CHAPTER 4
THE STANDARDS FOR RELEASE OF INFORMATION UNDER THE JFK ACT

Part I: Introduction and Background: Categories of Exempt Information

Section 6 of the *President John F. Kennedy Assassination Records Collection Act of 1992,* 44 U.S.C. § 2107 (Supp. V 1994) ("JFK Act"), provides Federal agencies with grounds for requesting the postponement of public disclosure of assassination records. Beyond the simple statement that "all Government records related to the assassination of President Kennedy should carry a presumption of immediate disclosure," JFK Act, section 2(a)(2), the Review Board had little guidance from Congress concerning how to apply each of the grounds for postponement set forth in section 6. This chapter will explain how the Review Board analyzed and applied each of the standards for declassification listed in section 6.

Part I of the chapter will begin with an overview of the existing law governing the Federal Government's release of information. In addition, Part I will summarize the Review Board's analysis and decision-making about the section 6 standards. Part II will enumerate the general principles that the Review Board established as it applied the provisions of section 6 to individual documents. Part III will discuss the general principles that the Review Board applied in dealing with records that it determined to be less relevant to the assassination. Included in Part III is an analysis of the postponement-by-postponement review process envisioned by the JFK Act and executed by the Review Board for assassination records. Finally, Part IV will evaluate the effectiveness of the JFK Act's declassification standards in terms of the work that the Congress intended for the Review Board to complete.

A. Current Guidelines for Exempting Information from Release

1. The Freedom of Information Act

a. Text of Freedom of Information Act, 5 U.S.C. § 552(b) **("FOIA")**

(b) This section does not apply to matters that are --

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
(B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section

552b of this title), provided that such statute

(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged and confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,
(B) would deprive a person of a right to a fair trial or an impartial adjudication,
(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the

regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.

2. Executive Order 12,958

a. Text of Executive Order 12,958, Section 3.4(a)-(b): Automatic Declassification (April 17, 1995)

(a) Subject to paragraph (b), below, within 5 years from the date of this order, all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. Subsequently, all classified information in such records shall be automatically declassified no longer than 25 years from the date of its original classification, except as provided in paragraph (b), below.

(b) An agency head may exempt from automatic declassification under paragraph (a), above, specific information, the release of which should be expected to:

(1) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state of the art technology within a U.S. weapon system;

(5) reveal actual U.S. military war plans that remain in effect;

(6) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

(7) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

(8) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

(9) violate a statute, treaty, or international agreement.

3. JFK Act Section 6: Grounds for postponement of public disclosure of records

Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that --

(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --

> (A) an intelligence agent whose identity currently requires protection;
>
> (B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or
>
> (C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(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;

(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;

(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;

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

B. Key Distinctions between Standards of Release Under the FOIA, the Executive Order, and the JFK Act

Given that the FOIA was the primary mechanism for access to assassination records at the time that Congress passed the JFK Act, Congress examined how the FOIA had failed to satisfy the public's desire for assassination records and how the JFK Act would need to differ from the FOIA in order to accomplish its objective of releasing as much information as possible about the assassination.

[forthcoming: JFK Act legislative history quotes about the FOIA]

Of course, President Clinton's Executive Order 12,958 did not go into effect until April 17, 1995 -- over 2 years after Congress passed the JFK Act. Clearly, the Executive Order applies to assassination records insofar as assassination records are considered to be of permanent historical value and tend to be over 25 years old. At the time that the Order came into effect, the Review Board compared its provisions to those of the JFK Act and realized that although the Executive Order would require agencies to take a second look at assassination records, it would not require agencies to release the records. Instead, the Executive Order allows agency heads to exempt records from automatic declassification provided that the agency head expected that disclosure of the records would result in one of the nine enumerated categories of harm. Although the Executive Order's standard for declassification appears to be disclosure-oriented, the Executive Order does not hold agency heads accountable for their decision-making.

Congress determined that the JFK Act would best accomplish its objectives if it made agencies accountable. Thus, Congress wrote three essential provisions into the JFK Act: *first,* the statute presumes disclosure of assassination records; *second*, the statute states that the only way to rebut the presumption of disclosure is for an agency to prove, *with clear and convincing evidence,* that disclosure would result in harm and that the expected harm would outweigh any public benefit in the disclosure; and *third,* the statute created an *independent* agency -- the Review Board -- whose mandate was to

ensure that agencies respected the presumption of disclosure and honestly presented clear and convincing evidence of the need to protect information. During the past 3 and ½ years, the Review Board has realized that, without these three crucial accountability provisions, the JFK Act would not have been able to accomplish its objective of releasing the maximum number of assassination records to the public.

1. Presumption of Release

The most pertinent language of the JFK Act is the standard for release of information. According to the Act, "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).

2. Requirement of Clear and Convincing Evidence

For each recommended postponement, the JFK Act requires an agency to submit "clear and convincing evidence" that one of the specified grounds for postponement is present. *See* Sections 6, 9(c)(1).

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). The legislative history of the JFK Act emphasizes the statutory requirement that agencies provide "clear and convincing evidence." 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. H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 16 (1992) (emphasis added).

The terms of section 6 require that information not be postponed unless the threat of harm outweighs the public interest in disclosure. As used in the JFK Act, "public interest" means "the compelling interest in the 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 of President John F. Kennedy." Section 3(10). The Review Board interpretats the balancing requirement to mean that agencies must provide the Review Board with clear and convincing evidence of the threat of harm that would result from disclosure. However, to the extent that the JFK Act leaves room for discretion in evaluating the historical

significance, or public interest, of particular assassination records, it is the Review Board -- not the agency that originated the document -- that is to exercise this discretion. The JFK Act established the Review Board as a panel of independent citizens with expertise as historians and archivists precisely in order to secure public confidence in such determinations. *See*, *e.g.*, S. Rep. No. 328, 102 Cong., 2d Sess. 30 (1992).

When agencies do present to the Review Board evidence of harm that will result from disclosure, it must be more than speculation.

> The [Review] Board cannot postpone release because it might cause some *conceivable or speculative harm* to national security. Rather in a democracy the *demonstrable harm* from disclosure must be weighed against the benefits of release of the information to the public.

H. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 26 (1992) (emphasis added).

3. "Rule of Reason"

Of course, some assassination records are of great interest to the public. With regard to records that had a close nexus to the assassination, the Review Board was extraordinarily strict in its application of the law. For example, the Review Board voted to release in full records from the FBI's pre-assassination Lee Harvey Oswald file because those records were of enormous interest to the public. The FBI appealed to the President nearly all of the Review Board's decisions on those records. The FBI, the Review Board, the White House Counsel's Office, and ultimately the State Department spent a substantial portion of time resolving the issues that arose in the appeal process, and for those important records that were at issue, the Review Board considerefd its time well-spent. Likewise, the Review Board carefully considered other key records and spent as much time as was necessary to make measured and fair decisions about those records.

In an effort to streamline its work, the Review Board consulted with the agencies to work out an approach to considering records that would allow the Review Board to make informed decisions, but not require agencies to spend hundreds of hours locating evidence for and providing briefings on each postponement within an assassination record. The first step to developing a reasonable approach was for the Review Board to formulate some general rules for sustaining and denying postponements. The Review Board's "guidance" to its staff and the agencies became a complex body of rules which this chapter describes in Part II. Once agencies understood the Review Board's approach to a particular issue, the agency could present those facts that the Review Board would need to make a decision on a postponement. For example, with regard to FBI informants, the Review Board worked with the FBI to create a one-page form titled an "Informant Postponement Evidence Form" that the FBI could use whenever it would provide evidence on an informant. The form allowed the FBI to

simply fill in the answers to a series of questions about the informant in question, which in turn allowed the Review Board to focus in on those facts that it deemed to be most determinative in a particular document.
For those documents that were of little or no public interest, the Review Board modified postponement standards in two ways: *First*, it created a set of standards that would apply to records that it designated "not believed relevant," or "NBR." The "NBR" guidelines allowed the Review Board to remove from further consideration those records or files that truly had no apparent relevance to the assassination. *Second*, the Board modified postponement standards to accommodate those records that were not immediately relevant, but shed at least some light on issues that the Congressional Committees that investigated the assassination explored as potentially relevant to the assassination. The Board determined that these marginally relevant records were not appropriate for "NBR" designation, as the "NBR" Guidelines would have resulted in withholding records in full. Instead, the Board passed the "Segregated Collection Guidelines," which ensured that the Review Board staff would review every page of the marginally relevant records, but would not require agencies to present the same amount of evidence in support of postponements.

Thus, throughout its tenure, the Review Board sought to be vigorous in applying the law, but, in order to complete its work, found it necessary to employ a "rule of reason."

C. Summary of Review Board's Application of Declassification Standards to Assassination Records

1. Defining "Assassination Record"

Section 3(2) of JFK Act defines "assassination records" to include records related to the assassination of President Kennedy that were "created or made available for use by, obtained by, or otherwise came into the possession of" the following groups: the Warren Commission, the four Congressional committees that investigated the assassination, any office of the Federal Government, and any State or local law enforcement office that assisted in a Federal investigation of the assassination.

When it passed the JFK Act, Congress intended for the JFK Collection to include the record groups that it identified in section 3(2), but it also intended for the Review Board to carefully consider the scope of the term "assassination record" and to issue an interpretive regulation defining this crucial term.

[forthcoming: JFK Act legislative history excerpts regarding need for definition]

JFK Act, § 7(n)

Interpretive Regulations
The Review Board may issue interpretive regulations

Senate Report, p. 21

Defining Assassination Records
"Assassination records" are defined in Section 3. The definition of assassination records is a threshold consideration for the successful implementation of the Act. Its scope will be the barometer of public confidence in the release of assassination records. While the records of past presidential commissions and congressional committees established to investigate the assassination of President Kennedy are included as assassination records under this Act, it is intended and emphasized that the search and disclosure of records under this Act must go beyond those records. While such records are valuable, they reflect the views, theories, political constraints and prejudices of past inquiries. Proper implementation of this Act and providing the American public with the opportunity to judge the surrounding history of the assassination for themselves, requires including not only, but going beyond, the records of the Warren and Rockefeller Commissions, and the Church and House Select Assassination Committees.

