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ASSASSINATION RECORDS REVIEW BOARD
REPLY TO THE
FBI'S AUGUST 8, 1995 APPEAL OF FORMAL DETERMINATIONS
UNDER THE JFK ASSASSINATION RECORDS COLLECTION ACT

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INTRODUCTION

The Federal Bureau of Investigation is contesting nine of the first ten decisions regarding its records made by the Assassination Records Review Board. *See* FBI Appeal to the President, August 8, 1995 (hereafter FBI Memorandum). In asking the President to continue to redact information in records related to the assassination of President Kennedy, the FBI relies *solely* on generalized arguments and on statements of Bureau policy. These general arguments do not satisfy the FBI's obligation under the President John F. Kennedy Assassination Records Collection Act (JFK Act) as adopted by Congress and as signed into law by President Bush in 1992.

In failing to offer the particularized evidence required by the JFK Act, the FBI is effectively retreating from a promise made by its own Director. In his congressional testimony in 1992, Director Sessions pledged that the FBI stood ready to satisfy its statutory burden to provide particularized evidence to the Review Board:

> 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.**[1]

As will be shown below, the FBI's Memorandum appeal not only makes no attempt to satisfy its prior pledge to Congress and its obligations under the JFK Act, ***its arguments here are inconsistent with its own prior releases of information***. This memorandum will examine the FBI's appeal in three steps: Part I will address the basic statutory requirements of the JFK Act; Part II will address the issue of informants; and Part III will address the "foreign relations" issue.

We trust that, after considering the applicable provisions of the JFK Act, the information that

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[1] *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 the Hon. William S. Sessions) (emphasis added).

the FBI wishes to redact, and the absence of "clear and convincing evidence" in support of continued secrecy, the President will agree with the Review Board's decision that the law requires full and immediate release of these records.

PART I: THE STATUTORY PRESUMPTION OF DISCLOSURE OF ASSASSINATION RECORDS AND OVERCLASSIFICATION OF GOVERNMENT RECORDS.

A. The JFK Act.

The statutory presumption favoring full disclosure. The FBI's memorandum fail to cite the most pertinent language of the JFK Act: the standard for release of information. According to the act itself, "all Government records concerning the assassination of President John F. Kennedy should carry a ***presumption of immediate disclosure***." Section 2(a)(2) (emphasis added). The statute further declares that ***"only in the rarest cases is there any legitimate need for continued protection of such records."*** Section 2(a)(7) (emphasis added).

The FBI's memorandum not only fails to cite the controlling language in the statute, it fails to address the substance of the issue as well. Indeed, nowhere in the FBI's submission is there any discussion of why the records at issue here are among "the rarest of cases" contemplated by the statute or why they differ in any way from the thousands of other records for which the Bureau also has redacted information.

The evidentiary standard of "clear and convincing" evidence. In addition to ignoring the statutory presumption favoring full disclosure of records in all but the rarest of cases, the FBI also neglects to discuss the evidentiary standard imposed by the JFK Act on agencies seeking to withhold information from the public. For ***each*** recommended postponement, an agency is required to submit "clear and convincing evidence" that one of the specified grounds for postponement is present.[2] *Ibid.*, Sections 6, 9(c)(1).[3]

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[2]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 and full release. H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 25 (1992).

[3]The Bureau recognizes in passing, and only in relation to the "foreign relations" issue, that the "clear and convincing" standard applies. *See* FBI Memorandum, p. 4.

