April 12, 1995

TO: Assassination Records Review Board

FROM: Sheryl Walter[1]

RE: Postponement of Sources and Methods under the Assassination Records Collection Act (ARCA) -- Background Information

Statutory Framework and Legislative History

Section 6(1) of the ARCA provides that the Review Board may postpone disclosure of intelligence sources and methods information if there is clear and convincing evidence that:

> "[T]he 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 --
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> (A) an intelligence agent whose identity currently requires protection;

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[1] Analyst Laura Denk contributed substantial research assistance in the preparation of the memorandum.

(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."

The Senate Report on the ARCA expressly considered the issue of how broadly the Review Board should construe the term "intelligence sources and methods" for purposes of making postponement decisions under the ARCA.[2] Intelligence agencies routinely employ obvious "methods" such as photography and listening devices on telephones and "sources" such as newspapers and public libraries. In the past, the intelligence agencies have sought to keep information from the public domain if it was gathered by these rather obvious "sources and methods." However, in passing the ARCA, Congress indicated that the Review Board consider a variety of factors in evaluating sources and methods postponements, including the age of the record, whether the use of the particular source or method is already well-known to the public, and whether the source or method at issue is inherently secret or whether the information collected was considered secret.

Intelligence Agency Positions Regarding Sources and Methods

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[2] See, S. Rep. No. 328, 102d Cong., 2d Sess. 28 (1992), 1992 U.S.C.C.A.N. 2977.

As outlined above, intelligence agencies, including the CIA, glean information from a number of publicly available sources, including libraries, telephone books and the like. The CIA takes the position that these sources are "intelligence sources and methods" and their use by the CIA should be withheld from public disclosure. This position, upheld by the Supreme Court in the Freedom of Information Act (FOIA) context in CIA v. Sims, is that hostile foreign governments can learn much about CIA activities simply by knowing the public sources of information that interest and are used by the agency. [3]

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[3] CIA v. Sims, 471 U.S. 159, 105 S.Ct. 1881, 1891-1892 (1985). The National Security Act of 1947 authorizes the Director of Central Intelligence to protect from public disclosure records involving intelligence sources and methods. 50 U.S.C. § 403(d)(3) (1982). The vast majority of case law interpreting the phrase "intelligence sources and methods," including CIA v. Sims and its progeny, arises out of disputes over the scope of § 403(d)(3). § 403(b)(3)'s directive that the CIA protect its sources has been found to reach broadly, protecting not only the name of the source, but to the extent the Agency considers reasonable to protect the source, the nature and type of information supplied. Weissman v. CIA , 565 F.2d 692, 694 (D.C. Cir. 1977).

Moreover, although many of the CIA's "sources and methods" do not seem to be meaningful or sensitive in themselves, the CIA vigorously protects these sources under the "mosaic" theory. The "mosaic theory" posits that each piece of information, when combined with other pieces of information, may be meaningful to hostile intelligence services. [4] In the past, courts have agreed with the CIA that the practical reality of intelligence work is that "it often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information" and that if the CIA were to identify the "innocuous" sources it uses, it could "tip-off" a foreign government as to "what areas the CIA is interested in and upon which it is focusing its resources." [5]

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[4] Sims, at 1892-1893. Compare the FBI's description of the "mosaic theory", on which is also relies to withhold sources and methods information from public release:

> Mosaic analysis is an elimination of common denominator deductive process ... whereby a trained hostile analyst, through review of innocuous type pieces of information within a document or series of documents, will draw accurate conclusions ... and determine the identity of a specific intelligence source, method or activity.

National Security Archive v. FBI, 759 F. Supp. 872, 877 (D.D.C. 1991) (citing FBI declaration).

[5] Id. at 1891; Allen v. Dept. of Defense, 658 F. Supp. 15, 19 (D.D.C. 1986).