The term "assassination record" was not more specifically defined by the Committee because to do so before more is known about the universe of records would have been premature, and would have further injected the government between the records and the American public. There is a sufficient volume of known assassination records to organize and review at the outset. However, it is intended that the Review Board issue guidance to assist in articulating the scope or universe of assassination records as government offices and the Review Board undertakes their responsibilities. Such guidance will be valuable notwithstanding the fact that government offices will begin to organize and review their records before the Review Board is established. Government offices are required to begin the review and disclosure of records upon enactment to expedite public access to the many records which do not require additional review or postponement. However, the ultimate work of the Review Board will involve not only the review of records recommended for postponement, but requiring government offices to provide additional information and records, where appropriate. Guidance, especially that developed in consultation with the public, scholars, and affected government offices, will prove valuable to ensure the fullest possible disclosure and create public confidence in a working definition that was developed in an independent and open manner.

House Report, p. 33

Section 10(j) [of the House version of the JFK Act] authorizes the Review Board to issue interpretive guidelines to assist in implementing the purposes of this joint resolution. The

Committee does not intend for the Review Board to engage in notice and comment rulemaking as contemplated by the Administrative Procedure Act in issuing its interpretive guidelines. The Committee does encourage consultation by the Review Board with a variety of diverse representatives of general and scholarly interest in assassination materials, including those identified in Section 10(e).

It is the Committee's intent that with a minimum of formality the Review Board shall promptly adopt and make publicly available any necessary interpretive guidelines. Among the topics which the Review Board may wish to address in such guidelines are coordination with executive branch agencies, security procedures, and personnel clearance procedures. It is the Committee's intent that the Review Board exercise broad discretion in the management of its affairs through interpretive guidelines, but any delay in issuing such guidelines should not be allowed to delay the release of assassination materials.

Nominations of Graff, Tunheim, Nelson, Joyce, and Hall

After the nomination hearings, Congress asked every Review Board nominee to provide written responses to the following questions:

Question 7
The definition of "assassination records" contained in the Records Review Act establishing this Board was intentionally left very broad. What kinds of criteria and factors will you use in determining whether or not a document or other item will fall within the definition?[1]

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[1]*Answers to Question 7*

Graff: Plainly any document that directly or tangentially deals with the Assassination will be subsumed under the head of "assassination record." but I believe that some documents and classes of documents will have to labeled such on an *ad hoc* basis.

Tunheim: It is my view that the Board should more fully understand the scope of the potential records before atttempting to define the term. I favor a broad definition in order to fulfill the clear intent of Congress. One important criteria will be the extent to which the record adds to the public understanding of the events and characters involved in the assassination and its aftermath.

Nelson: My sense at this point is that the Board should encourage this broad definition of records while we establish the parameters of the issue. Defining the records is the perfect topi for public hearings. Most individuals who have extensively studied the available information have opinions on this matter. In addition, the index of names from the [HSCA] report, and the subject index in the National Archives will help clarify the issues for us. I'm sure the Board will spend considerable time on this issue because of its importance to the work of the Board.

Joyce: The definition of "assassination records" will be a major challenge for the ARRB to resolve in a workable manner. In my view, the ARRB will need to establish criteria addressing: (a) the temporal proximity of the record in relation to the assassination, (b) the content of the record relative to the assassination, and (c) the relation of the record to important factors and issues perceived to be related to the assassination.

Hall: The statute creating the ARRB defines an assassination record as [statutory definition]. These materials are certainly, therefore, the core of what constitutes the "assassination records" that the

Board is duty bound to treat. Any of these materials that are held in private hands are also covered by the statute and are subject to its provisions. In general, I think that the Board should take a broad view of what constitutes an assassination record within the terms of statute.

Question 8

Many assassination records will likely be in the possession of private citizens, some of whom may be unwilling to permit disclosure. How far should the Board venture to seek out assassination records from these sources?[2]

Question 9

You have significant powers under the Board to reasonably search for assassination records. For example, the Board may administer oaths and subpoena and grant immunity to witnesses.

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[2]*Answers to Question 8*:

Graff: I believe that the Board must respect the privacy of citizens who choose to maintain it by withholding materials. still, I hope that we will be able to exercise considerable persuasion on such people, in the interest of history and public service.

Tunheim: I firmly believe that the Board has an obligation to seek out assassination records from all sources; public and private. The goal of Congress in passing S. 3006 was to ensure broadest possible disclosure of the records relating to the assassination. The fact that a document exists only in private hands should not deter the Board in any way from seeking to compel its transmission to the National Archives.

Nelson: The Board has an obligation to examine the records of former public officials who participated in any aspect or phase of investigation concerning the assassination, or of former public officials closely allied with Kennedy, as well prosecutors, etc. The Board should tread carefully when seeking papers from those who were always private citizens. Papers of individuals who were likely to have played a large role and that may be rich in information may be worth pursuing. In other instances, the peripheral nature of the individual may not be worth the legal problems in obtaining them. In general, this will have to be a flexible policy.

Joyce: Through fair and impartial application of the criteria developed by the ARRB and keeping in mind always the express purposes of the enabling legilation, I believe that the ARRB should be as aggressive as it needs to be toa chieve disclosure of relevant records. That also applies to records held by private citizens, if such records are within the purview of the legislation.

Hall: Personal materials kept by private individuals of events surrounding the assassination pose difficult issues. There is, for example, the question of whether such materials have been "taken" as private property under the statute. Moreover, a diary maintained by a private individual living, let us say, in Nome, Alaska, that recounted his or her reaction to the assassinationis surely not covered by the statute. If, however, a private individual has any of the kinds of materials cited in the statute, then these materials do fall under the Board's purview and are subject to disclosure. Private individuals should not be in the position of holding public records that bear on the assassination. Public officials that maintained private records relating to the assassination, to the extent that those records fall within the bounds of the statute, might also be susceptible to disclosure.

(b) To what extent would you propose compelling disclosure of a record from private and foreign sources?[3]

House Judiciary Committee Hearings from May 20, 1992

Did not find anything.

Green Book

Sen. Glenn at 2

> I believe the major issues include, first, how will agencies and others who hold records define the universe of, quote, "relevant" Kennedy assassination naterials. It is important to be able to go beyond the frame of reference of previous inquiries of Commissions and Committees, but the question must be asked, where will the search for documents end. In other words, what is relevant?

Sen. Boren at 16

> One involves setting the boundaries of, quote, "assassination material." The joint resolution defines the term "assassination material" as "a record that relates in any manner or degree to

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[3] *Answers to Question 9(b):*

Graff: I would hope to proceed as earnestly as possible within the law and the protection of privacy to compel disclosure.

Tunheim: Compelling disclosure of a record from a private and foreign sources would depend largely on the importance of the record for fully understanding the assassination and its aftermath. If in the judgment of the Board, the record is significant, and not reviewable in a public agency, the Board should utilize a broad standard for compelling such disclosure.

Nelson: As an historian, I have never had the experience of serving on a group that had such powers. Fortunately, the Board has a member from the ABA whose expertise will be essential on these matters. Currently, I think the Board should consider use of all its powers, including offering immunity, compelling disclosure from private and foreign sources and disclosing information under seal of a court. I also think the Board should be very cautious in using these powers. Before resorting to legal confrontation, the Board should make every effort to reach agreement through negotiation. In addition, the Board should weight the value of the information to be gained and exert all it powers when there is some indicationthat information is vital.

Joyce: In light of the broad powers of the ARRB to search reasonably for assassination records, I believe: (b) the Board might propose disclosure of a record by private and foreign sources, though I would seek legal guidance as to what steps would be necessary (much less desirable!) to compel such disclosure.

Hall: If the material fell under the statutory provision for an assassination record, then the Board should compel its disclosure, or at least consider whether it should be postponed for disclosure.

the assassination of President John f. Kennedy." Given the wide ranges of theories that have developed as to who killed President Kennedy and why, many types of records arguably relate in some way to the assassination. What records regarding, for example, Cuba, Vietnam, and organized crime should be covered? This matter requires careful consideration.

* * *

I do, however, suggest that the Committee, either in the Joint Resolution itself or in report language, set more precise parameters defining "assassination material," or else direct the Review Board to do so promptly after it is established. Otherwise, we may end with widely varying interpretations by the various records agencies and committees as to what documents should be forwarded to the Review Board executive director.

[forthcoming: analysis of Review Board consideration of definition of assassination record]

2. Identifying Groups of Records

Once the Review Board promulgated its regulation defining "assassination record," it turned its attention to those assassination records that were clearly within the scope of the statutory definition of "assassination record." Prior to the Review Board's nomination and appointment in 1994, some of the agencies had started to identify and process the following assassination record groups:

a. The FBI's "Core and Related" Files

The FBI's "core and related" files consist of those records that the FBI gathered in response to FOIA requests that it received in the 1970s for records relating to the assassination of President Kennedy. The "Core and Related" files include the FBI files on Lee Harvey Oswald, Jack Ruby, Marina Oswald, Marguerite Oswald, George DeMohrenschildt, Ruth Paine, and Michael Paine, as well as the FBI's Warren Commission files, the assassination investigation file, and the "administrative" file on the investigation into the assassination that the House Select Committee on Assassinations. The FBI began its processing of the "Core and Related" files in _____ , 1992, and opened in full _____ pages at the JFK Collection before President Clinton nominated the Review Board members.

b. The FBI's "House Select Committee on Assassinations" Subject Files

During the HSCA's tenure, the Committee made a number of requests to the FBI for records that the Committee believed might produce records relevant to their investigation of the Kennedy assassination. In response to the HSCA's requests, the FBI made available to the HSCA staff approximately 200,000 pages of FBI files. The FBI began its processing of the "HSCA Subject" files in _____, 1993, and opened in full _____ pages at the JFK Collection before President Clinton nominated the Review Boad members.

c. FBI records on the Congressional Committees that Investigated the Assassination

[forthcoming: overview of FBI's Records from Church, Pike, Rockefeller, and Edwards]

d. CIA's Lee Harvey Oswald "201" file

Part II: Declassification Standards

Section 6 of the JFK Act establishes a framework for the Review Board to analyze agency claims for continued protection of assassination records. The Review Board's primary purpose, as outlined in section 7(b) of the JFK Act, is to determine whether an agency's request for postponement of disclosure of an assassination record, or information within an assassination record, meets the criteria for postponement set forth in section 6. Section 6 consists of an introductory clause, which establishes the "clear and convincing evidence" standard, and five subsections that set forth the criteria under which the Review Board can agree to postpone public disclosure of assassination-related information.

