Assassination Records Review Board
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August 11, 1995

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I have the honor of submitting to you the enclosed Reply of the Assassination Records Review Board to the Federal Bureau of Investigation's August 8, 1995 Appeal of Formal Determinations under The President John F. Kennedy Assassination Records Collection Act of 1992.

There are two principal points made in our Reply. First, the Federal Bureau of Investigation has failed to provide the "clear and convincing evidence" required by the JFK Act; and second, much of the information that the Bureau now wishes to redact has already been officially released by the Bureau. We respectfully request that you carefully consider the merits of the arguments raised in our Reply.

In making its formal determinations, the Board carefully considered the assassination records in question and determined that the public interest in the release of all of the information contained in them outweighed the insufficient evidence that the FBI had offered in support of continued secrecy. The Review Board has, and will, postpone the release of information in cases where the statutorily mandated "clear and convincing evidence " is supplied and that evidence outweighs the public interest in disclosure.

A copy of the enclosed Reply, classified SECRET, is being submitted under separate cover to Marvin Krislov, Associate Counsel at The White House.

Sincerely yours,

David G. Marwell
Executive Director

Enclosure

SECRET

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

August 11, 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 ("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 imprecise 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 effectively is retreating from a promise made by its own Director. In his congressional testimony in 1992, Director Sessions pledged that the FBI stood ready 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 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.

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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. 64 (1992) (statement of the Hon. William S. Sessions) (emphasis added).

PART I: THE JFK ACT PRESUMES DISCLOSURE OF ASSASSINATION RECORDS.

The statutory presumption of full disclosure. The FBI Memorandum fails 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 this controlling language, 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.

The evidentiary standard of "clear and convincing" evidence.[2] In addition to ignoring the statutory presumption of full disclosure of records in all but the rarest of cases, the FBI omits meaningful discussion of 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. *See* 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, 102d Cong., 2d Sess., pt.1, at 25 (1992).

[3]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 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." *See* FBI Memorandum, pp. 5-10.

This veil of secrecy is inconsistent with the mandate of Executive Order

PART II: THE FBI's INFORMANT POSTPONEMENTS

The first four of the nine contested documents pertain to informant issues. *See* Exhibits 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 Failed To Meet 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.[4] To support its recommendations for Postponement 2, the Bureau must provide, for example, evidence that the informant is still living and 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

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12958 that whenever "there is significant doubt about the need to classify information, it shall not be classified." Exec. Order 12958, Sec. 1.2(b).

[4]*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.)

protection."

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[5] 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].[6]

Ignoring this statutory burden, the FBI Memorandum 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

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[5]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*, 102d Cong., 2d Sess. 14 (May 20, 1992).

[6]*Hearing Before the Subcommittee on Economic and Commercial Law, House Committee on the Judiciary*, 102d Cong., 2d Sess. 130 (May 20, 1992) (statement of Floyd I. Clarke, Deputy Director, FBI) (emphasis added). Congress agreed with this assessment by rejecting "claims that known informants or deceased informants should be protected." *Hearing Before the House Committee on Government Operations*, 102d Cong., 2d Sess. 30 (1992).

after the fact, any of the informants is possibly at risk.

The Bureau has offered only one reason for not providing clear and convincing evidence: that it would be burdensome. In making this argument, the Bureau certainly has not shown how it would be burdensome with respect to the four documents at issue. More important, 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 offices should have readily retrievable files for each individual informant. 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 ages if still alive. But the FBI did not even bother 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.*

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. These broad-brush arguments should be rejected not only because they are inconsistent with the 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. 7-8.

There is no question that, if the Bureau had 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.[7] 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. Indeed, former Director William Webster had argued that FOIA had caused informants to become an "endangered species." The current Director of Public Affairs of the Department of Justice, Mr. Carl Stern, published a devastating critique of Mr. Webster's argument against disclosure by using the FBI's own files. In the 1980s, Mr. Stern, through FOIA, obtained the FBI's internal study of the effect of FOIA on the recruitment of confidential informants. Mr. Stern showed that, contrary to Mr. Webster's argument, the Bureau's evidence showed that "[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 Exhibit 10).

Thus the Bureau is advancing today the same general argument that it has repeatedly 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.*

(c) The third argument: compromising confidentiality.[8] The legislative history of the JFK Act emphasizes the statutory requirement that the FBI, in advancing this

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[7]Review Board formal determinations of CIA records on August 3, 1995.

[8]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. However, the release of informant symbol or file numbers does not, in and of itself, compromise confidentiality.

argument, is asking the President to ignore. The House Committee on Government Operations concluded in its Report on 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.[9]

This document-specific requirement is the same as that ordered by then-Judge Mikva who wrote, in the FOIA context, that 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. United States Sentencing Commission*, 17 F.3d 1446, 1452 (D.C. Cir. 1994) (Mikva, J.). Here, the Bureau has provided no information about the documents themselves.

In lobbying to the House Government Operations Committee, the FBI pressed the same arguments regarding chilling the cooperation of existing informants or impeding recruitment of new ones that it repeated to the Review Board and now to the President. 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.*[10]

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[9]H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 16 (1992) (emphasis added).

[10]*Ibid.*, p. 29 (emphasis added). *See also* S. Rep. No. 328, 102d Cong., 2d Sess. 28-29 (1992) (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").

The FBI should not be permitted to prevail now on the same arguments that were rejected by Congress when the law was enacted.

C. In the Absence of Clear and Convincing Evidence to the Contrary, the JFK Act Requires Full and Immediate Release of the Appealed Documents.

The individual documents will be examined in turn. See Exhibits 1-4, attached hereto, with redacted portions highlighted in yellow.

-- SENSITIVE INFORMATION FOLLOWS --

-- END OF SENSITIVE INFORMATION --

CONCLUSION

The FBI has recited its own policy preferences and opinions instead of providing the clear and convincing evidence required to overcome the JFK Act's presumptions of disclosure. Its submission on appeal makes no real effort to reconcile its policies with the JFK Act; indeed, they cannot be reconciled. Moreover, the FBI's application of its policies to the appealed postponements is inconsistent with its own releases of assassination records and with other official disclosures by the Government.

Accordingly, the Review Board respectfully requests that the President accept its recommendations to release these assassination records in full.