Both the CIA and the FBI argue in support of their refusal to disclose "sources and methods" that they must protect the "appearance of confidentiality", claiming that it is essential to effective gathering of intelligence both within the U.S. and in operating our foreign intelligence service. The CIA argues that it "would find it difficult or impossible to recruit new intelligence sources absent such guarantees [of confidentiality], made and then kept by the CIA." [6]

In some cases, there may be wide speculation that a foreign government or an official within a foreign government has cooperated or is cooperating with the CIA. However, the CIA takes the position that "official disclosures" of such relationships by the Agency could cause great damage to national security. Even if a former CIA official wrote a book which disclosed information that a foreign government cooperated with the CIA, the CIA still protects that liaison as a "source or method" not "officially disclosed" by the Agency. "[M]ost governments do not officially acknowledge the existence of their intelligence services," and even though certain relationships (such as those between U.S. and foreign intelligence) may be widely reported, "they are not officially acknowledged, since the government adversely affected would be forced to take some official action in retaliation."[7]

The CIA seeks to protect its intelligence sources and methods, in part, to keep foreign governments uncertain as to which communications the CIA

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[6] See Fitzgibbon v. CIA, 911 F.2d 755, 763-764 (D.C. Cir. 1990); Sims , 105 S.Ct. at 1891, Allen, 658 F. Supp. at 19.

[7] Afshar v. Dept. of State, 702 F.2d 1125, 1131 n. 7 (D.C. Cir. 1983) (citing affidavit CIA filed with the court explaining its non-disclosure policies).

does, in fact, monitor. The Director of the CIA has explained this policy to a court by stating:

> "[D]isclosure [of intelligence methods] would directly permit hostile governments to either neutralize [the disclosed methods] or utilize them as a vehicle for disinformation. Hostile intelligence services and governments are not omnipotent; they cannot watch all potential sources and guard against all possible methods of collection. For example, the procedure of monitoring international telecommunications is one of the most simple intelligence collection methods, but its superb utility stems from the sole fact that hostile powers do not know which communications are seized and which channels are open to compromise. Therefore, protection of the fact of CIA use of even the simplest methods in certain situations keeps this Nation's adversaries guessing as to the goals of U.S. intelligence activities and the means of carrying them out."[8]

Even when the CIA has released information previously, it resists the subsequent release of similar information to the public, arguing that its release of such material may be done in order to "send a message" to "allies or adversaries". The CIA takes the position that such decisions are strategic

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[8] Fitzgibbon v. CIA, 911 F.2d 755, 763 (D.C. Cir. 1990) (DCI's statement to district court reprinted in D.C. Cir. opinion). See also, Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981) (lack of official disclosure can leave foreign intelligence services guessing as to whether information is true.)

and that releases of such information should not require the CIA to release similar information. [9]

Defining Intelligence "Sources and Methods"

Although the standards governing disclosure of intelligence sources and methods under the ARCA are far more broad than those developed under the FOIA and related case law (and are intentionally so due to FOIA's ineffectiveness in securing the public release of documents of historical value on the assassination), the interpretations of "sources and methods" in those cases is instructive in analyzing these questions under the ARCA.

[9] CIA v. Sims, 105 S.Ct. at 1893.

According to Justice Marshall's concurring opinion in CIA v. Sims, which subsequent federal district and circuit courts followed, the majority in that case equated "intelligence source" with "information source". Finding that "practical necessities of modern intelligence gathering" require use of sources that are extremely diverse (including public and "innocuous" information), any source of information, including public domain sources like dictionaries, libraries, journals, and television programs, are "intelligence sources" that may be withheld from the public under a "sources and methods" umbrella.[10] Other courts have concurred with this sweeping approach, finding that previously disclosed material or sources can still be protected, as can "nonsensitive" information from private citizens or other open contacts. In addition, "basic & innocent" methods have been protected as intelligence "sources", including physical surveillance, interviewing or examination of airline manifests.[11] The legislative history to the ARCA notes that "methods" such as photography and listening devices on telephones have in the past been withheld from researchers.[12]

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[10] Id. See also, e.g., Filbert, *The CIA is Given Broad Powers to Withhold the Identities of Intelligence Sources*, 54 U.M.K.C. L. Rev. 332 (1986); Jordan, *Freedom of Information Act: CIA's Right to Nondisclosure Broadened by Liberal Definition of Intelligence Source*, 25 Washburn L.J. 586 (1986); Godley, *Defining the CIA's 'Intelligence Sources' as an Exemption to the Freedom of Information Act*, 9 W. New England L. Rev. 333 (1987).

[11] Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990).

[12] S. Rep. No. 328, 102d Cong., 2d Sess. 28 (1992), 1992 U.S.C.C.A.N. 2977.