As part of this chapter, Review Board's decision-making, setting forth in a general way how the Review Board progressed from reviewing, considering, and not voting on, four (4) Warren Commission records in its January, 1995, meeting, to considering and voting on 5,036 documents from eight (8) Federal agencies in its March 10, 1998, meeting.

A. Standard of Proof: Clear and Convincing Evidence

Text of Section 6

> *Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that:*

2. Review Board Guidelines. For each recommended postponement, the JFK Act requires an agency to submit "clear and convincing evidence" that one of the specified grounds for postponement is present. *See* Sections 6, 9(c)(1). The Review Board required agencies to submit specific facts in support of each postponement, according to the Review Board's guidelines for each postponement type.

3. Commentary. Although the FBI and the CIA, in particular, argued that the Review Board could rely on general arguments and "position papers" to sustain postponements, the Review Board determined that the clear and convincing evidence requirement was a document-specific one. The Board required agencies to present evidence that focused on individual postponements within individual documents.

Although the JFK Act clearly required agencies to provide "clear and convincing evidence" in support of its postponements, the JFK Act did not establish a mechanism for when and how such evidence should be presented. Given the absence of clear statutory guidance on the question of when agencies should present their evidence, the Review Board considered Congress' intent about how to receive agency evidence.

The Senate Report offers the following guidance: "to the extent possible, consultation with the government offices creates an understanding on each side as to the basis and reasons for their respective recommendations and determinations. S. Rep. No. 328, 102 Cong., 2d Sess. 31 (1992). The Review Board did consult with Government offices to determine fair, efficient, and reasonable procedures for presenting evidence, inviting the agencies to make oral and/or written presentations of evidence to the Review Board.

When the Review Board first began to review assassination records, it decided that it would begin with pre-assassination records from the Lee Harvey Oswald files at the FBI and the CIA. But, rather than address the documents in chronological order or on a document-by-document basis, the Review Board recognized that it would need to establish declassification policy on the major issues that it would face in assassination records. In the case of the FBI records, the Review Board's views on the "clear and convincing evidence" standard came to light according the following chain of events. First, the Review Board slated a group of FBI records for review and notified the FBI of the meeting date at which it intended to vote on the records. The Review Board invited the FBI to present its evidence. Second, the FBI requested an audience with the members of the Review Board. At the briefing, the FBI presented its position to the Board -- both in an oral presentation and in a "position paper." The FBI's "position papers" (attached) summarized the FBI's general policy preferences in support of continued classification of certain categories of information. Third, the Review Board staff researched existing law on each of the FBI's "positions" and determined that the arguments that the FBI put forth in support of its JFK Act postponements were essentially the same arguments that the FBI offers to courts in support of its FOIA decisions. Of course, in legislating the declassification standards of the JFK Act, Congress intended for the JFK Act standards, and specifically <u>not</u> the FOIA standards -- to apply. Aware of Congressional intent, the Review Board finally rejected the FBI's general policy preferences on the basis that the arguments did not constitute the "clear and convincing" evidence necessary to support a request for a postponement under section 6. The FBI did appeal the Review Board's decisions to the President, but the Review Board's document-specific interpretation of the "clear and convincing" evidence standard ultimately prevailed.

B. Intelligence Agents

Text of Section 6(1)(A)

> *. . .clear and convincing evidence that the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --*

(A) an intelligence agent whose identity currently requires protection

1. CIA Officers

a. Review Board Guidelines. Names of CIA Officers who are still active or who retired under cover in potentially risky circumstances were generally protected. Names of officers who were deceased or whose connection to the CIA was public knowledge were generally released throughout the collection.

"CIA Employee" was used as substitute language, though when available, useful, and appropriate an alias or pseudonym was substituted.

b. Commentary. Review Board members confronted the name issue in the first CIA document they reviewed but did not close the issue until two years later. The drawn out review of CIA employee names points to some of the challenges that existed in the process and to the seriousness with which those involved, both on the Review Board and at the Agency, approached the task at hand.

CIA began by defending the protection of employee names as a matter of policy. First, since many employees are "under cover," the maintenance of that cover is critical to gathering intelligence. CIA contended that the identification of a name can identify the cover provider and jeopardize operations. Second, although the majority of names are of retired CIA employees, CIA has a confidentiality agreement with them. Many of these former employees objected to release of their former Agency affiliation, suggesting that such release might jeopardize business relationships or threaten personal safety. Initially, CIA wished to argue these as general principles for the protection of all employee names. But the Review Board determined that the merits of these arguments could only be determined on a case-by-case basis. Gradually the CIA began to provide supporting evidence of the postponement of individual names.

CIA's initial refusal to provide evidence on individual names was met, not with the wholesale release of names by the Board, but with a firm but patient insistence that the Agency meet the requirements of the Act. Names of a few individuals who were of central importance to the JFK story were released early in the process, but for others the Board gave the Agency a number of additional opportunities to provide specific evidence. For example, December 1995 was the first name day, a Board meeting at which the Agency was to provide evidence for names encountered in records during the previous six to seven months. CIA offered a generalized blanket response. Realizing that the personal safety of individuals could be at issue, Board members gave CIA more time to provide evidence. Other name days were set in May 1996 and May 1997. As deadlines for submission of evidence approached, CIA agreed to release some of the names, but in most cases, continued to offer less than satisfactory evidence on those they wished to protect. By May of 1996 the position of the Board on names of CIA employees was as follows: There is a presumption that the true name of

a CIA employee should be opened. However, the name should be protected if the individual retired under cover or abroad if the individual objects to the release, in which case the presumption shifts to release unless an individual is important to the assassination story. The name may also be postponed if the Agency is able to identify an ongoing operation in which the individual has been involved or if it can be demonstrated that the person is still active for the Agency. The Board gave the Agency until May 1997 to provide evidence on the remaining names. Over the year, the list of pending names grew as review expanded from the Oswald 201 file to the Sequestered Collection.

When the name issue was finally resolved in July 1997, the names were viewed in two categories: those with high public interest and those with a reduced level of public interest. High public interest names included all those that appeared in the 201 file and those that appear frequently in the collection and/or considered important to understanding the assassination. Progress had already been made. Fifty-eight of the 83 names in the 201 file that had been pending at some point were released by this date. CIA had begun to provide specific and convincing evidence on names. The Board voted to protect a number of names and released a few additional names. Those names with lower public interest outside of the core collection were postponed with a reduced level of scrutiny than those more central to the assassination story.

Thus, the Review Board considered the names of CIA officers on a case-by-case basis when the individuals were seen as having high public interest as part of the story of the Assassination of President Kennedy. High public interest was determined by a substantive connection to the assassination story or by the appearance of the name in CIA's core assassination files, notably Oswald's 201 file. The Board demanded specific evidence of the need to protect the individual. It was presumed that employee names would be released if their identities were important to the assassination story unless the CIA could provide convincing evidence of the need for protection. This evidence included the current status and location of the individual and the nature of the work he or she did for the Agency.

This approach was the most practical given the limited time and resources available to complete review of the files. The Review Board would have preferred to review each name at the same high level of scrutiny. On the other hand, the CIA was compelled to release many more names than they would have desired. Though protracted and selective, the review of CIA employee names forced the CIA forced to take a careful look at them and weigh the need to postpone each name, and it allowed the Review Board to carefully weigh evidence on names of import.

2. "John Scelso" (Pseudonym)

a. Review Board Guidelines. The true name of the individual known by the pseudonym of John Scelso was protected but will be opened in full on either May 1, 2001 or three months after the decease of the individual, whichever comes first.

b. Commentary. The postponement of the true name of John Scelso was an instance when public interest was very high, but the evidence to support postponement outweighed it. John Scelso was a throw away alias used by the CIA employee who was head of WH3 during the period immediately after the assassination of President Kennedy. His name appears on hundreds of documents, many of which were the product of the Agency's extensive post-assassination investigation that spanned the globe. The Board was inclined to release Scelso's true name, but the Agency argued strongly against release. As an interim step, "Scelso" was inserted as substitute language. CIA provided evidence on the current status of the individual, shared correspondence sent by him, and even arranged an interview between him and a Review Board staff member. At the May 1996 Board meeting, Board members determined that the evidence was persuasive, but still wanted to insure that his true name would be revealed as soon as was prudent. Their solution was the release in five years or upon his decease.

C. Intelligence sources and methods, and other matters relating to the national security of the United States

Text of Section 6(1)(B) and (C)

> *. . .clear and convincing evidence that the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --*
>
> *(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or*
>
> *(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States , the disclosure of which would demonstrably impair the national security of the United States;*

1. Information that Identifies CIA Officers

a. Review Board Guidelines. Identifying information was approached using the same standards applied to true names. If it was determined that the identity of the officer required protection, specific identifying information was protected,

however generic information may have been released.

b. Commentary.

2. CIA Sources and Methods

a. Review Board Guidelines. Sources, Assets, Informants and the Identifying information that describes them were reviewed under standards similar to those for CIA officers. Names that carry a high level of public interest were subjected to close scrutiny. The Board protected the identity of foreign nationals unless they are of high public interest in relation to the assassination story, in which case CIA was required to provide specific evidence of the need to postpone. Sources, assets and informants in this country were protected if CIA could demonstrate that ongoing operations could be harmed by release of the individual's name. If none of these criteria could be met the name of the individual was released. In addition, names of individuals whose connection to the CIA was a matter of public knowledge, especially if previously released in US government records, were released.

b. Commentary. The Board's decision to protect the name of Sources, assets, and informants in cases where the identity of the source is of reduced public interest was based on two factors: the concern that, since CIA sources generally live outside the Untied States, they risk harm if their identities were revealed. In records where the identity of the source is of possible public interest in relation to the assassination story or is important to understanding information related to the assassination, the CIA was required to provide additional evidence to support the protection of the source's identity. The Board protected the sources for ten years except in cases where it might be inferred that the source was committing treason. In these cases, the name and identifying information for the source was protected until 2017.

