April 12, 1995

TO: Assassination Records Review Board

FROM: Sheryl Walter

RE: Public release of Informant Identities --
Additional background and analysis

This memorandum supplements materials you have received in the past on the question of the public release of informant identities under the Assassination Records Collection Act (ARCA) or of information that allegedly would lead to the identification of the informant providing the information. This is not a comprehensive treatment of the question, but is geared to providing some sense of whether and in what contexts informant names have been publicly released.

Informant Postponements under the ARCA

Under Section 6 the ARCA, postponement by the Review Board of informant information may be allowed 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]

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"(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."

Thus, certain preconditions for postponement are established that must be demonstrated by clear and convincing evidence. The statute variously requires a showing that the individual in question is still alive (§2), that an understanding of confidentiality existed, that release of the informant's identity would pose a substantial risk now or in the future to that informant (§2) or would cause a harm not outweighed by the public interest in disclosure (§4). Section 2 applies only to confidential information provided to the United States; section 4 applies to foreign governments as well as individuals. No mention is made in the ARCA or its legislative history of a danger posed to other persons or of a potential hindrance to law enforcement agency recruitment of informants in the future. Even if there is a demonstrated understanding of confidentiality, the statute requires evidence of the need to continue to currently honor it. The legislative history also makes it clear that Congress saw:

"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 will be judged on its own merits and

every record will ultimately be made available of public disclosure."[1]

FBI's Position on Public Release of Informant Identities

As the Review Board is already aware from the briefings and materials provided by the FBI, that agency believes that regardless of the passage of time it must "absolutely protect the identities of informants and others with whom a confidential relationship exists." [2] The FBI advances the following primary reasons why informant identities and related information must be postponed:

- Informant sources are invaluable to its law enforcement mission and they often have useful ties to the agency that span many years.
- Public identification could put informants in danger.
- Subjects may become aware of the fact and extent of investigations.
- Future potential sources will be deterred from becoming informants because they will not believe FBI assurances of confidentiality if the identities of informants are revealed here.

Despite these positions against disclosure of information identities, staff review of documents released by the FBI under the ARCA reveals that the FBI in fact has released the names and symbol numbers of hundreds of

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

[2] *FBI Memorandum* (prepared for the FBI's December 14, 1994 briefing of the Review Board) at 12.

informants.

Types of Informants Whose Identities the FBI Seeks to Keep Confidential

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

1. **Criminal Informants**, who provide information in support of law enforcement investigations. In the past (including the period when most assassination records were generated), these individuals were characterized initially as "Potential Criminal Informants" (PCIs). Once a PCI's reliability was established, the individual was promoted to "Criminal Informant" (CI) status and assigned an identifying symbol number. Thereafter, to protect the CI's identity all contacts with the CI were described (even in internal documents) only by symbol number. The agency maintained separate files for each PCI and CI.

2. **National Security Informants** are now referred to as "assets" but were previously called "Security Informants" or "SIs". These informants provided information related to the FBI's foreign counterintelligence and domestic security activities. Similar to CIs, SIs passed through a probationary period as "Potential Security Informants" (PSIs) until they had proved their reliability. Also similar to CIs, the FBI assigned identifying symbol numbers only when a PSI was upgraded to SI status. The FBI maintains separate files for each PSI and SI.

3. **Cooperating Witnesses**, or "CWs", is a newer category of sources.

The FBI asserts that it expects CWs but not CIs or SIs to testify in criminal prosecutions when the time comes but that until they give public testimony their identities are confidential. [3]

4. **Others Expressly Promised Confidentiality in Exchange for Information** include neighbors or other acquaintances of a subject of an investigation and employees of a variety of institutions, including state and local governments, financial institutions, airlines, hotels, and the like who before they talked with the FBI insisted on an assurance of confidentiality. The FBI says:

> "Where such a promise is given, documents containing such information will contain the name 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." [4]

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[3] This assertion is questionable given a reported 1968 memorandum of J. Edgar Hoover's said to state that "as a general rule, all of our security informants are considered available for interview by Department Attorneys and for testimony, if needed". See A. Buitrago and L. Immerman, *Are You Now or Have You Ever Been in the FBI Files?*, p. 69 and n.37 (1981). See also discussion on pages 4-6, infra.

[4] Memorandum, *FBI Informant/Confidentiality Postponements* at 3.

5. **Persons Providing Information Under Circumstances that the FBI Views as Impliedly Promising Confidentiality** include employees of banks, phone companies, and similar institutions from whom the FBI obtained non-public information without resorting to a subpoena. The FBI says that:

> "[r]egardless of the frequency with which they provided such information, [they] 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."[5]

The FBI includes in this category all person 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.[6]

Legal Standards Governing Disclosure of Informant Identities

The FBI's reliance on what is commonly known as the informer's privilege "in reality is the government's privilege to keep its sources of information confidential."[7] The rationale underlying the privilege is that the

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[5] Id.