B. Overclassification of government records.

The Bureau's memorandum not only fails to provide the particularized evidence required by the statute, it exemplifies the Bureau's overclassification of government records. The Bureau's entire ten-page memorandum is classified "SECRET," although virtually all of the information it contains should not properly be classified at all. For example, the Bureau goes so far as to classify the statutory language of the JFK Act itself. *See* FBI Memorandum, pp. 1-2. Similarly, there appears to be nothing in the Bureau's discussion of informants that should be classified "SECRET," although the Bureau designates it as such. *See* FBI Memorandum, pp. 5-10. Indeed, the only information that could reasonably be considered to be classified are the six paragraphs (starting at the middle of page 3 and continuing on to page 4) that discuss the particular foreign relations question at issue. (Our discussion below will show why classifying even those paragraphs would be overreaching.) This façade of secrecy, exemplified by the FBI's memorandum itself, is inconsistent with both the letter and the spirit of Executive Order 12958.[4] That Order affirms that "[o]ur democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information." Thus, whenever "there is significant doubt about the need to classify information, *it shall not be classified.*" Ex. Order 12958, Sec. 1.2(b) (emphasis added). The Bureau's memorandum and arguments take an approach that is exactly the opposite of the new Executive Order.

[4]Executive Order 12958 becomes effective on October __, 1995. **[180 days after April 17, 1995. figure out date.]**

PART II: THE FBI's INFORMANT POSTPONEMENTS

The first four of the nine contested documents pertain to informant issues. *See* Tabs 1-4 (attached). The Review Board provided the FBI with every opportunity to present its "clear and convincing" evidence in support of continued redaction of the information. Although the Bureau has submitted written documents and has made oral briefings (in which it made the same general arguments as appear in its memorandum), ***the FBI provided no evidence whatsoever regarding the particular informants at issue.***

Rather than offering the particularized evidence mandated by law -- and promised by its former Director -- the Bureau has reverted to two broad-brush arguments that: (a) disclosure of informant information may cause harm to existing informants, and (b) disclosure of informant information will impair the Bureau's crime-fighting activities.[5] These broad-brush arguments should be rejected for three reasons: first, the arguments are inconsistent with the obligations imposed by the JFK Act (as the Bureau itself is fully aware); second, the arguments have been specifically repudiated by Congress and the Courts; and third, the arguments are inconsistent with the Bureau's own releases of information.

A. The FBI Ignored its Statutory Obligation to Provide Particularized Evidence.

[5]These two arguments are not clearly delineated in the FBI memorandum, but may be gleaned therefrom. *See* FBI Memorandum, pp. 5-10.

The FBI redacted the four informant documents (tabs 1-4) on the basis of two statutory provisions: Sections 6(2) and 6(4) (commonly referred to as Postponement 2 and Postponement 4). These two postponements impose a burden on the Bureau to provide particularized evidence supporting its recommendations.[6] To support its recommendations the Bureau must provide evidence such as that the informant is, for example, still living and that the informant would incur a "substantial risk of harm" if his or her identity were revealed (from Postponement 2), or that the confidential relationship "currently requires protection" (from Postponement 4).

The Bureau is fully aware that the JFK Act requires a particularized showing. As quoted above, Director Sessions acknowledged it in his testimony to Congress. *See* p. 1 above. In testimony before Congress, another FBI official conceded that H.J. Res. 454[7] would ***not*** permit the

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[6] *The Statutory Standard: Postponement 2.* Section 6(2) permits redactions ***only if*** there is "clear and convincing evidence" that "public disclosure":

> (1) "would reveal the name or identity ***of a living person*** who provided confidential information;" ***and***
> (2) "would pose a ***substantial risk of harm to that person***" (emphasis added).

The Statutory Standard: Postponement 4. Section 6(4) requires "clear and convincing evidence" that:

> (1) "public disclosure would compromise the existence of an understanding of confidentiality . . . between a Government agent and a cooperating individual or a foreign government";
>
> (2) the understanding of confidentiality ***"currently requir[es] protection"; and***
>
> (3) ***"public disclosure would be so harmful that it outweighs the public interest"*** in disclosure. (emphasis added)

[7] The JFK Act as passed is ***more*** disclosure-oriented on this issue than the version of H.J. Res. 454 on which the FBI was then commenting. That version of H.J. Res. 454 would have permitted postponement to avoid "a substantial and unjustified violation of confidentiality between a Government agent and a witness or a foreign government," ***without*** any balancing against the

categorical protection of dead informants:

> [A]s I read the current resolution [H.J. Res. 454], there would be other judgments used as to the disclosure of confidential informants.
> . . . .