3. CIA Pseudonyms

a. Review Board's Guidelines. Pseudonyms were released with only a few exceptions. In some instances pseudonyms were used as substitute language for the individual's true name.

b. Commentary.

4. *CIA Crypts*

a. Review Board Guidelines. Crypts or digraphs are generally releasable within the JFK collection and in related records. All US government crypts are released. "LI" crypts, especially those in the core files, are generally releasable. "AM" crypts are generally releasable. For all other crypts, the digraph is usually

protected and the rest of the crypt is released. A few exceptions to these guidelines exist. For these, CIA was required to present specific evidence of the need to protect.

b. Commentary. Early phases of the review of crypts highlighted the cultural differences between the Agency and the Review Board. For the Agency, crypts were an operational method that required protection despite the fact that CIA had years ago replaced most of the crypts at issue. For the Review Board, crypts, having been conceived as a code to obscure an identity or an operation discussed in a document, could presumptively be released without compromising the identity or the operation. Some push and shove in the early months of Board deliberations brought the two entities to a middle ground where CIA yielded to the release of most crypts and digraphs in the JFK context and the Review Board acknowledged that some sensitive crypts required protection.

Early in the review process the CIA argued for the protection of all crypts, even those such as ODENVY- the crypt for the FBI- which were no longer used and which had been inadvertently released in other records. The Board quickly rejected this postponement. For other crypts, the burden of proof was on the Agency, and they began to identify the crypts for the Board. Those that might be sensitive were tabled at the early meetings so that CIA could provide additional information. At one point CIA complained that the research necessary to identify all the crypts was cumbersome. But since the Act requires that agencies provide clear and convincing evidence, CIA continued to reveal the identities to the Board. Next, after the release of a number of LI-crypts -LI was the digraph for Mexico City at the time of the assassination- CIA argued for the postponement of all "LI" series crypts on the grounds that mosaicing would allow researchers to piece together the puzzle and discern the identity being protected by the crypt. The Board rejected this argument, and CIA provided more detailed evidence for crypts they considered more sensitive. When faced with crypts that refer to sensitive operations, the Board opted for a contextual treatment of crypts. Crypts for some sensitive operations may be released in many circumstances, but in other contexts when release of the crypt may reveal the sensitive operation, it was postponed.

The crypt-by-crypt review was productive and necessary for core records, but soon it became clear that this would not be possible for the entire collection since hundreds or thousands of different crypts appear in the assassination related records of the CIA. The solution was the postponement of the digraph and release of the rest of the crypt for crypts outside of the LI, AM, and OD series. Thus, the majority of crypts in the collection were released in full or released with the digraph protected. Sensitive crypts for which CIA has provided convincing evidence are protected in full; For AM and LI crypts in non-core files, the digraph may have been protected when [a] the crypt appears next to a true name that has been released; [b] when the crypt appears next to specific identifying information; [c] when convincing evidence has been provided of the need to protect.

5. CIA Slugline

a. Review Board Guidelines. The slugline is releasable according to the same criteria applied to crypts and digraphs.

b. Commentary. The slugline is a routing action indicator, the components of which are crypts, that appears just a couple of lines above the text in CIA cables. At the very beginning of the review process, the CIA had argued to postpone the slugline even when the crypts in the slugline were released elsewhere. An example can be found in the slugline RYBAT GPFLOOR. RYBAT is a crypt that means secret, and GPFLOOR was the crypt CIA gave to Oswald in the post-assassination investigation. In a number of records CIA was willing to release the RYBAT indicators at the top and bottom of the record and GPFLOOR when it appeared in the text but requested postponement of the slugline RYBAT GPFLOOR. This was a knee jerk reaction by CIA. When asked why it should be postponed the response was a simplistic, CIA cannot reveal the slugline. The Agency had no reason to protect the slugline other than habit, and when the Act forced the CIA to consider this aspect of their culture of secrecy, the only reasonable response was release.

6. CIA Surveillance Methods

a. Review Board Guidelines. CIA surveillance methods, the details of their implementation and the product produced by them are generally releasable in the context of the JFK story, except when convincing evidence has been provided that they are politically or operationally sensitive. When postponed, the language substituted for this type of redaction was “Surveillance Method,” “Operational Details,” or “ Sensitive Operation.”

b. Commentary. Since surveillance, notably teletaps and photo operations, were a central part of the Oswald Mexico City story, the Review Board addressed them early in process during review of Oswald’s 201 file. CIA attempted to defend postponement of surveillance as a current method that requires continued protection. The Board’s response was that the fact CIA has used the type of surveillance methods employed in Mexico City is common knowledge and that officially acknowledging the use of these methods in Mexico City in 1963 does not necessarily imply that the operations continue today. The Board concluded that the public interest far outweighed any possible risk to national security and directed release of the information. However, in records that may have revealed sensitive aspects of an operation, those aspects were postponed if CIA was able to provide specific and convincing evidence.

7. CIA Installations

a. Review Board Guidelines. All CIA installations related to the Mexico City story are releasable from 1960 through 1969. With the exception of a

few installations for which CIA has provided convincing evidence of sensitivity, all remaining installations from the date of the Assassination to the publication of the Warren Commission Report are releasable in the context of the Assassination story. In Oswald's 201 file, again with the exception of a few installations for which CIA has providing convincing evidence of sensitivity, all installations are releasable from 01/01/61 through 10/01/64. Outside of these time frames, CIA installations are protected.

b. Commentary. The Review Board chose substitute language for these postponements that will allow researchers to track individual CIA installations through the JFK collection without revealing the exact location of the installation. To accomplish this, the world was divided into five regions: Western Hemisphere, Western Europe, Northern Europe, East Asia/ Pacific, and Africa/ Near East/ South Asia. Then a number was added to each different location in the region. Thus, substitute language such as "CIA Installation in Western Hemisphere 1" serves as a place holder for a particular installation in all CIA related records in the collection.

From the beginning the Review Board displayed an inclination to release CIA installations. During first phase of review of CIA records, Review Board members examined documents related to the Mexico City story. In this context, they voted to release CIA installations over only minor objections from the Agency. But as the context broadened to the world wide sweep that the CIA made after the assassination, the location issue became more contentious. CIA argued for postponement but produced only a minimal amount of evidence to defend the postponements. Having been offered insufficient evidence, the Board voted for the release of all CIA installations that appeared in records they reviewed at the January 1996 meeting. CIA responded by assembling an appeal package. The suggestion of appeal sharpened the debate. Anticipating an appeal, Board members stressed the importance of communicating to the White House their frustration with the sketchy evidence initially provided. They wanted to make informed responsible decisions but were hampered by receipt of incomplete evidence. And Board members worried that precious time might be squandered on the review of just a few records if they could not obtain complete evidence in a timely manner. Further, since CIA records were among the first reviewed by the Board, they were concerned that their handling of CIA issues would be scrutinized by other agencies. Ultimately, the Agency provided a complete evidence package that convinced the Board members of the sensitivity of a small number of CIA installations. However the Board believed that public interest related to the assassination story weighed heavily for release of CIA installations during a period of time that has arguable relevance to that story. Board members didn't want to make this an "Oswald issue," so they established a time frame broader than the Oswald story. With the noted exceptions, CIA installations referenced in the 201 file were released from 01/01/61 through 10/01/61 and those that appear in the rest of the collection the were released from the date of the assassination to the end of the Warren Commission.

The installation issue exemplifies two recurring themes in the review process. The

first is that layers of evidence that were slowly added by the Agency. The CIA would initially provide only minimal evidence of a postponement. Without clear and convincing evidence, the Board voted to release the information. The CIA then responded with a more comprehensive evidence packet sometimes accompanied by a threat of appeal to the president. While this pattern was frustrating and slowed the early stages of the review process, the larger issues were sorted out and addressed. CIA's reluctance to share complete information may have been motivated by a concern that they were sharing secrets beyond the immediate assassination story or a fear that the Review Board might not act responsibly with the information. But the submission of evidence became more dependable when CIA understood that the Board would use the evidence as mandated by the act and that such evidence was required if postponements were to be sustained. The second theme is that appeal to the president loomed large but was something that both the Agency and the Review Board wished to avoid. The Board was willing to review additional evidence even though they had given CIA ample opportunity to present it before they reviewed the records. This was motivated by a desire to accomplish a responsible review, but possibly also by a wish to avoid an appeal to the president. CIA provided the additional evidence, and often released additional information. The release may have been an admission that the information was not as sensitive as they had argued, but it may also have been an attempt to avoid appeal to the president. The check provided by appeal to the president was never utilized in the review of CIA records, but it did influence the review of those records.

8. CIA Prefixes (Cable, Dispatch, Field Report)

a. Review Board Guidelines. Cable Prefixes, Dispatch Prefixes and Field Report Prefixes were released when the installations to which they refer were released and protected when the installation to which they refer were protected. Substitute language for cable prefixes parallels that was applied to CIA installations, for example: "Cable Prefix for CIA Installation in Western Hemisphere 1." Language for the other prefixes was "Dispatch Prefix" and "Field Report Prefix."

b. Commentary.

9. CIA Job Titles

a. Review Board Guidelines. CIA JobTitles were released except when their disclosure might reveal the existence of an installation that is protected or the identity of an individual that requires protection.

b. Commentary.

10. CIA File Numbers

a. Review Board Guidelines. All file numbers that refer to Mexico City, except those for which CIA has provided convincing evidence of their sensitivity, are releasable. All remaining country identifiers (the first segment before the hyphen) are protected with the exception of all “15" and “19" files. 201 file numbers are generally releasable in the context of the JFK assassination story.

b. Commentary.

