

DRAFT

September 28, 1995

Mr. Howard M. Shapiro
General Counsel
The Federal Bureau of Investigation
Washington, D.C. 20535

Dear Mr. Shapiro:

We appreciate receiving your September 19, 1995 letter describing the Bureau's position with respect to the four documents (and their copies) that previously were the subject of your appeal. (*See* Exhibits 1-4 -- the yellow highlights signify the postponements proposed by the Bureau). The members of the Review Board read your letter and exhibits with care.

On September 21, the Review Board made formal determinations regarding the four Federal Bureau of Investigation assassination records and their copies. At the time the Review Board first made its formal determinations regarding these records in July, the Bureau had not submitted any specific evidence relating to the documents or to the informants whose symbol numbers were referenced therein. After the Bureau appealed the decisions to the President, the Review Board agreed to provide the Bureau with additional time to submit specific evidence in support of its proposed postponements. The Review Board has had the opportunity to review your letter in which you state your arguments in favor of postponement of the records and to which you attach redacted copies of personal interviews with informants and their acquaintances. In addition to making arguments related to the specific documents in question, you also request that the Review Board adopt a "categorical" approach to all remaining records involving informants and that the Review Board issue regulations that would eliminate the Bureau's need to provide specific evidence in the future regarding informants.

Because of the precedential importance of the records at issue, and the significance of your request to issue categorical regulations, I will explain the Board's formal determinations with respect to the records at issue and respond to your general request.

DRAFT

The Four Records at Issue

Exhibit 1: 124-10119-10078.

The Bureau was unable to locate any descendants or relatives of this informant who died in 1979, and you expressed "no further objection to disclosure" of the document. Due to the lack of the clear and convincing evidence needed to support a postponement, and given the Bureau's waiver of any further objection, the Review Board voted unanimously to open the record in full.

Exhibit 2: 124-10070-10354.¹

Exhibit 2 provides a significant lead on the question whether there was any complicity on the part of Dallas police officials in the death of Lee Harvey Oswald. Dated only two days after Oswald was murdered in the Dallas Police Department building, the document is an "urgent" cable to Director J. Edgar Hoover from the Special Agent-in-Charge of the Houston office. The portions of the document that already have been made public reveal that the FBI informant (whose symbol number is redacted), reported that a longstanding female acquaintance of the informant (whose name -- or alias -- is redacted) was reputedly a "fixer" between the Dallas police and the "criminal element."² The document reports that the informant called the fixer and asked her questions about the murder of Oswald while he was in Dallas police custody. The informant wanted to know whether it was an "accident" that Ruby had shot Oswald, or whether there was anything more to the story. The document reveals that the fixer believed that there was more to the story than had been disclosed, but was reluctant to talk at that time.

The murder of Lee Oswald has prompted substantial discussion on the question whether his murderer, Jack Ruby, acted alone, or at the behest of organized crime, or with the possible assistance of his contacts in the Dallas police force. Although the Review Board takes no position on the merits of

¹Record number 124-10108-10142 is a duplicate of this record, and the Review Board made the same determinations with respect to it.

²The phrase between "Dallas police and criminal element" remains redacted on the copies of this record now publicly available; however, the FBI has agreed to release this phrase. See copy attached at Tab C of your Petition for Postponement Under Section 9(d) of the President John F. Kennedy Assassination Records Collection Act of 1992, dated August 8, 1995, and page 10, footnote 13 of our August 11, 1995 Reply.

DRAFT

these important issues, it does believe that the document in question clearly is relevant and material to a resolution of them. There is, in short, a very high public interest in this record.

There are three subjects redacted in the document: the symbol number of the former informant, the name (or alias) of the fixer, and the occupation of the fixer. The only evidence provided in support of their postponement by the Bureau consists of an FD-302 report by a Dallas, Texas, FBI agent who conducted an interview with the former informant. In the words of the FBI agent, the informant "does not want his name, telephone number or other identifying information disclosed as to do so would be detrimental to himself, his family and his business."

Since the document does not reveal the identity of the informant, but rather the informant symbol number, the Bureau has a two-pronged responsibility. It must provide clear and convincing evidence, first, that the release of the redacted information would in fact lead to the disclosure of the informant's identity, and second, that the disclosure of the identity would lead to harm. The Board believes that the Bureau did not meet its burden in either case. The Bureau provided no evidence that the release of the redacted information would lead to the disclosure of the identity of the informant, and rather than provide evidence of harm in the event that the identity were disclosed, the Bureau simply repeated the assertions of harm voiced by the informants themselves without providing any corroborating evidence.

Based upon the evidence presented to it, the Review Board voted, unanimously, to release the name and occupation of the fixer (regarding whom no evidence was offered)³ and to release the prefix and suffix of the informant's symbol number. The only information to be postponed is the numerical portion of the informant's symbol number. The Board decided to redact this portion of the symbol number because it would provide very little (if any) useful information to the public and it would preclude any possible basis for arguing that the release of the number would disclose the identity of the informant.

³Important additional grounds for the release of this information are found at pages 11-12 of our August 11, 1995 Reply.

