December 13, 1994

TO: Assassination Records Review Board

FROM: Sheryl Walter

RE: Postponement of informant information in FBI documents

This memo provides the Board with background information for its December 14 briefing by the FBI on the agency's position regarding postponement of informant names, sources, and material provided by informant sources. Summarized here are passages in the statute and legislative history that illustrate how Congress addressed the question of to what extent the Board should postpone informant material. Also included is a summary of the Supreme Court's recent decision in Department of Justice v. Landano (113 S.CT. 2014 (1993)), in which the Court held that the FBI is not entitled to a presumption that all sources supplying information to the agency in the course of criminal investigations are presumptively "confidential "ones whose identity or the information they provided must be kept secret. Instead, the Court required the FBI to demonstrate in a particular case why the information should not be publicly disclosed. Finally, a brief analysis of major points in the FBI's briefing memorandum (an advance draft of which was provided to Board staff) along with policy considerations and suggested issues for discussion is provided to assist the Board in weighing these issues.

Statutory Framework and Legislative History

Section 6 of the JFK Collection Act of 1992 describes the conditions under which the Board may postpone release of informant information and establishes a standard of "clear and convincing evidence" that the FBI has the burden to meet before its postponement requests are affirmed by the Board. (A copy of Section 6 is attached to this memorandum). The 1992 House Report explains that Congress "carefully selected" the "clear and convincing evidence" test after concluding that "less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation's stated goal" of providing public access to all records at the earliest possible date, and "imposing the most exacting standard -- evidence proving a proposition beyond a reasonable doubt -- would effectively preclude meaningful review and protection of other legitimate interests by the Review Board." H.Rep. 102-625, part 1 at 25.

The Act's legislative history also makes clear that "postponement" is to be determined in a context that presumes disclosure, that it is to be narrowly applied to allow the release of a majority of the documents with a minimum of redactions, that records postponed will be disclosed in full within 25 years (absent intervention by the President) and that the postponement standards are not to be construed as exemptions in the sense usually applied under the Freedom of Information Act or national security executive orders. See S.Rep. No. 102-328 at 20, 27. Underlying this guidance is Congress's expressed displeasure with the past withholding practices

of many agencies, including the FBI, which in the words of the House Report, has resulted in "continued unjustified secrecy and concealment of these records [that] increases speculation about the assassination and fuels a growing distrust in the institutions of government." H.Rep. 102-625, part 1at 17.

The Senate Report describes in some detail the factors considered in constructing Section 6's postponement scheme. In regard to informant names or information collected from informants, lists arguments made by government agencies to Congress against public disclosure of identities of agents or informants (broadly characterized by the intelligence agencies "to extend to a domestic or foreign intelligence or counterintelligence asset, collaborator, foreign liaison contact, or covert employee of a US intelligence organization where the identity of any of these currently require protection"). The FBI's and other agencies' arguments against public disclosure included the potential risk of physical harm to surviving family members and that the fact of a person's employment with an intelligence agency may itself be a secret requiring protection. The researcher community argued to Congress that sources or agents requiring protection should at a minimum not apply to deceased persons. Congress agreed that it in certain cases is legitimate to consider impact on survivors, but questioned the broad scope of the agencies' definition and instructed the Board to consider a variety of factors in making postponement decisions, including the source or agent's breadth of responsibilities and assignments, the age of the records, and whether an agency's use of a source or method is known by public (for example, the fact that Soviet embassy was bugged during Oswald's alleged visit). See S.Rep. 102-526 at 27-28.

Language in the Senate Report also sheds light on the "confidentiality" standard in Section 6(4), which permits postponement if disclosure would "compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or foreign government, and public disclosure would be so harmful that it outweighs the public interest." In responding to the arguments made by the FBI and other intelligence agencies that secrecy always is required for confidentiality concerns, the Senate report urges the Board to consider in such situations whether there is an express written confidentiality agreement, whether confidentiality otherwise was expressly or implicitly promised, the scope and duration of expected or implied confidentiality, whether the agreement currently requires protection, whether the witness/informant/confidential source is now deceased, and whether the government appears to be seeking postponement only because it believes all such records should be withheld or because of the informant's express desire that the understanding not be made public. In reaching its conclusions, the Board is instructed that postponement in these cases should be kept to an absolute minimum and, when postponement is found advisable, to ensure that it is narrowly drawn for the shortest possible time and releases as much information as soon as possible See id. at 28-29.

The House Report adds that "the criteria for postponing release on national security and privacy grounds include a balancing test, where the public interest in release must be weighed against the demonstrable harm from disclosure." H. Rep. 102-625, part 1 at 26. In making postponement decisions, law enforcement activities that rely on the cooperation of confidential informants are shielded only if "public disclosure would be so harmful that it outweighs the

public interest, as are Presidential security procedures currently utilized or reasonably expected to be utilized by the Secret Service and other government agencies". H.Rep 102-625, part 1at 30. "A limited protection is provided for living individuals who were but are no longer sources of confidential information or intelligence if the release would pose a substantial risk of harm to that individual." Id. at 28. The 1994 House Conference Report on the technical amendments reiterates Congress's intentional "establishment of a narrow protection for confidential informants which requires a more exacting showing than that routinely made by the FBI under the FOIA . . . 'The Committee recognizes that law enforcement agencies must to some degree rely on confidential sources to effectively perform their missions. 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.'" H.Rep. 103-587 at 19, fn 14 (quoting H.Rep. 102-625 part 1 at 28).