11. CIA Domestic Facilities

a. Review Board Guidelines. References to domestic CIA facilities which are a matter of official public record were released. Domestic facilities not publicly acknowledged were protected if CIA provided evidence of their sensitivity or if they are of peripheral interest to the assassination story.

b. Commentary.

12. CIA Official Cover

a. Review Board Guidelines. In Congressional documents, cover information was released unless the information might reveal details of the scope of official cover or important details about the mechanisms of official cover that were not generally known to the public. Information was released if the CIA or another agency of the Executive Branch was able to demonstrate that it has taken affirmative official action to prevent the disclosure of such information in the past and that its release in a particular record would cause identifiable damage to national security. In Executive Branch documents and in documents derived from Executive Branch documents, substitute language such as “official cover” or “details of official cover” was used in lieu of the actual cover or the details of official cover. The cover status of certain high-profile individuals was released when disclosure has previously been permitted by affirmative official acts of the Executive Branch of the US government. Cover status of other individuals was disclosed only to the extent that they were important to the assassination story. They were handled on a case-by-case basis.

Substitute language: “Official Cover,” “Details of Official Cover,” “Location.”

b. Commentary.

13. Human Sources in FBI Foreign Counterintelligence (Assets)

a. Review Board Guidelines. The Review Board evaluates the need to postpone the identity of human sources in foreign counterintelligence operations on a case-by-case basis, considering the following factors in making its determination about a particular asset:

(1) the significance of the information that the source provided to understanding the assassination;

(2) the importance of the identity of the source to assessing the accuracy of the reported information; and

(3) the significance of the threat of harm to the source from disclosure, considering at least the following:

(a) whether the source is a citizen of a foreign country;

(b) the type of information that the source provided;

(c) the amount of time that had passed since the source last provided information; and

(d) any specific evidence of harm or retaliation that might come to the source or his or her relatives.

In assassination records that are more closely related to the events of the assassination, the Review Board released the identity of FBI assets. The Review Board was willing to protect the identities of FBI assets where the threat of harm to the source from disclosure outweighed the need to release the identity of the source.

b. Commentary. In its position paper, the FBI defined "intelligence source" as "any individual who has provided or is currently providing information pertaining to national security matters, the disclosure of which could reasonably be expected to result in damage to the FBI's intelligence and counterintelligence-gathering capabilities."

The FBI offered the following arguments in support of its request to keep intelligence sources' identities secret: (1) Review Board disclosure of intelligence sources would harm the FBI's ability to develop and maintain new and existing sources, because sources would reasonably believe that the Government would reveal their identities. (2) Review Board disclosure of intelligence sources may subject the sources, their friends, and their families to physical harm, ridicule, or ostracism.

The Review Board's interpretation of the "clear and convincing" evidence standard required it to reject the FBI's general policy arguments, and instead required the FBI to present postponement-specific evidence of harm that explained why the FBI wished to protect the identity of the particular person at issue. Once the Review Board examined the FBI's evidence, it would balance that evidence against the public interest of the document at issue and determine whether to protect or release the identity of the source.

15. FBI Foreign Counterintelligence Activities

a. Review Board Guidelines. As a general rule, the Review Board believes that most aspects of the FBI's foreign counterintelligence ("FCI") activities against Communist Bloc countries during the cold war are well-known the public, are of high public interest, and are not eligible for postponement pursuant to § 6(1)(B)-(C) of the JFK Act.

b. Commentary and Overview of Appeals. The JFK Act's legislative history instructs the Review Board to consider a variety of factors related to the need to postpone disclosure of intelligence sources and methods, including the age of the record, whether the use of a particular source or method is already well-known by the public, . . . and whether the source or method is inherently secret, or whether it was the information it collected which was secret. S. Rep. No. 328, 102 Cong., 2d Sess. 2977 (1992).

In March and April of 1996, the Review Board considered and voted on a group of FBI records relating to the FBI's FCI Activities. In response to the Review Board's "Requests for Evidence" on the FCI records, the FBI had provided its "position paper" on FCI activities. In its position paper, the FBI defined "intelligence activities" as "intelligence gathering action or techniques utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest." The FBI's primary argument in support of its request for continued secrecy for intelligence activities was that disclosure of specific information describing intelligence activities would reveal to hostile entities the FBI's FCI targets, measures, and priorities, thereby allowing hostile entities to develop countermeasures.

On May 10 and 28, 1996, the FBI appealed to the President 17 records -- all relating to the FBI's surveillance of officials and establishments of four Communist countries (the Soviet Union, Cuba, Czechoslovakia, and Poland) during the 1960s. The FBI's primary arguments were that disclosure of the information would reveal sensitive sources and methods that would compromise the national security of the United States, and that disclosure of the targets of the surveillance (four Communist countries) would harm the foreign relations of the United States.

The FBI sought to postpone five types of source and method capabilities: tracing of funds, physical surveillance (lookout logs), mail cover, electronic surveillance, and typewriter and fingerprint identification. The Review Board's responses dealt with each source or method in turn, and specific details regarding the appeal of each issue are discussed below.

In response to the FBI's argument that disclosure of the information would reveal sensitive sources and methods and compromise the national security, the Review Board responded that the JFK Act's statutory presumption of disclosure and argued

that little harm to foreign relations would result since the FBI had previously disclosed publicly the very sources and methods that it sought to hide, and since the FBI publicly trumpeted in the 1960s the fact that it had targeted the very Communist-Bloc countries whose identities it sought to conceal on foreign relations grounds. In response to the FBI's argument that disclosure of the targets of the surveillance would harm the foreign relations of the United States, the Review Board responded with three arguments: *first,* the information that the FBI sought to protect is widely available in the public domain, from both official government sources and secondary sources, so if foreign relations are harmed by disclosure of the information, then the harm has already occurred; *second,* the FBI simply did not prove its argument that the FBI may have violated international law or "diplomatic standards" by employing the sources or methods at issue -- the FBI did not cite the laws or treaties to which it referred and the Review Board could not locate any laws or treaties that were in effect at the time that the records were created; and *third,* other governments do acknowledge that, in past years, they conducted foreign counterintelligence operations against other countries.

The Review Board believed that the FBI and the State Department had not provided evidence of a "significant, demonstrable harm" to current foreign relations or intelligence work. Thus, it continued to argue that the FBI and the State Department's requests for postponement should be denied.

In late 1996, the FBI withdrew the first two of its pending appeals, including some records in which the Review Board voted to release information obtained from a technical source

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To the extent that the information in the proposed redaction does not meaningfully contribute to the understanding of the assassination, the Review Board is more willing to allow the FBI to postpone direct discussions of FCI activities against non-Communist Bloc countries. With regard to the FBI's "Segregated Collections," the Review Board stated,

> It is presumed that the FBI will, at least partially, carry over its post-appeal standards for disclosing foreign counterintelligence activities targeting Communist-bloc nations. To the extent that the HSCA subjects reflect foreign counterintelligence activities against other nations that have not been addressed by the Review Board in the "core" files, the FBI will be allowed to redact direct discussion of such activities, unless the information in the proposed redaction meaningfully contributes to the understanding of the assassination.

15. Information that Reveals the FBI's Investigative Interest in a Communist Bloc Diplomatic Establishment or Personnel

a. Review Board Guidelines. The Review Board releases information that reveals that the FBI has an investigative interest in Communist Bloc countries' diplomatic establishments or personnel. For example, the Review Board routinely releases case captions such as "FCI-R" (foreign counterintelligence-Russia), "FCI-Cuba," "FCI-Czechoslovakia," and "FCI-Poland."
As a general rule, the Review Board agrees to protect information that reveals that the FBI has an investigative interest in a non-Communist Bloc foreign diplomatic establishment or in foreign personnel.

b. *Commentary.* In the FBI's May 10 and 28, 1996, appeals to the President, the overriding issue was whether the FBI could, in 1996, keep secret its investigative interest in the diplomatic establishments or personnel of Communist Bloc countries. For a full discussion of the Review Board's decision-making, *see* section 15(b) above.

16. Technical Sources in FBI Foreign Counterintelligence

a. Review Board Guidelines. The Review Board releases all general information and some specific information (or operational details) regarding technical sources on Communist Bloc countries' diplomatic establishments and personnel. "General" information is information that the FBI obtains from its technical sources on Communist Bloc countries' diplomatic establishments and personnel, including transcripts from electronic surveillance. "Specific" information is information regarding installation, equipment, location, transmittal, and routing of technical sources. The Review Board evaluates "specific" information about technical sources on a case-by-case basis, agreeing to sustain postponements provided that the FBI proves that the "operational detail" at issue is currently utilized and not officially disclosed.

For that material that does not contribute in a meaningful way to the understanding of the assassination, the Review Board releases as much information as possible about the FBI's use of technical sources in its foreign counterintelligence activities against non-communist bloc countries, but the Review Board will allow the FBI to protect the identity of the country that is the target of the FBI's surveillance. The Review Board is more willing to protect specific details regarding installation, equipment, location, transmittal, and routing of technical sources where the FBI can prove that the source currently requires protection and that the Government has not officially disclosed the source.

b. Commentary. In the spring of 1996, the Review Board considered and voted on a group of FBI documents that contained, *inter alia*, information about technical sources in FBI FCI investigations. In addition, the JFK Act specifically identifies "listening devices on telephones" as an "intelligence method" that should *not* be postponed in circumstances where they are "already well known by the public." S. Rep. No. 328, 102d Cong., 2d Sess. 28 1992) (emphasis added).

The FBI's use of non-human sources or methods (*e.g.,* electronic surveillance and "black bag jobs") in foreign counterintelligence operations against Communist Bloc countries diplomatic establishments and personnel is, in many aspects, a matter of official public record. The FBI appealed to the President a number of Review Board decisions involving non-human sources or methods. The Review Board staff called to the attention of the President those prior disclosures that we believed were relevant to deciding the issues on appeal.

