) delinquent in complying with the JFK Act, and that delinquency has nothing to do with providing evidence for the appealed postponements.

-- Bottom Line: Neither the Review Board, nor the White House, nor even the JFK Act itself required the FBI to spend over 300 man-hours on these documents. If the FBI had released these assassination records -- none of which contains the name of any living informant -- it could have avoided all of this bother. Further, there is no formula whereby X manhours yields Y postponements sustained. The FBI could waste its agents' time and the public's money until doomsday looking for "evidence" regarding informants who don't currently require protection under the standards of the JFK Act. (The fact that, after investigation, even the FBI concedes that it must release one of the four appealed documents demonstrates that many of these informants don't need protection by any conceivable standard.) It's the FBI's own fault if it chooses to flush its money down the drain.

IV. Evidence of Confidential Relationship: Apparently in response to Judge Mikva's request to focus on the factors enumerated in the Senate Report, the FBI's submission extensively discusses the informants' recollections of whether they were assured confidentiality, the terms of those assurances, and whether there was a written agreement of confidentiality. But, at least with regard to these symbol-number informants, the existence of an understanding of confidentiality was not in dispute -- indeed, it was conceded in the Review Board's appeal papers. The FBI's discussion of these points is therefore largely irrelevant.

To the extent it is relevant, it is unpersuasive:

-- Our appeal paper demonstrated that it was the FBI's general policy to publicly disclose informants' identities when there was a prosecutorial need to do so. Given this fact, the FBI's characterization of some of these informants' recollections of an unconditional promise of confidentiality is unpersuasive.

-- Clear and convincing evidence of the existence and terms of a *written* agreement of confidentiality would be the writing itself. A copy of any such agreement should be in the HQ or field office file for each informant. The FBI undertook to retrieve and review these

files, but has not provided a copy of written agreements with any of these informants. Accordingly, the FBI has not provided clear and convincing evidence of the existence or terms of such agreements.

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