

November 23, 1994

Draft analysis -- Informants issue:

REVIEW:

Legislative history

Hearings

Landano case

Law reviews

CIA Information Act of 1984

Get H.Rep 102-625

talk to Jim Dempsey

### **1994 Conf. Report (H.Rep 103-587)**

"Continued unjustified secrecy and concealment of these records increases speculation about the assassination and fuels a growing distrust in the institutions of government. . . prompt disclosure of all records relating to the assassination is the best way to fulfill the American people's right to know what happened to their president." (at 2)

"The committee's oversight . . . confirms that widest public skepticism persists . . . there is continuing and compelling public interest in releasing all materials concerning the assassination at the earliest possible date, and . . . only in the rarest cases is there any legitimate need for continued secrecy or classification of those materials." (at 3)

Purpose of the act is to make available to the public all materials relating to the assassination . . . at the earliest possible date. (at 5)

### **1992 Senate Report (S.Rep No. 102-328)**

Page 17:

Creates process to publicly disclose all records re assassination

Principles are independence, public confidence, efficiency, cost effectiveness, speed of disclosure, and enforceability.

18: President can override the Review Board's postponement determinations on executive branch records.

Congress can disagree, but must pass a resolution to change or create a rule government disposition of its records.

18: All postponed records undergo periodic review; contemplate disclosure in full after 25 years unless the President demonstrates that public disclosure will result in an identifiable harm to national security, intelligence operations, or foreign relations of the US.

20: Purposes of statutes -- preservation of all related records, presumption of immediate disclosure, eventual disclosure of all records to enable full public information about the assassination.

Need for independent and enforceable mechanism for disclosure under uniform standards for review.

Emphasis on how current information law is inadequate; records are over 30 years old; only are rare cases with a legitimate need for continued protection of such records.

27: Section 6 has standards for postponement. Postponement means that the records will be disclosed some time in the future and the standards are not exemptions from disclosure.

Standards are discretionary. Applicable principle is presumption of disclosure. Postponements should be narrowly drawn to allow release of the majority of the documents with minimal redactions. Standard for postponement is "clear and convincing evidence".

- a. Intelligence agents, sources, methods
  1. Identity of agents (Section 6(1)(A))

Gov arguments to congress re identity of agents:

    - risk of physical harm to surviving family members
    - fact of employment a secret requiring protection
    - definition of "intelligence agent" -- term of art that should extend to a "domestic or foreign intelligence or counterintelligence asset, collaborator, foreign liaison contact, or covert employee of a US intelligence organization where the identity of any of these currently require protection"

researcher community:

    - term shouldn't apply to deceased agents

Congress:

    - Consult with agencies and public
    - Legitimate to consider impact on survivors
    - Committee questions scope of agency definition, should consider breadth of responsibilities and assignments in the category
    - In all cases board should satisfy itself as to the basis and need for agencies assertions as grounds for postponement
- b. Sources and methods (6(1)(B))
  - Act allows postponement of source or method currently or reasonably expected to be utilized

Congress:

  - Board should consider variety of factors, including age of records, whether use of source/method is known by public (ex: fact that Soviet embassy was bugged during Oswald's alleged visit), is source/method inherently secret or information that's secret
- c. "Confidentiality" (6(4))
  - Act permits postponement if disclosure would "compromised the existence of an understanding of confidentiality currently requirement protection between a Government agent and a cooperating individual or foreign government, and public disclosure would be so harmful that it outweighs the public interest"
  - Govt arg: all such confidentiality requires withholding to preserve the integrity the promise of confidentiality made by a government agency to a witness to get testimony or information
  - Board to consider -- is there an express written confidentiality agreement?

is the agreement express or implied? what are the exact restrictions regarding the scope and duration of confidentiality? Does the agreement currently require protection? Is a witness/informant/confidential source deceased? Is the government seeking postponement only because it believes all such records should be withheld or because of the informant's express desire that the understanding not be made public?

- Board is instructed that when it considers postponement those cases should be kept to an absolute minimum and ensure it is narrowly drawn for the shortest possible time, and release as much information as possible

Page 31: RE consultation with agencies, Congress notes that consultation and dialogue is important. To the extent possible, consultation with the government offices [should be so as to] create[] an understanding on each side as to the basis and reasons for their respective recommendations and determinations.

Page 45: Postponement mechanisms --In consultation with the originating body and consistent with the standards for postponement, board is to make every effort to release, but can

- disclose reasonably segregable parts,
- create a substitute record for information that is postponed, must accurately reflect the information in the actual record that is postponed
- create summaries of records -- outlines or profiles of records that cannot be released even in a redacted form

Practice should be limited to the rarest cases if ever, with the understanding that the release of information other than official records will perpetuate public distrust and undermine public confidence in the government's responsibility to disclose the assassination records.

Materials under seal:

Section 10 gives guidance. Can request AG to petition any court to release info re the assassination held under seal or under grand jury injunction.. Indicates in this instance that a request for disclosure of assassination materials under the law shall be deemed to constitute a showing of particularized need under Rule 6, Fedrules crim pro.

