

September 10, 1996

BY HAND

Patrick W. Kelley, Esq.
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Office of the General Counsel
Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Pat:

I am writing in response to your letter of September 4, 1996, to William Leary of the National Security Council. There are four points that I wish to make.

First, it seems as if there is a misunderstanding regarding our informal agreement with respect to appeals to the President. When I spoke to you about it, I suggested that whenever it was believed by both the FBI and the Review Board that further briefing would not be of use, we would have a "standstill" agreement without prejudice to either side. However, if the FBI wishes to brief any issue on any appeal, the Review Board has no objection and will respond. Similarly, if the Review Board believes that an issue that the Bureau has noticed for appeal is ripe for the President's decision, it is fully entitled to place that issue on the President's agenda. In short, the agreement was to avoid a briefing when *both* agencies concluded that, in the light of prior submissions and pending resolution of the issues addressed in those submissions, further briefing would serve no purpose. The Review Board has *not* agreed that either agency may *unilaterally* decide whether and when the merits of an issue will be addressed. We believe that records 124-10073-10270, 124-10073-10271, and 124-10073-10284 should be on the President's immediate agenda, and accordingly have addressed the merits of your appeal of them.

Second, with respect to those three records, your letter states that "our research to date has not -- contrary to the Board's letter -- shown that the FBI previously released the information from these documents that we now seek to protect." (p. 2). In stating that the FBI has released the contested information, we relied on statements in the Haines and Langbart book that we quoted in our letter, copied for the FBI's convenience, and discussed with FBI personnel. In these passages, the authors specifically identify the officially released sources that they used. Any "research" into whether this information has been officially released or whether, as you have suggested, the authors improperly published classified information obtained from non-public sources, would naturally start by consulting the public materials cited by the authors. An examination of the first official source cited by Langbart and Haines reveals that it was, indeed, the FBI that released most of the contested information. See "Appraisal of the Records of the Federal Bureau of Investigation" dated November

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9, 1981 (amended on January 8, 1982), submitted by the FBI in *American Friends Service Committee v. William H. Webster*, Civ. No. 79-1655 (D.D.C.) (excerpts included as Attachment C to enclosed letter to the President).

Third, I wish to reiterate that, by referring to prior official disclosures of information appealed by the FBI, the Review Board in no way undertakes to prove that *all* appealed information has already been officially disclosed or otherwise is known to the public. The FBI cannot satisfy its burden of proof under Section 6 of the JFK Act merely by asserting that information has not been the subject of previous official disclosures. Where, as here, the FBI appeals records without having first determined whether the "secrets" it wishes to keep have been officially disclosed or are otherwise publicly known, we will continue to research these matters as best we can and call the results of our research to the attention of the President when we address the merits of your appeals.

Fourth, with regard to the timeliness issue, we understand that inadvertent mistakes can be made and we fully accept the Bureau's representations that these were honest mistakes. Nevertheless, you should also recall that the Review Board made several attempts to discourage the Bureau from filing these late appeals. We made several telephone calls and met with Bureau staff in an attempt to show the Bureau that these three records did not seem to be appropriate candidates for appeal -- *particularly* when they were so late. For you now to suggest that our plea for the timing provisions of the statute to be respected was merely "exalt[ing] form over substance" seems ungracious in the light of this history. More importantly, given that it is the Review Board that *has* addressed the substance of these postponements and it is the FBI that wishes to delay further the resolution of these issues, your characterization rings hollow.

I am enclosing a copy of the letter that we sent to the President today. I would urge the FBI, if it still wishes the President to overturn the Review Board's decisions regarding Records 124-10073-10270, 124-10073-10271, and 124-10073-10284, to provide its reasons in support of this request.

Sincerely,

T. Jeremy Gunn

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General Counsel

Enclosure

cc: Mr. William Leary
Senior Director, Records and Access Management
National Security Council