In its May 10, 1996, appeal of the Review Board's decisions on FCI records, the FBI requested that the President override the Review Board's decisions to release information that related to electronic intercepts of telephone and teletype communications involving Communist Bloc officials. In its appeal briefs, the FBI argued that its decisions regarding the targets of its electronic surveillance are secrets. The Review Board collected a large body of evidence proving that, at least with regard to Communist-Bloc countries, the Government has already acknowledged that the FBI conducted extensive technical surveillance of foreign establishments during the 1960s. In fact, the official public record and secondary sources revealed information regarding wiretaps and electronic surveillance against foreigners and foreign establishments that was more specific than information that the FBI sought to protect.

17. Classified Symbol and File Numbers for Technical Sources (usually electronic surveillance, or ELSUR) in FBI Foreign Counterintelligence

a. Review Board Guidelines. As a general rule, the Review Board agrees to postpone until the year 2017 symbol and file numbers for technical sources provided that the source is still properly classified pursuant to the current Executive Order. The Review Board releases classified symbol and file numbers for technical sources if the number has been previously released in a similar context, or if the source is of significant interest to the public. The Review Board agreed that the phrases, "source symbol number" and "source file number" would be adequate substitute language.

b. Commentary. Originally, the FBI's position on appeal was that, at least in some cases, the symbol number and much of the information obtained from the corresponding source or method required postponement.

18. Other Classified File Numbers in FBI Foreign Counterintelligence

a. Review Board Guidelines. The Review Board releases classified file numbers when they the file number reveals information about foreign counterintelligence activities against Communist Bloc countries. The Review Board has voted to protect classified file numbers where the FBI has provided particularly

compelling evidence in support of its request for postponement. The primary factor that the Review Board considers in deciding to postpone a particular classified file number is whether the FBI can show that it has a current and ongoing need to protect the number.

For that material that does not contribute in a meaningful way to the understanding of the assassination, the Review Board agrees to protect classified file numbers for non-technical sources.

b. Commentary.

[Discussion of “202" classification -- Review Board June 14, 1996, response, pp. 5-7]

19. FBI Mail Cover in FCI Investigations

a. Review Board’s Guidelines. The Review Board released information that revealed that the FBI conducted mail cover operations against the Soviet Embassy in the 1960s.

[need to locate other documents in which the mail cover issue arose to determine the extent to which the Board released such information. FBI may have unilaterally released mail cover information after this appeal.]

b. Commentary. In its May 10, 1996, appeal to the President, the FBI sought to redact information from two documents that the FBI alleged would reveal that the FBI engaged in a “mail cover” operation against the Soviet Embassy in Washington, D.C. in 1963. The Bureau argued that the “[h]ow, when where, and [the] circumstances” of its mail cover operation were among its most “closely guarded secrets.”

The Review Board responded that the information that the Bureau sought to redact had already been released. The Church Committee disclosed the mail cover operation at issue -- the “Z-coverage” program -- twenty years ago. In addition, the Review Board produced three previously disclosed assassination records in which the FBI disclosed that the Soviet Embassy in Washington, D.C. was targeted under the “Z-coverage” program, a program that the document discloses existed pursuant to an agreement with the Post Office.

20. FBI Tracing of Funds in Foreign Counterintelligence Investigations

a. Review Board’s Guidelines. The Review Board released information that disclosed that the FBI was capable of tracking funds and examining bank accounts of Communist-Bloc enterprises.

b. Commentary. In its May 10, 1996, appeal to the President, the FBI and the State Department sought to redact information from six documents related to the FBI's ability to track funds from diplomatic establishments. The FBI and the State Department argued, *first*, disclosure would reveal sensitive sources and methods, and *second,* disclosure would reveal that Soviet government bank accounts were the target of FBI counterintelligence activities.

The Review Board responded that the "sources and methods" employed in tracking of funds already has been disclosed, citing FBI documents that reveal the FBI's ability to trace funds as well as other federal government records that explained that the FBI engaged in covert examination of financial records and bank accounts in order to determine whether an individual is engaged in espionage. In addition, the Review Board noted that the FBI cannot now classify that the Soviet government was the principal target of the Bureau's FCI activities in the United States, again citing FBI documents as well as a lengthy list of publicly available federal government publications that disclosed the FBI's interest in Soviet financial activities in the United States. In late 1996, the National Security Agency and the CIA removed whatever fig leaf remained covering the FBI's tracing of funds. In the NSA/CIA joint publication, *Venona: Soviet Espionage and the American Response 1939-1957 (Robert Louis Benson & Michael Warner, eds., 1996),* the agencies released records that explicitly stated that the FBI monitored Soviet bank accounts in the United States. The *Venona* releases also show that the Soviets knew about the FBI's monitoring of their finances in the 1940s.

The Review Board concluded that previous official disclosures of the FBI's ability to trace funds in FCI investigations prevented the FBI from making any plausible or convincing argument that the method was one that should remain secret.

21. FBI Physical Surveillance

a. Review Board Guidelines. The Review Board released information that disclosed that physical surveillance is a method that the FBI employs in conducting investigations. Moreover, the Review Board specifically released information that the FBI conducted physical surveillance in its FCI investigations against Communist-Bloc countries.

b. Commentary. As part of its May 10, 1996, appeal, the FBI sought to redact information from one document because it revealed that the FBI maintained physical surveillance on the Soviet Embassy and that it kept a "lookout log" that recorded visitors to the Embassy. The FBI did not offer evidence in support of its redactions.

The Review Board again stressed the statutory requirement that the FBI provide document-specific, clear and convincing evidence in support of its proposed redactions. In its May 23, 1995, brief, the Review Board also noted that not only had the FBI

previously officially acknowledged the particular physical surveillance operation that the document at issue revealed, but that former Director Webster had publicly acknowledged that the FBI conducts physical surveillance and used the physical surveillance of the Russian Embassy as an example.

The Review Board concluded that previous official disclosures of the FBI's physical surveillance of the Soviet Embassy prevented the FBI from making any plausible or convincing argument that the method was one that should remain secret. The FBI ultimately withdrew its appeal of the Board's decision on "lookout logs." (9/18/96 FBI letter to Hon. Jack Quinn).

The Review Board's also took the position that, even in documents where the Board might agree to protect the identity of a particularly sensitive target of the FBI's physical surveillance, the fact that the FBI uses the method of physical surveillance in conducting investigations is not secret and is not eligible for postponement.

22. FBI Typewriter and Fingerprint Files

a. Review Board Guidelines.

b. Commentary.

*** TJG: Carl redacted large sections of this discussion in the appeal briefs and I want to be careful not to type in any information that he believes is still classified. I'm going to check with him regarding the info. he wants to protect before completing this sect. -LD ***

D. Personal Privacy

Text of Section 6(3)

> *. . .clear and convincing evidence that the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest*

1. Review Board Guidelines. During the course of the Review Board's work, the Board almost never agreed to sustain agency's requests for postponements on personal privacy grounds. The primary exception to the Review Board's policy to release records with privacy postponements is social security numbers. The Review Board determined that the public interest in disclosure of social security numbers was so small that any risk of harm would outweigh it. Accordingly, the Board routinely protects social security numbers throughout assassination records it reviews.

In the Segregated Collections, the FBI rarely requests that the Review Board sustain privacy postponements, and so the FBI unilaterally releases the information that would fall into the category of "personal privacy" information. In some Segregated Collection records, the Review Board agrees to postpone personal privacy information where agencies provide the Review Board with evidence that the person in question is alive, living in the same area, the public interest in the information is extremely low, and the individual would truly suffer a substantial intrusion of privacy if the Board releases the information. For example, the Review Board agreed to sustain the postponement of the identity of a 13 year old girl who was a rape victim. The girl in question was the niece of an organized crime figure (who was himself only of marginal relevance to the assassination story) and her story appeared in the organized crime figure's FBI file.

2. Commentary. The Review Board began its document review work in its closed meeting on January 25, 1995. At that meeting, the Review Board discussed personal privacy information in four Warren Commission records, but did not vote on the four records at that meeting, opting instead to defer final decision on the records. On March 6th and 7th, 1995, the Review Board staff presented to the Review Board a briefing book on personal privacy postponements. The Board's General Counsel provided the Board with a memorandum that identified several types of information that would potentially implicate privacy concerns. The Review Board discussed the scope and intent of section 6(3) and how the personal privacy provisions of the JFK Act might apply to eighteen (18) sample documents. At the end of the meeting, the Review Board again decided that it would defer a vote on the records and on the personal privacy postponements in general.

Although the Review Board expected that it would encounter a number of personal privacy postponements, the FBI and CIA did not request many postponements citing section 6(3).

In one case, the FBI appealed to the President the Review Board's vote to release information that the FBI requested be postponed on personal privacy grounds. (FBI 5/28/96 Appeal) The Review Board very carefully considered the privacy concerns involved and requested that the President issue a decision that would result in release of the important information in the record.

*** do we need a discussion here of how other agencies dealt with privacy, such as Secret Service, NSA, etc...? ***

E. Informant Postponements

Text of Sections 6(2) and 6(4)

section (2).. *. . .clear and convincing evidence that 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*

section (4). . .clear and convincing evidence that 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;

A Note on the Statutory Framework for Review of FBI Informant Postponements

The FBI initially offered sections 6(2) and 6(4) as justification for continued protection of informant identifying information. Section 6(2) clearly requires that the Bureau prove that the informant is living and that the informant faces a substantial risk of harm if the information is released. Because section 6(2) requires such specific evidence, the FBI quickly realized that section 6(4) offered a less rigorous rubric for postponement of informant names and identities. So, the FBI categorically decided to rely on Section 6(4) for informant postponements, and not Section 6(2) -- even though most of the records, as originally processed by the FBI, refer to both subsections in support of informant postponements. Despite the Bureau's position that it need not prove that informants were alive, the standards set forth by section 6(2) clearly did affect on the Board's decision making on informants.