DRAFT

Exhibits 3 and 4: 124-10184-10256 and 124-10244-10077.⁴

Exhibits 3 and 4 discuss, in part, a small Communist Party meeting at the home of Ms. Genne Kuhn in Wheeling, West Virginia. In December 1963, Ms. Kuhn had invited five persons to her home to hear a talk by her guest, Arnold Johnson, who was then the Public Relations Director of the Communist Party USA. The documents disclose that three of the five invitees who gathered to hear Mr. Johnson were FBI informants. Your September 19 letter to the Review Board further discloses that two of the informants were married to each other, that both are now living, and that the third informant is deceased. One of the documents also discloses that, at one point, a smaller meeting included only Mr. Johnson, Ms. Kuhn, and two of the three FBI informants.

Although the Bureau provided statements from two living informants (the husband and wife team) and a statement by relatives of the third requesting continued non-disclosure, the Bureau did not demonstrate why releasing the symbol numbers in these two documents would make it any more likely that the informants' identities would be revealed.

Exhibit 3 also discloses other information about some additional Communist Party activities and two file numbers. The Bureau did not make any argument showing how the release of this information would tend to disclose the identity of the informants, given what has already been released, nor did it offer any basis for postponing the file numbers.

Accordingly, the Review Board voted, unanimously, to release all of the information in the two documents, including the file numbers,⁵ except for the numerical portion of the informants' symbol numbers.

The Review Board's Response to the Bureau's Request for a Categorical Approach

⁴Record numbers 124-10035-10065, 124-10243-10367, 124-10232-10345, 124-10170-10064, and 124-10006-10342 are duplicates of record number 124-10244-10077, as to which the Review Board made the same determinations.

⁵Additional grounds for the release of the file numbers are provided on page 9 of our August 11, 1995 Reply.

DRAFT

The Bureau reported it had expended more than 300 man-hours gathering information on the four informants. In order to avoid such expenses in the future, the Bureau suggested that the Review Board "adopt a categorical approach when determining whether to postpone disclosure of all similar records." This "categorical approach" constitutes, of course, a significant revision of the Bureau's previously stated willingness to "be prepared with particularity to defend a particular piece of information and the necessity of its not being divulged."⁶

The JFK Act provides, in relevant part, that

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 . . .

(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

44 U.S.C. § 2107.6. The Review Board does not read the statute as giving the Board the latitude to issue blanket regulations that would, effectively, exempt the Bureau from providing any evidence in support of its redactions. The Review Board must, therefore, respectfully decline to adopt the suggestion that a categorical approach be adopted. Under the JFK Act, the Review Board must receive clear and convincing evidence not only that there was at one time an understanding of confidentiality, but that understanding *currently* requires protection and that the disclosure of the prior relationship would be so harmful as to outweigh the public interest in the record.

We make the following observations in response to the Bureau's concerns regarding its expenditure of resources:

⁶*Hearing Before the Senate Comm. On Governmental Affairs on S.J. Res. 282 to Provide For the Expeditious Disclosure of Records Relevant to the Assassination of President John F. Kennedy*, 102d Cong., 2d Sess. 64 (1992) (statement of the Hon. William S. Sessions).

DRAFT

First, the Bureau seems to have devoted part of its effort to obtaining informant confirmation that they had "an understanding of confidentiality" within the meaning of Section 6(4) of the JFK Act.

The Review Board did not question the original existence of such an understanding with these informants. Indeed, the Review Board stated in its August 11, 1995 Reply to the President that for the postponements at issue, "the Review Board accepts that the use of informant symbol numbers or the existence of an informant file provides evidence that the informant in question was assured some measure of confidentiality."⁷

Second, interviews with former informants that simply recount their discomfort with the disclosure of their identities provide little probative information, particularly when there is no reason to believe that the disclosure of all (or part) of a symbol number would reveal the identity. If, on the other hand, a former informant had specific information that identified particular harms, the Board would be interested in receiving such information.

Third, the Bureau devoted some of its resources to tracking down distant descendants of deceased informants. The Review Board believes that such efforts will provide little probative information and would recommend that the Bureau not undertake such efforts.

Fourth, the Bureau continues to withhold from the Review Board evidence from the Bureau's least expensive and most probative source: the informant's source file. Rather than track down an informant to determine what kind of understanding of confidentiality he or she had, the Bureau might simply have shown the Review Board (or staff) a copy of the agreement. Indeed, the Review Board was struck by the Bureau's reluctance to provide copies of confidentiality agreements with informants who insisted that they had signed comprehensive non-disclosure agreements. Similarly, the source file would seem to provide the best evidence of whether the informant at issue had provided information on dangerous persons who might subsequently be inclined to cause harm.

The Review Board continues to be interested in receiving evidence on whether the informant is still living,⁸ whether there is any corroborating evidence of any harm that could befall the informant if his or her identity were disclosed, and, very importantly, whether the disclosure of the redacted information in the documents under review would in fact disclose the identity of the informant.

⁷Page 6, footnote 8 of our August 11, 1995 Reply.

⁸We understand that, in the large majority of cases, this information is retrievable from computer databases without directly contacting the former informants.

Mr. Howard Shapiro
September 28, 1995
Page 7

DRAFT

I trust that this response will provide you with some useful guidance regarding the Review Board's understanding of these matters.

I am enclosing a copy of our Federal Register notice wherein the Board's decisions are recorded. The ARRB staff will be pleased to provide any further information that you might wish.

Very truly yours,

John R. Tunheim
Chairman

cc: The Honorable Jamie Gorelick
Deputy Attorney General

Marvin Krislov, Esq.
Associate Counsel to the President

John A. Hartingh
Inspector-in-Charge, JFK Task Force