

Introduction

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 provide a chronological overview of 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 how the Review Board applied a relaxed set of standards to those 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.

Part I

Part I will provide a chronological overview of the Review Board's decision-making, setting forth in a general way how the Review Board moved from considering, but not voting on, any FBI and CIA documents in its [month], 1995 meeting, to considering and voting on 5,036 documents from eight agencies in its March 10, 1998, meeting.

Freedom of Information Act and Executive Order [number] Similarities and Differences

[insert discussion comparing provisions of Section 6 of JFK Act with similar parts of FOIA and Executive Order declass standards. Emphasize that the Congress believed that neither the FOIA or the EO were sufficient mechanisms for declassifying the JFK records.]

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.

[list groups -- WC, HSCA, Church, Pike, Rockefeller, Review Board records, etc. .]

When it passed the JFK Act, Congress intended for the JFK Collection to include at least the record groups that it identified in section 3(2), but it also granted to the Review Board the authority to issue interpretive regulations -- and the JFK Act's legislative history states that Congress intended for the Review Board to carefully consider the scope of the term "assassination record."

[insert discussion of the interpretive regulation and refer to reg. as Exhibit A]

Groups of Records

FBI 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, the FBI had identified and begun to process the following assassination record groups:

The "Core and Related" files

The "core and related" files are a group of records that the FBI gathered together 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 their investigation of the assassination of JFK, FBI files on Lee Harvey Oswald, Jack Ruby, Marina Oswald, Marguerite Oswald, George DeMohrenschildt, Ruth Paine, and Michael Paine, the FBI's "administrative" file on the investigation into the assassination that the House Select Committee on Assassinations conducted in the late 1970s. 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.

The "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 [number] 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 Board members.

FBI records on the Congressional Committees that Investigated the Assassination

- (c) the files relating to other investigations into the assassination by the Church, Edwards, Pike, and Rockefeller Committees
- (2) CIA assassination record categories

[Bob]

- (D) Document Review

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. [is this true?] 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. Accordingly, the Review Board requested that its staff gather together groups of records that provided examples of the agency's requests to postpone a particular type of information. For instance, in FBI records, the Board determined that it would first address the issue of personal privacy postponements. In preparation for the [date] meeting, the staff gathered [number] of FBI records in which the FBI requested postponements pursuant to Section 6(3) and notified the FBI that the Review Board intended to vote on the records.

The FBI then requested an audience with the members of the Review Board so that it could present to the Board its position -- both in an oral presentation and in a "position paper." The FBI's "position papers" (attached as Exhibit B) summarized the FBI's policies in support of continued classification of certain categories of information.

In preparation for the FBI's presentations to the Board, 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 not the FOIA standards -- to apply. Aware of Congressional intent, the Review Board rejected the FBI's general FOIA-litigation arguments on the basis that the arguments did not constitute the "clear and convincing" evidence necessary to support a request for a postponement until section 6.

[discussion of how the Review Board came to require specific, rather than general, arguments from the agencies in support of the agency's postponements.]

Part II

Summary: Part II will enumerate the general principles that the Review Board established as it applied the provisions of section 6 to individual documents.

Section 6 of the JFK Act established a framework for the Review Board to analyze agency's 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. The text of Section 6 is attached as Exhibit C.

Introductory Clause

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 --

[discussion regarding the Board's reluctance to accept postponement of entire records]

[discussion of the Board's unwillingness to accept broad-brush arguments, but rather to define "clear and convincing" to mean "specific" evidence tailored to justify a particular postponement]

[discussion of the Board's reluctance to accept "mosaic theory" arguments as the sole basis for postponement of a record or information within a record.]

Section 6(1): Intelligence agents, intelligence sources and methods, and other matters relating to the national security of the United States

... 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;*

[may want to add a definitional section here to define terms of the statute]

FBI Issues

Foreign Counterintelligence Postponements

On [date], the Review Board notified the FBI that it intended to vote on [number] documents containing foreign counterintelligence information. In addition to its position paper on 1B and 1C postponements, the FBI provided to the Review Board its evidence in support of the individual postponements. After carefully considering the Bureau's arguments, the Review Board voted to release the majority of the [number] documents.