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compelling public interest in immediate disclosure. *See Hearing Before the Subcommittee on Economic and Commercial Law, House Committee on the Judiciary*, p. 14 (May 20, 1992).

> For example, *if the informant was now dead, that information would be released* [under H.J. Res. 454]. We would not release that under the prior or current processing procedures [under the Freedom of Information Act]."[8]

Moreover, in its own internal analysis of the JFK Act, Bureau officials acknowledge that the Bureau must make a particularized showing. [Insert from Phil]

Ignoring its statutory burden, the FBI's memorandum (and its submissions to the Review Board) failed to provide ***any*** evidence whatsoever regarding any of the informants at issue in the four documents. The Bureau's memorandum does not reveal, for example, whether any of the informants is even alive. The memorandum similarly provides no evidence that any harm would come to any of the informants, nor does it explain why, thirty years after the fact, any of the informants is possibly at risk.

The Bureau argues, by way of analogy, that because Aldrich Ames identified some citizens of the former Soviet Union as intelligence sources and because they were subsequently executed, the informants at issue here should be protected. *See* FBI memorandum, pp. __. *There is no question that, if the Bureau presented evidence that the informants at issue are alive and were at a substantial risk of harm if their identities were revealed, the Review Board would protect the identity of the informants.* The Review Board has, in fact agreed to several postponements in CIA records that relate to sensitive source and methods issues.[9] The Review Board carefully weighs the ***evidence*** and makes a determination. The Bureau simply has not satisfied its statutorily mandated burden to provide the evidence.

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[8]Testimony of Floyd I. Clarke, Deputy Director, FBI *Hearing Before the Subcommittee on Economic and Commercial Law, House Committee on the Judiciary*, p. 130 (May 20, 1992). Congress agreed with this assessment by rejecting "claims that known informants or deceased informants should be protected." *[Committee Report at 30? verify]*

[9]Review Board decisions from August 3, 1995.

(1) Compromising Confidentiality: For purposes of the postponements now at issue, the Review Board accepts that the use of informant symbol numbers or the existence of an informant file provides evidence that the informant in question was assured some measure of confidentiality. It does not follow, however, that this confidentiality is, or ever has been, absolute. Indeed, as a matter of historical record, the FBI has been prepared to release information about an informant where doing so furthered its own objectives. The FBI's *Manual of Instructions* admonished FBI agents that they

> "must condition the informant to the fact that someday the knowledge he possesses may be needed as evidence in court to assist the Government ... Psychologically prepare the informant for the fact that he may at some future date be called upon to render a still further contribution to his Government by testifying to the information he has furnished ... Proper indoctrination of the informant is essential as the Bureau **must provide witnesses whenever the Department of Justice initiates prosecutions in security cases."**

Manual of Instructions, Section 107, "Security Informants and Confidential Sources," p. 10 (issued June 13, 1962).

Nor does it follow that release of an informant symbol number or file number, as opposed to the informant's true name, necessarily will compromise confidentiality.

(2) "Currently Requiring Protection". As was the case with the Bureau having failed to provide <u>any</u> evidence that the informants are alive or would be harmed, so has the Bureau declined to provide any evidence that the confidential relationships from 1963 must still be preserved in 1995.

(3) Harm Weighed Against Public Interest: The JFK Act defines the "public interest" as the "interest in 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.***" Section 3(10) (emphasis added). The statute specifies that this public interest in prompt disclosure is "***compelling.***" *Ibid.* (emphasis added).

The Bureau has provided only one reason for not providing particularized evidence: that it would be burdensome to do so. In making this argument, the Bureau has not shown how it would be

burdensome to do so with the four cases at issue. More importantly, the FBI has not show that it would have been unduly taxing to have given the Review Board at least *some* information about these informants. Because these informants were assigned symbol numbers, both the FBI's Headquarters and the responsible field office should have a file for each individual informant, readily retrievable by the corresponding symbol number appearing in the assassination records. At a minimum, these files would reflect true names and last known residences, the years in which the FBI used them as informants, and their (at least approximate) ages if they were still alive. But the FBI did not bother *even to provide such rudimentary information from its own Headquarters files* in support of these postponements. In a real sense, the FBI has not even *tried* to meet its evidentiary burden under the JFK Act.