Factors Relevant to Decisions on Informant Postponements

In analyzing FBI informant postponements, the Review Board considered a number of factors in determining whether to protect or release an informant's identity:

(1) the significance of the information that the informant provided to understanding the assassination;

(2) the importance of the identity of the informant to assessing the accuracy of the reported information; and

(3) the significance of the threat of harm to the informant from disclosure, considering the following:

(a) whether the informant is still living;

(b) if the informant is still living, whether the informant is still living in the same area;
(c) the time period during which the informant provided information to the FBI;
(d) the type of information the informant provided;
(e) the level of confidentiality that existed between the FBI and the informant at the time that the informant provided the information;
(f) any specific evidence of possible harm or retaliation that might come to the informant or his or her relatives;

Although no one factor proved to be dispositive in every case, the Board considered certain factors to be more important than others in making decisions to release records. For example, to the extent that the FBI confirmed that an informant is deceased, the Board released the informant's identity in all but one document. Similarly, if disclosure of a particular informant's identity would shed substantial light on the events surrounding the assassination, the Board would release the informant's identity even where the FBI provided excellent evidence in support of its request to maintain the confidentiality of its relationship with the informant.

Where a person's informant relationship with the FBI has already been made public, the Review Board did not agree to protect the fact of the relationship.

History of Review Board's Decision-Making on Informant Postponements

The Review Board first considered informant postponements in its meeting on May 2nd and 3rd, 1995. The FBI's initial evidence in support of informant postponements consisted of a briefing that FBI officials gave to the Review Board, followed by the FBI's "position papers" on confidential informant postponements. In the position paper, the FBI distinguished among informants, explaining that the FBI has a number of different types of informants who differ depending on the type of information they provide to the FBI and the level of confidentiality that existed between the FBI and the informant at the time that the informant provided the information.

After hearing the FBI's general policy arguments, the Review Board followed the same approach that it did with all other postponement issues -- it informed the FBI that it interpreted the "clear and convincing" evidence standard to require the agencies to provide very specific evidence tailored to individual postponements. After the FBI appealed the Review Board's decisions on four informant records, the FBI eventually came to eliminate general policy arguments from its evidence submissions and began to provide evidence in support of informant postponements on standard forms titled "Informant Postponement Evidence Form" (attached as Exhibit D). Once the Review Board received the FBI's specific evidence, it started to develop a group of guidelines for the review of informant postponements.

Effect of Prior Disclosures

If the name of an informant in a particular record had already been released in a context that *disclosed the informant relationship with the FBI,*, then the staff recommended that the Review Board release the name. If an informant symbol number in a particular record had already been released in a context where the same informant symbol number was providing the same information as in the record at issue, the staff recommended that the Review Board release the symbol number.

As a practical matter, both the FBI and the Review Board made an effort to track the names and symbol numbers of FBI informants whose relationships with the FBI had already been made public. When Review Board staff members encountered informant names or symbol numbers that were eligible for postponement, staff members researched whether the name or symbol number had already been released. Similarly, the FBI maintains and checks an informant card file that tracks those informant names and symbol numbers that have been publicly disclosed and in what contexts.

Commentary on the Informant Appeals

In the summer of 1995, the Review Board considered four documents containing informant postponements. Three of the documents concerned symbol number informants. The fourth document disclosed the name of a deceased informant. Because the FBI did not present document-specific evidence in support of its postponements, the Board voted to release the records. On August 11, 1995, the FBI appealed to the President the Review Board's decisions on those four records. The FBI argued that disclosure of informant information would result in the following harms: *first,* harm to existing informants; *second,* harm to the FBI's ability to recruit new informants and its ability to obtain cooperation from existing informants, and *third,* harm to the government's "word" since disclosure results in a breach of a promise of confidentiality.

In its response briefs to the President, the Review Board emphasized the JFK Act's clear and convincing evidence standard and explained that speculative harm does not provide sufficient grounds for withholding of information. In addition, the Review Board offered examples of prior releases that had not resulted in expected harm. The FBI did agree to provide particularized evidence on three of the four documents. The FBI's evidence was to interview the informants to determine whether they would object to having their identities disclosed. Of course, all of the informants or their relatives objected to disclosure of their identities. Upon receipt of the FBI's evidence, the Review Board reconsidered the informant postponements and determined that it would release all information except for the numeric portion of the symbol numbers.

The Review Board's September 28, 1995, letter to the FBI informing the FBI of its decisions on the documents provided useful and specific guidance as to what type of evidence the Review Board was looking for -- interviewing informants would not be

necessary, nor would the Review Board find it useful. Instead, the Review Board needed to know whether informants were still alive and whether the informant file contained corroborating evidence of harm that would befall the informant if identity were disclosed. Ultimately, the FBI was able to satisfy the Review Board's requests for evidence on informant issues by providing information that was available at FBI headquarters.

1. FBI Informants: Individuals who Request that their Identity be Protected

a. Review Board Guidelines. Where an individual provides information to the FBI and requests that the FBI protect his or her identity, *but the FBI provides no evidence of an ongoing confidential relationship with the individual*, the FBI will release the name of the individual unilaterally.

b. Commentary. When the FBI first began to present evidence to the Review Board in defense of its attempts to protect its informants, it asked that the Review Board protect the identity of any individual who either expressly or implicitly requested confidentiality when providing information to the Bureau. Persons who provide information in exchange for express promises of confidentiality may include neighbors or other acquaintances of a subject of investigation, as well as employees of state and local governments, financial institutions, airlines, hotels, etc. . . . According to the FBI,

> "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."

FBI Memorandum, *FBI Informant/Confidentiality Postponements*, p. 3.

Initially, the FBI's policy was to protect "the identities of persons who gave the FBI information to which they had access by virtue of their employment," regardless of whether "their providing the information . . . involve[d] a breach of trust," provided that the person in question requested confidentiality. Moreover, the FBI implied that, even where a request for confidentiality is not explicit on the face of the document, the identities of such persons will be withheld in cases where their providing the information to the FBI involved a "breach of trust":(*e.g.*, a phone company employee who gives out an unlisted number.)

The Review Board rejected the FBI's argument and voted to release the names pursuant to Section 6(4) of the JFK Act. Section 6(4) requires that the FBI provide clear and convincing evidence that disclosure would compromise the existence of an understanding of confidentiality currently requiring protection between a Government

agent and a cooperating individual. That the individual lacks one of the Bureau's many informant designations (*e.g.*, PSI, PCI, panel source, established source, informant symbol number) suggests that the individual did not have an ongoing relationship with the FBI. To the extent that FBI believes that a particular "protect identity" source did have an ongoing relationship with the FBI, it may provide evidence to the Review Board of the relationship. Without the benefit of such evidence, the Review Board assumes that "protect identity" sources are not sources with an "understanding of confidentiality currently requiring protection." The Review Board learned that FBI agents often offer confidentiality as a matter of course to interviewees, whether or not the individual requests or requires confidentiality. Eventually, the Review Board and the FBI agreed that the FBI would release the names of these individuals unilaterally.

2. *FBI Informant Names*

a. Review Board Guidelines. The Review Board adopted a case-by-case approach to those informants that the FBI confirms as still living, considering the factors listed above. To the extent that the Review Board voted to postpone the identity of a positive contact informant, it voted to postpone it for ten (10) years. The Review Board tended to release informant names if the informant was of particular relevance to the assassination.

In those cases where the FBI could not confirm that the informant was still alive, the Review Board routinely released the name and any accompanying identifying information.

In the "Segregated Collection" files, the Review Board did not require that the FBI provide evidence that an informant was alive to sustain a postponement. Thus, unless the informant was of relatively high public interest, the Review Board voted to protect the informant's identity.

b. Commentary. "Named informants" includes people whose names appear in assassination records and who had some type of ongoing informant relationship with the FBI. The FBI records often refer to such informants as "PSIs" or "PCIs," but "established sources," "panel sources," and others might fall into the category of "named informants." The Review Board attempted to categorize informants according to the level of confidentiality that existed between the FBI and the informant.

In those cases where the Review Board agrees to protect an informant's name and specifically-identifying information, the Review Board replaces the name with the substitute language "Informant Name" and the identifying information with the substitute language that specifically refers to the redacted information (*e.g.* phone number, street address, informant file number, informant symbol number.)

With regard to deceased informants -- the Review Board explained in the informant

appeals briefs that there may be some rare case where the FBI could prove, clearly and convincingly, that a "confidential relationship" with an deceased informant might currently require protection under the standards of the JFK Act. For example, the FBI might be able to show that the relatives of a high-level organized crime informant could still be at risk of retaliation. The document at issue, however, did not present such extraordinary circumstances.

3. FBI Informants: "Negative Contacts" (Informant provided no assassination-related information)

a. Review Board Guidelines. As a general rule, if the FBI confirms that the informant is still alive, the Review Board agrees to protect for ten (10) years the informant's name, and any specifically-identifying information (*e.g.,* phone number, street address, "case number" part of file number, "numeric" portion of the informant's symbol number).

In those cases where the FBI can not confirm that the informant is still alive, the Review Board routinely releases the name and any accompanying identifying information.

b. Commentary. Once the FBI began to fill out the "Informant Postponement Evidence Forms," the Review Board and the FBI agreed that the FBI could adequately identify an informant as still living if the informant is identified through current information with a living person with the same name and other specifically identifying information, such as date of birth or social security number.

With regard to the "negative contact" informant issue, the Review Board and the FBI struggled to decide how to treat handle these records that were of such low public interest. The large number of "negative contact" informant reports in the JFK assassination records at the FBI is due to the widespread and relatively comprehensive nature of the FBI's JFK assassination investigation. In the days following the President's death in 1963, the Director of the FBI requested that all FBI agents check with their informants in an effort to produce leads for the investigation. Of course, most of the FBI's informants knew little or nothing about the events surrounding the assassination, and so they provided "negative" reports. The Review Board clearly wished to provide to the public an accurate picture of the FBI's activities in the days following the assassination, but requiring the FBI to research each "negative contact" symbol number informant seemed unnecessary and of little to no public interest. Eventually, the FBI agreed that it would unilaterally release all unclassified negative contact symbol number informants (on the theory that, with no additional information from or about the informant, no researcher could ever determine the identity of the informant) and the Review Board agreed that it would protect those negative contact named informants (on the theory that, since they provided no information about the assassination, there was no point in recklessly releasing the identities of hundreds of FBI informants.)