CIA station locations also routinely have been withheld from public disclosure, even where information about or the fact of the existence of the station has been disclosed by Congress, in open court, or widely discussed in the media.[13]

Age of the Information

In the FOIA context, the age of the information or the record in question is a relevant but not determinative factor for courts to consider in deciding whether to require its disclosure. For instance, if a record is very old, courts should treat with scepticism an agency's argument that disclosure of the record will create an immediate danger to national security.[14] On the other hand, agencies have consistently been allowed to withhold even very dated information. In contrast, the legislative history to the ARCA indicates that the Board should consider the age of the record in question to determine whether it is appropriate for immediate release or

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[13] The CIA claims that officially acknowledging information about stations or the existence of specific activities in specific foreign countries would lead to retaliation, with "obvious" effect upon the nation's foreign relations and national security. Afshar v, Dept. of State, 702 F.2d at 1133 n.12 (citing the CIA's affidavit filed with the court).

[14] See, e.g., Powell v. United State Dep't of Justice, 584 F. Supp. 1508, 1517 (N.D. Cal. 1984); CIA v. Sims, 105 S.Ct. at 177; Fitzgibbon, 911 F.2d at 764; McDonnell v. United States, 4 F.3d 1227, 1243-45 (3d Cir. 1993). .

postponement.[15]

Relevance of Previous Public Disclosure

In Section 6(1)(B) of the ARCA, Congress directed that the Review Board cannot postpone information that already has been "officially disclosed." In the FOIA context, courts have defined "official disclosure" quite narrowly, so that under FOIA, unless an agency's current officials make "official disclosures", the agency may withhold the information. The effect of these decisions is that agencies can withhold information from FOIA requesters that is already quite public.

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[15] S. Rep. No. 328, supra note 12, at 2977.

For example, to qualify as an official release, information must have been shown to be as specific as the information previously released, the information requested must match information previously disclosed, and it must already have been made public through an official and documented disclosure.[16] The prior public disclosure of similar information also has been found not an "official disclosure" for purposes of FOIA. For example, although the CIA had acknowledged the existence of an intelligence relationship with SAVAK (the intelligence agency of the Shah of Iran) it was not required to release additional information on the theory that even though the relationship was generally known, releasing records of particular contacts might provide new and damaging information regarding the extent and nature of the liaison.[17]

Moreover, even if information is the subject of widespread media and public speculation, agencies have in the past not been required to waive their rights to withhold that information from FOIA requesters, on the grounds that "new" official acknowledgement may damage the national security. The reasoning relied upon is that foreign governments can ignore unofficial leaks and public surmise, but may be harmed if the CIA officially discloses that they cooperated with the CIA.[18] On the other hand, lack of official disclosure can leave foreign intelligence services guessing as to

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[16] Fitzgibbon, 911 F.2d at 765.

[17] Afshar v. Dept. of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

[18] Id. at 1131.

whether information is true. [19] From this viewpoint, face-saving, or what the CIA termed in its briefing of the Review Board in early March as "plausible deniability", is as important as substance in the world of international diplomacy.[20] Also relied upon is the notion that the fact that information is in the public domain does not eliminate the possibility that further disclosures can harm sources, methods and operations, especially given that foreign governments change.[21]

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[19] Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981).

[20] Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981).

[21] Fitzgibbon, 911 F.2d at 766.

While the term "officially released" is not precisely defined in the ARCA, the legislative history suggests that if the Review Board finds that an intelligence agency's use of a particular source or method is already well-known to the public, the information should not be postponed on the grounds that it is a source or method warranting protection.[22] For example, the Senate report cites as the fact that the public is now aware that the Mexico City Soviet Embassy was bugged during Oswald's visit and implies that this is the type of information that the Review Board should release despite the fact that it has not been officially disclosed. This approach reflects that adopted in recent FOIA decisions finding that the existence of information in the public domain is relevant to determining whether that information should continue to be withheld from public release as it calls into question the soundness of the agency's decision to continue to classify the material.[23]

Embarrassment to the Intelligence Agency

Finally, it is well-settled law in both the case law and in the current and pending draft executive orders governing national security classification standards that no agency, including intelligence agencies, may withhold information from public release solely to avoid embarrassment.[24] In the

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[22] S. Rep. No. 328, supra note 12, at 2977.

[23] Washington Post v. U.S. Dept. of Defense, 766 F.Supp. 1,8 (D.D.C. 1991).

[24] Executive order 12356 (1982), Draft Clinton Administration Executive Order (pending as of the date of this memorandum); McDonnell v.

FOIA context (and thus, certainly for purposes of ARCA), an agency may not invoke the national security exemption solely to avoid embarrassment to the agency.

U.S., 4 F.3d 1227, 1245 (3d Cir. 1993).