B. The FBI's General Arguments Against Release of Information About Informants Have Been Rejected.

The FBI is not asking the President to apply the standards of the JFK Act. Rather, the FBI is asking the President to ignore the particularized requirements and to protect instead an entire class of records. The FBI has repeatedly made the same broad argument that all informant records must be protected. But that argument was specifically rejected by Congress (and implicitly by President Bush), and it has repeatedly been rejected by the Courts -- including in those cases cited by the Bureau itself. *See* FBI Memorandum, pp. ___.

Congress rejected the Bureau's argument by passing the JFK Act. The legislative history of the JFK Act reinforces the very requirement that the FBI is asking the President to ignore. The House Committee on Government Operations concluded in its Report on a predecessor bill (H.J. Res. 454):

> "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).

The FBI presented to the Committee the same arguments regarding chilling the cooperation of existing informants or impeding recruitment of new ones that the FBI has repeated to the Review Board and now to the Chief Executive. The Committee responded that it

> "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.*** As with all other government information, ***the government's legitimate interest in keeping such information confidential diminishes with the passage of time."***

Ibid., p. 30 (emphasis added).[10]

The Courts have rejected the Bureau's argument as well.

Inserts from Laura?

C. The FBI's Arguments Against Release of Information About Informants Are Inconsistent with Its Own Prior Releases of Information

insert text from Phil

[10] *See also* S. Rep. 102-328, 102d Cong., 2d Sess. (1992), pp. 28-29 (requiring the Review Board to consider "the exact restrictions regarding the scope and duration of confidentiality" and "whether the agreement [of confidentiality] currently requires protection" -- despite the Government's argument "that ***all*** such confidentiality requires withholding to preserve the integrity [of] the promise of confidentiality") (emphasis added).

PART III: THE FBI's "FOREIGN RELATIONS" POSTPONEMENTS.

Five of the nine documents pertain to "foreign relations" issues. *See* Exhibits 5-9 (attached). In its cover letter to the President, the Bureau describes the second set of documents as follows: "[f]ive of the documents reveal cooperation with the United States by the Federal police of a foreign nation with which we have a long-standing and continuing relationship." FBI Letter, p. 1.[11]

A. The FBI's Arguments are Inconsistent with Its Prior Releases of Information

For its postponements in the remaining five documents, the FBI relies on Sections 6(4) and 6(1)(B).[12]

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[11]This portion of the letter is unclassified where, as here, it is separated from the classified attachment.

[12]For a postponement to be sustained under these two provisions, there must be "*clear and convincing evidence*" that:

(1) public disclosure would *compromise the existence of an understanding of confidentiality;*

(2) the understanding of confidentiality *currently requires protection; and*

(3) disclosure would be *so harmful that it outweighs the public interest* in disclosure.

The postponement standards under Section 6(1)(B) are similarly stringent. There must be *"clear and convincing evidence"* that:

(1) "the threat to the *military defense, intelligence operations, or conduct of foreign relations* of the United States is of *such gravity that it outweighs the public interest in disclosure;"*

(2) "disclosure would reveal an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government;"

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(3) the source or method in question *"has not been officially disclosed"; and*

(4) disclosure of the source or method *"would interfere with the conduct of intelligence activities."*

The Bureau employs dramatic language to suggest that the release of the information contained in these five documents would have a harmful effect on law enforcement and on the foreign relations of the United States. The FBI Memorandum states that release of the information in question: would cause "damage" that is "substantial and serious" (p. 4); "will seriously . . . confidence in the United States" (p. 4); and will have a "result [that] can only be detrimental to United States interests." (p. 4).

The Bureau elliptically hints that it is "advised that the State Department concurs in this view." Although the Bureau did not present this "evidence" to the Review Board, and although the State Department itself has not documented any such concern, these opinions do not constitute *evidence* -- as opposed to opinions -- of harm. Moreover, the FBI provides no evidence that the State Department was evaluating the issue under the JFK Act.

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