4. FBI Informant Symbol Numbers and File Numbers

a. Review Board Guidelines. As a general rule, the Review Board routinely agrees to postpone for ten (10) years the "numeric" portion of informant symbol numbers and the "case number" portion of informant file numbers, *provided* that the informant's symbol number has not already been made public. The Review Board uses the phrases "informant symbol number" and "informant file number" as substitute language.

Routine exceptions to this rule occur in two types of documents: *First,* in documents that refer to an informant by both name and symbol (and/or file) number, the Review Board considers the symbol number to be specific information that might identify an informant*; Second*, the FBI agrees to unilaterally release the entire symbol number for "unclassified negative-contacts" -- those FBI informants who were asked about a particular subject, but had no "positive" information.

The non-routine exception to the general rule arises in documents in which the unredacted information in the document *unambiguously* identifies the informant. Such documents are not routine because the Board will not agree to protect the numeric portions of the informant's symbol and file number in a document that otherwise reveals the informant's identity.

b. Commentary. When the FBI has an informant who provides "valuable and sensitive information to the FBI on a regular basis" (*quoting,* FBI position paper), the FBI may assign a "symbol number" to the informant. The informant does not know his or her symbol number. Rather, the symbol number is an internal number that allows an FBI agent to write reports about the informant and information that the informant provides to the FBI without writing the informant's name. Most informant symbol numbers consist of three parts -- the prefix indicates the field office to which the informant reports (*e.g.* "NY" for New York, "DL" for Dallas, "TP" for Tampa), the numeric portion corresponds directly to a particular informant, and the suffix indicates whether the informant usually provides the FBI with information about criminal (C) or security (S) cases.

The Review Board came to believe that, in the majority of the FBI's assassination records, disclosure of the numeric portions of the symbol number (and the numeric portions of the corresponding informant file) were of little public interest. Rather than require the FBI to research the status of every symbol number informant, the Review Board determined that it would allow the FBI to protect the numeric portions of informant symbol numbers and file numbers, reserving the right to request evidence on any informant the Review Board considered to be of significant public interest.

In support of its argument to keep the symbol and file numbers for informants secret,

the FBI argued that the "mosaic theory" justified postponement of any portion of an informant's symbol number. The Review Board rejected the mosaic theory as the sole basis for postponement of symbol numbers, or for any other particular postponement issue, simply because the mosaic theory itself contains no limiting principle. However, the JFK Act requires the Review Board to balance any incrementally greater risk that the release of further information will lead to disclosure of (and harm to) the informant against the public interest in releasing the information. In striking this balance, the Review Board gave great weight to the public interest in the information provided. In the "core and related" files, the Review Board did not postpone the information provided by symbol number informants even though it would postpone the numeric portion of the symbol number.
The Review Board has consistently released the prefixes and suffixes of informant symbol numbers, even in cases where it sustains the "numeric" part of the symbol number. Thus, for the hypothetical symbol number "NY 1234-C," "NY" and "-C" would be released, even if the Review Board sustained postponement of the "1234." After the Review Board's action, researchers would know that the informant was run by the New York City field office and reported on criminal (rather than "security") cases, but may not know the informant-specific numeric portion of the symbol number.

In the "core and related" files, the Review Board did not postpone any part of a "T-symbol" number. Rather, the FBI began to unilaterally release these "temporary symbols" under the JFK Act after the Review Board's first few discussions about informant postponements.

With regard to unclassified "negative contact" symbol number informants, the FBI agreed to unilaterally release all unclassified negative contact symbol number informants, based on their belief that the definition of a "negative contact" symbol number informant is an informant about which no specifically identifying information appears in the document to identify the informant, so release of the symbol number would not risk disclosure of the individual's informant relationship with the FBI.

F. Confidential Relationships Between Governments and Cooperating Foreign Governments

Text of Section 6(4)

> *. . .clear and convincing evidence that 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;*

1. Foreign Liaison Postponements in the FBI Files

a. Review Board Guidelines. The official position of the FBI is that any foreign government information in FBI files is the property of the foreign government, and as such, the FBI cannot release the information without first obtaining the consent of the foreign government that provided the information. When the Review Board believed that information in FBI records truly was "foreign government" information, it worked with the FBI to approach the foreign government and attempt to persuade the foreign government that it is in our countries' mutual interests to release liaison information in assassination records. When necessary, the Review Board requested the assistance of the State Department in approaching the foreign government.

In the "Segregated Collection" files, the Review Board recognized that the cost of releasing foreign government information far outweighs the benefits of releasing this information when it was of marginal relevance, as is the case in most of the "Segregated Collection" files. In October, 1997, the Review Board staff recommended to the Board that it sustain postponements of foreign government information in the "Segregated Collection" files, provided the information is not assassination-related. The Review Board expressed reluctance to accept the FBI's definition of "foreign government information" and requested that the staff continue to bring records to the attention of the Review Board so that the Review Board could oversee the processing of the records.

b. Commentary. On August 8, 1995, the FBI appealed to the President the Review Board's decisions to release five documents that contained foreign relations postponements. The FBI made three arguments in support of its postponements: *first,* the fact of the liaison relationship between the FBI and the foreign government in question was a classified secret; *second,* the FBI had never officially released documents demonstrating the nature of the relationship between the FBI and foreign government; and *third,* release of information about the relationship would cause dramatic harm to the United States' foreign relations with the foreign government in question.

Three days later, on August 11, 1995, the Review Board responded to the President that its research in publicly available sources supported the Review Board's decisions to release the five records at issue. In response to the FBI's first two arguments, the Review Board explained that the FBI had publicly announced its liaison relationship with the foreign Government at issue more than thirty years ago, and that the FBI *had already* released assassination records that described the FBI's liaison relationship with the foreign government. The Review Board offered a three part response to the FBI's third argument that harm would result from release of information about the liaison relationship: *first*, the FBI had not met the "clear and convincing evidence" standard because it had not identified a particular harm that would result, *second,* if foreign relations would be harmed as a result of release of information about the liaison

relationship, the harm would have already occurred when the relationship was previously disclosed by the FBI; and *third,* harm to foreign relations was unlikely because the information in the documents is the type of information that we would expect Governments to share in law enforcement activities.

The FBI then consulted representatives of the foreign government to ask whether the foreign government would object to an official disclosure of the liaison relationship. The foreign government asked the FBI not to reveal the relationship, and the FBI argued to the President that the United States should respect the request of the foreign government. The Review Board noted that, had the FBI released the records without consulting the foreign government, foreign relations would not have been harmed, but since the FBI did consult the foreign government, the FBI itself had created a foreign relations problem. Despite the paradox that resulted from the FBI's consultation with the foreign government, the Review Board took the position that the foreign government's desire that the FBI not release the information was a relevant factor in the balancing test but that, in this case, the public interest in disclosure outweighed the foreign government's unexplained desire to protect the information.

After the FBI and the Review Board briefed the issues to the President, representatives of the Review Board and the FBI met with the White House Counsel's Office. The White House asked the Review Board to reconsider its decisions on the documents on appeal, but also instructed the FBI to provide the Review Board with postponement-specific evidence in support of its claimed postponements. The Review Board and the FBI agreed to the White House request and entered into a Stipulation on August 30, 1995.

In an attempt to understand the position of the foreign government, the Review Board met with representatives of the State Department and the foreign government to discuss the documents at issue. As a result of the meeting, the foreign government agreed to release of the overwhelming majority of information in the documents. The Review Board agreed to sustain the one postponement that the foreign government requested, which was the name of the employee of the foreign government, recognizing that the identity of the individual was of little or no interest to the public.

After the appeals process had ended, the FBI maintained its position that it could not release foreign government information without the consent of the foreign government. The Review Board recognized that it simply did not have the time or the resources to pursue release of each postponement in the same way that it pursued release of the five appealed documents. Initially, the Review Board had hoped to approach each foreign government separately in an attempt to convince the governments that release of liaison information in assassination records would benefit both the United States and the foreign governments. In the end, the Review Board recognized that the easiest way to release the foreign information in the FBI records would be for the FBI, through its "Legats" (Legal Attaches), to request the foreign government at issue to release the information. The Review Board saw three advantages to this approach: *first,* in those

cases where the FBI was successful in obtaining release of the information, the record at issue would be available to the public with no further action by the Review Board; *second,* allowing the FBI to request release of foreign information using the same channels through which they obtain foreign information makes it possible for the FBI to maintain positive relations with their foreign contacts, and *third,* the Review Board relinquished no rights to make its own approach to the foreign government, either before or after the FBI Legat had approached its foreign contacts.
Practically, the FBI sent the records at issue to its Legats with a letter from Director Freeh explaining to the foreign government how important release of the information is to the FBI and to the American people. In addition to materials from the FBI, the Review Board enclosed a letter to the foreign governments explaining our statute and our mission and requested release of the records.

To the extent that the Legats are unsuccessful in obtaining the consent of the foreign government to release of the information, the Review Board agreed to evaluate the individual records and determine whether to attempt to obtain consent from the foreign government for release of the records through diplomatic channels.

*** to be continued as the story unfolds ***

If the Review Board adopted the same policy on marginally relevant foreign government information in the "Segregated Collections" that it follows for records more closely related to the assassination, the Review Board and its staff would have spent the majority of the last year of the Review Board's operations approaching foreign governments to try to obtain the release of information that is of little public interest. The Review Board came to believe that the cost of release of the information outweighs the benefits of releasing this marginally relevant information in the "Segregated Collection" files.

*** need to discuss whether Board will do NBR ***

G. Presidential Protection

Text of Section 6(5)

> *. . . clear and convincing evidence that the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.*

Postscript: Information Exempt from the JFK Act

Section 10: Materials Under Seal of Court

The JFK Act gives the Department of Justice particularized responsibility to assist the Review Board. The Attorney General is to assist in obtaining court records and obtaining Grand jury testimony under seal. Sections 10(A)(1)-(2) an d (10)(b)(1).

Grand Jury Material

Records Under Seal that are not Grand Jury records

Title III records (ELSUR after Congress passed Title III)

Section 11(a): Tax Return Information

Internal Revenue Service Records

Social Security Administration Records

Tax Return Information in the Assassination Records of Other Executive Branch Agencies