[number] days later, the FBI requested that President Clinton reverse the Review Board's decisions on the [number] documents. [Fill in history and story of appeal, including what was argued, etc. . .]

After the FBI withdrew its objections to the Review Board's decisions on the [number] documents, the FBI and the Review Board staff began to apply the following guidelines to all foreign counterintelligence postponements in the assassination records of the FBI.

Human Sources in Foreign Counterintelligence (Assets)

The Review Board evaluates the need to postpone the identity of human sources in foreign counterintelligence operations on a case-by-case basis. The Review Board considers the following factors in evaluating whether to postpone or release the identity of a particular asset:

[discussion of factors and how Board uses them, such as the passage of time, whether the source is still alive, public interest, etc...]

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.

[discussion of Review Board response to FBI general arguments. Need to listen to meeting tapes.]

Foreign Counterintelligence Activities Generally

As a general rule, the Review Board believes that most aspects of the FBI's foreign counterintelligence 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) of the JFK Act.

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 counterintelligence targets, measures, and priorities, thereby allow hostile entities to develop countermeasures.

[discussion of Board's response to FBI's general argument.]

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.

Technical Sources

In its [date] appeal, the FBI proposed to redact information in three (3) documents that related to electronic intercepts of telephone and teletype communications involving Communist Bloc officials. [discussion of appeal on technical sources]

Classified Symbol and File Numbers for Technical Sources (usually electronic surveillance, or ELSUR)

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.

Information about Technical Sources

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.

Other Classified File Numbers

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.

Information that Reveals an Investigative Interest in a Communist Bloc Diplomatic Establishment or Personnel

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. In those cases where the Review Board determines

[insert discussion of "Z-coverage" and covert examination of financial records and bank accounts as subsection of "investigative interest" section]

CIA Issues

Section 6(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

FBI initially used 6(2) along with 6(4) to protect informant names and 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 better rubric for requesting that the Board postpone informant names and identities.

So, the FBI categorically has 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. *See* the analysis of section 6(4) below.

Section 6(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

[may want to include a definitional section here]

FBI Issues

General rule: Postpone only where the person affected is adequately shown to be still living and the intrusion on privacy would truly be substantial.

Routine Postponement: Social Security Numbers

core files -- one issue appealed

segregated collection -- effect of little-no public interest in the information (e.g. 13 year old rape victim's name in a "see" reference file)

CIA Issues

Section 6(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;

[may want to include definitional section here]

FBI Issues

Informant Postponements

Symbol Number Informants

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 relasing the information. In striking this balance, the Review Board gives 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. In the “Segregated Collection” files, the Review Board would only postpone “T-symbol” numbers where Indeed, to its credit, the FBI began to unilaterally release these “temporary symbols” under the JFK Act after the Review Board’s first few discussions about informant

“PROTECT IDENTITY REQUESTED”

Where an individual provided information to the FBI and requested 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.

When the FBI first began to present evidence to the Review Board in defense of its attempts to protect its sources of information, it asked that the Review Board protect the identity of any individual who requested confidentiality when providing information to the Bureau. 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 agency 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. In these cases: (1) the Review Board does not consider these types of sources as sources with an “understanding of confidentiality currently requiring protection.” We know that FBI agents often offer confidentiality as a matter of course to people that they talk to, whether or not the individual requests or requires confidentiality (e.g. agents have come to our offices of to do follow-up security checks on our co-workers and offered us confidentiality), (2) without evidence of an ongoing relationship, the Review Board does not consider these types of sources

Persons who gave the FBI information to which they had access by virtue of their employment
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.

“Negative Contacts”

“Negative Contact” informants are those informants who were contacted, but who provided no information, regarding either the assassination or persons, groups, or events related to the assassination

“positive contacts”

names

informant identifying information

specific textual informant identifying information

general textual informant identifying information

Effect of Prior Release of Informant's Relationship with the FBI

Where a person's informant relationship with the FBI has already been made public, the Review Board continues to release the fact of the relationship.

