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8/10/95 5:30 p.m.

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

August 10, 1995

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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 clear and convincing 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 clear and convincing 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 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 JFK ACT PRESUMES DISCLOSURE OF ASSASSINATION RECORDS.

The statutory presumption favoring full disclosure. The FBI 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 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,[2] 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.[3] *Ibid.*, Sections 6, 9(c)(1).[4]

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[2]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.

[3]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).

[4]The Bureau's memorandum not only fails to provide the clear and convincing 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 Memorandum itself, is inconsistent with both the letter and the spirit of Executive Order 12958. 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.

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.***

A. The FBI Ignored its Statutory Obligation to Provide Clear and Convincing Evidence.

The FBI redacted the four informant documents 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 clear and convincing evidence supporting its recommendations.[5] To support its recommendations for Postponement 2, the Bureau must

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[5] *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***

provide, for example, evidence that the informant is still living and that he or she would incur a "substantial risk of harm" if his or her identity were revealed. For Postponement 4, the Bureau must show, *inter alia,* that the confidential relationship "currently requires protection."

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

The Bureau is fully aware that the JFK Act requires these clear and convincing showings. As quoted above, Director Sessions, in his Congressional testimony, presumed that the Bureau would need to make particularized showings. *See* p. 1 above. In testimony before Congress, another FBI official conceded that H.J. Res. 454[6] would ***not*** permit the categorical protection of deceased 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.
>
> . . . .
>
> 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]."[7]

Ignoring its statutory burden, the FBI 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 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 has provided only one reason for not offering clear and convincing evidence:

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[6]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 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).

[7]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]*

that it would be burdensome to do so. In making this argument, the Bureau certainly has not shown how it would be burdensome to do so with respect to the four cases at issue. More importantly, however, the FBI has not shown 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 files for each individual informant that are 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. Thus, ***while asserting that protection of informants is of paramount importance, the Bureau failed to take even the modest step of checking its own files.***

Even in the FOIA context, as then-Judge Mikva wrote, the analysis should not be based upon "an abstract inquiry," as the FBI urges here, but should focus on "the document itself." *Washington Legal Foundation v. U.S. Sentencing Commission,* 17 F.3d 1446, 1452 (D.C. Cir. 1994) (Mikva, J.).

[INSERT ON PUBLIC INTEREST IN RECORDS]

B. The FBI's "Broad-Brush" Arguments Against Release of Information About Informants Should Be Rejected.

Rather than offering the clear and convincing evidence mandated by law -- especially the particularized evidence promised by its former Director -- the Bureau has reverted to some broad-brush arguments that would apply equally to all informant issues, regardless of the JFK Act. The Bureau argues, for example, that: (a) disclosure of informant information may cause harm to existing informants; (b) disclosure of informant information will impair the Bureau's crime-fighting activities; and (c) disclosure of the information would breach prior promises of confidentiality.[8] These broad-brush arguments should be rejected not only because they are inconsistent with the

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

language of the JFK Act, but because they run afoul of Congress's intent and because they are inconsistent with the Bureau's own prior releases of information. The three issues will be addressed in turn.

(a) The first argument: possible harm to informants. The Bureau argues, solely 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 are at a substantial risk of harm if their identities are revealed, the Review Board would protect the identities 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.

(b) The second argument: hampering crime-fighting activities. The Bureau has repeatedly, and unsuccessfully, argued that disclosure of information about informants will compromise FBI crime-fighting activities. The current Director of Public Affairs of the Department of Justice, Mr. Carl Stern, has published a devastating critique of the Bureau's argument. In the 1980s, Mr. Stern, through FOIA, obtained the FBI's own internal study of the effect of FOIA on the recruitment of confidential informants. Although then-Director William Webster had argued that FOIA had caused informants to become an "endangered species," Mr. Stern showed that the Bureau's own internal evidence proved otherwise. Contrary to Mr. Webster's argument, the Bureau's evidence showed that, according to Mr. Stern, "[n]o harm was reported to any informant as a result of use of the act, and there was only one case in which agents believed that an informant was endangered because of released documents." Carl Stern, "F.B.I. Informants," *The New York Times*, Feb. 10, 1982 (attached at Tab 10).

The Bureau is advancing today the same argument that it has promulgated before. But the FBI has failed to provide *even one specific example of any harm coming to any person from the release of information that is thirty-years old.*

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

(c) The third argument: compromising confidentiality.[10] Although the Bureau suggests here that it has made permanent and absolute assurances of confidentiality to its informants, this position is inconsistent with the instructions that it issued to its agents in the 1960s. Far from promising perpetual confidentiality, the FBI's 1962 *Manual of Instructions* admonished agents that they

[10]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.

> 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.[11]

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.[12]

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.***[13]

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[11] *Manual of Instructions*, Section 107, "Security Informants and Confidential Sources," p. 10 (issued June 13, 1962) (emphasis added).

[12] H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 16 (1992) (emphasis added).

[13] *Ibid.*, p. 30 (emphasis added). *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

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

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

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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").

Five of the nine documents pertain to "foreign relations" issues. *See* Tabs 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.[14]

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).[15]

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

[15]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;"

(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*

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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 undermine . . . 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 states 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 standard appropriate to the JFK Act.

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