[6] Id.

[7] 8 J.Wigmore, *Evidence* §2374 (McNaughton rev. 1961).

privilege promotes and protects the public's interest in effective law enforcement. It is designed to protect the public interest in credible and effective government processes and is not primarily geared to protect the individual informant.[8] The focus in these situations is often on "the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers and, by preserving their anonymity, encourages them to perform that obligation.[9]

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[8] *Government's Privilege to Withhold Disclosure of Identity of Informer*, 1 LED. 2d 1998 (1995).

[9] *Government's privilege*, supra note 3 at §1.

This privilege is not absolute and dissolves under certain circumstances, such as when disclosure of the informant's identity is necessary to prevent false testimony or to ensure a fair trial. Even in cases where the Supreme Court has permitted the government to keep an informant's identity secret, it has relied on circumstances in which "we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege."[10] The case law does not establish an absolute rule against disclosure, nor does it foreclose the possibility that, in a particular circumstance based on unique facts, public disclosure of any informant's identity may be necessary for fairness. In these situations it rests with the final decisionmaker to decide whether disclosure is required, as the scope of the privilege to withhold informant identities is always limited by its underlying purpose to maximize the integrity of government procedures.[11]

Thus, despite the FBI's arguments in support of an absolute ban on disclosing informant identities, the Supreme Court has said that even in the context of an ongoing criminal case "no fixed rule with respect to disclosure [of an informant's identity] is justifiable" and established a balancing test in which the privilege to withhold informant's identities falls away if that information is "relevant and helpful to the defense of an accused or is essential to a fair determination of a cause."[12] The FBI's

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[10] McCray v. Illinois, 386 U.S. 300 (1967) (in context of attempt to suppress evidence before trial).

[11] Roviaro v. U.S., 353 U.S. 53 (1933).

[12] Id. at 60-61. The Supreme Court also held in Roviaro that

blanket rule similarly is undermined by the fact it has and is releasing scores of informant names and symbols.

The balance struck in such situations often weighs, on the one side, the general need to maintain anonymity of informants, the reality that for effective law enforcement the use of informants is essential, and that many informants condition their cooperation on confidentiality. Tipping the scales on the other side is the danger that failing to disclose the information will result in a subversion of the judicial process.[13]

Useful analyses of the need in a particular situation to keep an informant's identity secret often focus on the effect of the release of the information to a fair determination of a particular cause rather than attempting to determine the informant's degree of involvement in that matter. Similarly, police informers have been found to have no constitutional protection against having their identities disclosed since their testimony is available to the public when desired by grand juries or at criminal trials, so that the identity of an informant cannot be concealed

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the content of the informant's communication is not privileged, except to the extent it may reveal the informant's identity, and previous disclosure of the identity preclude the privilege claim.

[13] In comparison, ordinary rules of evidence do not require disclosure of an informer's identity if is not relevant to the matters involved in the litigation in which disclosure is sought. *Government's privilege*, supra note 3 at n.5.

when it is relevant to getting at the truth. [14]

[14] See Branzburg v. Hayes, 408 U.S. 665 (1975).

In articulating a rule that gives due weight to these competing concerns, one approach in the criminal context finds disclosure is necessary except when what is at issue "can be fairly determined without such disclosure."[15] In the criminal context, "the most important limitation on the government's nondisclosure privilege is based on notions of fundamental fairness, so that where disclosure of an informant's identity is relevant and helpful to the defense or is essential to a fair determination of the cause, the privilege must give way." [16]

Under the ARCA, the issue is of course not whether a fair trial is at stake but the effect on the historical record of the release or postponement of the information. However, a fundamental interest underlying the ARCA and the Review Board's work is to release all information that will inform and illuminate the facts related to the events surrounding the assassination of President Kennedy and to put speculation to rest wherever possible. The analysis established by the statute includes a balancing test that takes into account the public interest only in the context of a "compromise [of] the existence of an understanding of confidentiality currently requiring protection." (Where there is clear and convincing evidence of a substantial risk of harm to a living person who acted as a confidential informant, no balancing test applies, at least for §2 above.) As a way to apply the public interest portion of the balancing test set out in Section 6(4), evaluation of the extent to which the public release of the informant's identity will enrich and broaden the historical record and enhance public credibility in the

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[15] Model Code of Pre-Arraignment Procedure, § SS 290.4 (1975).

[16] Government's privilege, supra note 3 at §2a.

activities of government can serve as a lodestar to help make postponement decisions.