The Review Board staff 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.

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.

EFFECT of HIGH PUBLIC INTEREST

In some cases, the fact that a particular individual had an informant relationship with the FBI was sufficiently important to warrant recommending release under circumstances where the general rules would otherwise point toward sustaining the postponement.

Foreign Liaison

Section 6(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.

III. Weighing of the Public Interest in Evaluating Agencies' Requests for Postponements Pursuant to Section 6

A. Core and Related Files and Records Obtained as a Result of Requests for Additional Information

1. all are considered to be of high public interest
 2. some records so significant that public interest outweighed otherwise valid grounds for postponement
 - a. examples
- B. Segregated Collections
1. Relaxed Standards
- C. NBR Records

IV. *JFK Act -- Section 10 -- Materials Under Seal of Court.*

- A. Records Under Seal that are not Grand Jury records
1. Title III records
- B. Grand Jury Material
1. *see* ARRB guidelines for review of grand jury material

V. *JFK Act -- Section 11*

- A. Information protected by § 6103 of the Internal Revenue Code

Part III

Discussion how the Review Board applied a relaxed set of standards to those 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.

each of the subsections of section 6.] Finally, the chapter will explain how the standards were applied very strictly to those records that the Review Board considered to be of high relevance to the assassination and in a more relaxed manner to those records that the Review Board considered to be of lesser relevance to the assassination.

Part IV

Evaluation of the effectiveness of the JFK Act's postponement standards in terms of the work that the Congress intended for the Review Board to complete.

Exhibits

- Exhibit A** Interpretive Regulation Defining Assassination Record
- Exhibit B** FBI “position papers”
- Exhibit C** Text of JFK Act, Section 6

Exhibit C

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.

Review Board Meeting Chronology

8/23/93 end of 300 day review period established by the JFK Act

as of

4/12/94 Board's first meeting -- FBI had reviewed and transferred to NARA records on Oswald, Ruby, the Warren Commission, Marina Oswald, Marguerite Oswald, George DeMohrenschildt, and the Rockefeller Commission. FBI had promised NARA that they would soon transfer records from the JFK Assassination Investigation files.
Expressed a need to define assassination record

7/12/94 Meeting

- Bill Joyce wrote to ~ 55 agencies to ask about the process of review of records. Had rec'd approx. 20 responses by 7/12/94. (min. p. 6)
- Still concerned about defining assassination record -- definitely want to do that before going into a document-by-document analysis (min. p. 8)
- By 7/12/94, FBI had sent entire JFK Assassination Investigation file to NARA and the Pike Comm. records (min. p. 9)

10/11/94 Public Hearing, Washington, D.C.

- Considered defn. of "assassination record"

11/18/94 Public Hearing, Dallas, Texas

- Considered defn. of "assassination record"

12/13-14/94 Public Meeting, Washington, D.C.

- Announced that they were hoping to begin review of documents by Feb. or March of 1995 (min. p. 5-6)
- Consider defn. of "assassination record" and specifically whether artifacts would be included in the defn.

1/25/95 Closed Meeting

- Board discussed proposed interpretive regulations for publication in the Fed. Reg.
- Board discussed personal privacy information in 4 Warren Commission records and deferred final decision on the records

3/6-7/95

Meeting

- Briefing book to Board on personal privacy issues; General Counsel provided a memorandum that identified several types of information potentially implicating privacy concerns and reviewed how government
 - discussion of overall scope and intent of section 6(3)
 - discussed privacy issues presented in 18 sample documents
- Review Board made no decision on these records

3/24/95 Boston Public Hearing

5/2-3/95 Meeting (tape)

- open meeting: finalization of defn of assassination record
- Informant Issue discussed

5/18/95 Closed Meeting (tape)
-analysis and discussion of 2 CIA documents

6/7/95 Closed Meeting (tape)

6/27-28/95 New Orleans Public Meeting
(need to listen to tape for closed parts)

7/17-18/95 Closed Meeting (tape)

8/2-3/95 Closed Meeting

8/28-29/95 Closed Meeting