Relevant case law on public release of informant information:
U.S. Dept of Justice v. Landano

Generally, prior case law on the extent to which the FBI is required to release informant information to the public (which developed primarily in the context of FOIA litigation) relies on an objective analysis of the degree of risk such disclosures will cause. Factors informing this risk analysis include an examination of law enforcement techniques involved and the degree to which they are routine or already well known to the public, whether the information comes from a closed or open file, the degree of demonstrable risk to personal safety, the existence of explicit promises or demonstrable expectations of confidentiality, and the extent to which the release of the information might interfere with ongoing, pending or prospective law enforcement proceedings.

Last year, the Supreme Court in U.S. Dept of Justice v. Landano (113 U.S. 2014 (1993) decided the nature of the FBI's evidentiary burden under the FOIA's exemption allowing withholding of law enforcement informant information. (A copy of the decision is attached.) In Landano (which involved an inmate convicted for murder of police officer who sought exculpatory evidence provided by informants in the FBI's files) the FBI stated that it generally withholds informant information provided by five types of sources: regular FBI informants, witnesses who are not regular informants, sources in state or local law enforcement agencies, sources in other local agencies, and information provided by private financial commercial institutions and argued that all such sources should be presumed confidential. Id. at 2018. The Supreme Court affirmed lower court rulings rejecting the FBI's position, finding that the FBI has a burden to establish that each document it wishes to withhold "reasonably could be expected to disclose the identity of, or information provided by, a 'confidential source'." Id.

For the Court, the proper standard for the FBI to apply (in the context of the FOIA, which is a less rigorous standard for the FBI to meet than the JFK Act's requirement of "clear and convincing evidence"), "is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that

the communication would remain confidential.," further defining "a source [a]s confidential . . . if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." Id. at 2020.

The Court explicitly rejected the FBI's argument that presumptive confidentiality applies whenever a source cooperates with the FBI and that the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality, finding that this "sweeping presumption [does not] comport[] with 'common sense and probability'." Id. at 2021. Among the sources that the Court noted the FBI hasacknowledged it does not treat as presumptively confidential are newspaper clippings, wiretaps, and witnessers speaking to an undercover agent who therefore do not realize they are communicating with the FBI. Even while claiming a need for blanket inferences of assured confidentiality because of risk of reprisal or negative attention, the Court also noted the FBI admission that reprisal may not be threatened or even likely in any given case. Among the types of sources the Court did find more likely to require confidentiality are paid sources, ones in an ongoing relationship with the FBI, ones whose circumstances of communication with the FBI involve "locations and under conditions which assure the contact will not be noticed," the character of the crime, and sources related to the crime. Id. at 2023. The Court found that the FBI's arguments were otherwise too conclusory, seeking to create an "all but irrebuttable presumption" for secrecy, and suggested that the FBI's broad request for a presumption of secrecy for all informant sources and information seemed based less on the particular sensitivities of any one case but instead on a desire for across-the-board "ease of administration". Id. at 2021.

Analysis of FBI's Briefing Memo and Discussion Issues

The draft memorandum provided by the FBI in advance of the briefing to the Board lists the following classes of confidential informants and provides some general discussion of the reasons it believes this information require protection:

1. Criminal informants (including potential criminal informants and organized crime informants/top echelon informants)
2. National security informants(including double agents, defector sources, and recruitments in place)
3. Cooperating witnesses
4. Sources given expressed promises of confidentiality
5. Persons providing information requiring that confidentiality be afforded its source.
6. Informant symbol numbers and asset code names
7. Recruitment and operation of informants and other sources

The draft memorandum does not, however, address how the FBI views the JFK Act's explicit requirement of narrowly crafted postponements based on clear and convincing evidence of harm to apply to its documents that contain this kind of information. It also advances

arguments in favor of secrecy that were explicitly rejected by the Congress in enacting the statute and by the Supreme Court in Landano. The FBI's memo does not address the issue of how the sensitivities described in the memo might still apply over three decades after the fact and nor does it address the Act's balancing test that incorporates the role of evaluating the public's interest in finding out what happened to their president and how his assassination was investigated in making disclosure determinations. Nor does it differentiate between the continuing sensitivity of information provided by dead versus live sources

Some additional lines that might be drawn in determining what types of sources and source information might be releasable or require postponement involve differentiating among technical sources or information gathered by technical means (such as bugs or wiretaps), especially where the technology has changed or the method used is well known to the public, information provided by an agent or a state or local law enforcement officer or other official source (who has provided the information in the course of official duties), and private citizens who cooperate with law enforcement personnel (who may be dead or alive or may have cooperated voluntarily or under duress). Another relevant question regarding the scope of expected confidentiality is whether the source would have been potentially called to testify in a court of law. (For example a 1968 memo by J. Edgar Hoover states that "as a general rule, all of our security informants are considered available for interview by Department attorneys and for testimony, if needed." See Buitrago, Are You Now or Have You Ever Been in the FBI's Files? at 69, n. 37 (Grove Press 1981). Such a consideration, which may be especially relevant where documents related to the Kennedy assassination or efforts to investigate it are concerned, arguably would indicate a lessened expectation of confidentiality than might otherwise be the case.

These factors illustrate some, but not all, of the issues that informant names, sources, and the information provided by informants and sources raise for the Board in making determinations, either on a broad policy level or on a case by case basis, to release or postpone material in FBI files. The Board may wish to raise these issues during the December briefing or on an ongoing basis as the review process proceeds.

(cite)).