1. AG shall assist re records under seal
2. SecState should contact Russia re records of KGB and GRU, and contact any other foreign government that may hold info re assassination [eg Cuba]
3. all agencies should cooperate

## 92 Hearing on SJRes 282

CIA testimony (Gates) pg 50 et seq

53: CIA not releasing privacy info based on perceived constraints of Privacy Act

security and personnel files on CIA employees requested by HSCA, "irrelevant to ass." but contain personal info  
derogatory info on individuals based on gossip and rumor

House select committee records claimed not releasable because "sequestration" [meaning no authority to release absent congressional permission, or simply fact of sequestration], are taking steps to lift sequestration  
name traces

Referred documents issue  
are conferring with agencies

Sources and methods issue  
information provided by individuals on a promise of confidentiality (can this be demonstrated) will summarize info (did they)

### **FBI testimony (Sessions) 58 et seq.**

Critical issues:  
Classified info  
Confidential sources  
Sensitive investigative techniques

(org crime files)

Sources & Methods

Confidentiality (see Landano)

Burden needs to be on the agency to demonstrate, with clear and convincing evidence, that harm will occur from release of information

Presumption of release is part of act

Lots of this information is out already

The act's powers are broader than traditional FOIA/national security case law

Effect of other laws, esp. CIA?

What about CIA Information Act of 1984 decennial review?

Per 1994 conf report, fact that "existing law. . . had failed to secure the timely release of materials relating to the assassination." (at 5)

Hearings

Policy issues

Considerations

What is justified secrecy

Implied public interest balancing test

Presumption in favor of release, balancing test that balances the public interest with the needs for national security, particularly here as applied to documents 30 plus years old

This is an information access statute, not a substantive investigation. Focus should be on appropriateness of withholdings.

Purpose of act is to collect and release not just documents related to the assassination itself but documents recording the governments response to it and efforts to investigate. Thus, the scope

of relevant documents is much wider than usual. The erosion of public confidence that the act is focused on curing is not just based on doubts about who killed JFK but also lack of clarity about the government's response and the scope of efforts to investigate. Thus, records sought by the congressional committees are relevant in a broad sense.

Ask FBI -- why in this instance would there be a problem about disclosing information that is "particularly critical to successful law enforcement investigations and national security"  
-- don't talk about informants generally, but about this particular instance

Relevance: Congressional intent to include organized crime files. See H.Rep. 102-625 part 1 pg 19: The collection is intended to be inclusive and it intends to apply a "broad and encompassing" definition of assassination records that "includes records created, obtained, or generated by each of the governmental reviews of the assassination as well as records of agencies supporting those reviews."

Need clear and convincing evidence that the narrow grounds specified in the statute are satisfied. FOIA standards do not apply

[but will be helpful in showing a floor]

Explanation for clear and convincing evidence standard

Congress "carefully selected" it after concluding that "less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation's stated goal" of providing public access to all records at the earliest possible date, and "imposing the most exacting standard -- evidence proving a proposition beyond a reasonable doubt -- would effectively preclude meaningful review and protection of other legitimate interests by the Review Board. Part 1, pg. 25.

Criteria for postponing release on national security and privacy grounds includes a balancing test, where the public interest in release must be weighed against the demonstrable harm from disclosure. *Id.* at 26.

Law enforcement activities that rely on the cooperation of confidential informants are shielded only if "public disclosure would be so harmful that it outweighs the public interest, as are Presidential security procedures currently utilized or reasonably expected to be utilized by the Secret Service and other government agencies (*id.* at 30). A limited protection is provided for living individuals who were but are no longer sources of confidential information or intelligence if the release would pose a substantial risk of harm to that individual." (*id.* at 28).

[FBI estimates its total holding is 1 million pages; has transmitted as of June 94 464,000 pages. Was to transfer 44,000 more in July (represented remaining FBI files on the investigation of the assassination.) Is now reviewing Church and Pike Commission records. Remainder (370,000) is Stokes committee, to be completed by December 94 (need to query FBI on this).]

Substantial withholdings have been made from released materials. Of 464,000 transferred pages, 10,500 are postponed in part, 3700 postponed in whole [450 of those solely FBI postponements.] 1700 have been referred (do those already have an FBI postponement

decision attached?) 1500 contain IRS information exempt from release under the Act. A commitment was made to review these postponements -- (has that been done?)

Footnote 14 in the 94 conference report reiterates the act's intentional "establishment of] a narrow protection for confidential informants which requires a more exacting showing than that routinely made by the FBI under the FOIA . . . "The Committee recognizes that law enforcement agencies must to some degree rely on confidential sources to effectively perform their missions. However, the Committee specifically rejects the proposition that such confidentiality exists in perpetuity. As with all other government information, the government's legitimate interest in keeping such information confidential diminishes with the passage of time." 94 rep at 19 fn 14, citing h.rept 102-625 part 1 pg. 28).

Srep 102-328

Pg. 27

Standards for postponement are not exemptions from disclosure, and are discretionary, not compulsory.

Conversation with Jim Dempsey, 12/5/94

Informants is the number one grounds FBI asserts for withholding information from public release. Analysis is based on releasing names, plus information produced by source. FBI has extended to dead people. At times they have disregarded this general policy re a hard line on informant info. It depends on the situation, need to look at all facts and circumstances.

Lines to draw:

1. Technical sources/info from technical means -- bugs, wiretaps, trash, etc.  
Non-humint info should be totally subject to disclosure  
For the board's purposes, is likely most technology has changed\  
No likely big surprises  
Fact of gathering device in a particular office -- info obtained from it should be disclosed
2. Source of information is an agent or a state or local law enforcement officer  
Maybe name is postponed, but fact of official source should not be hidden  
Unlikely someone will be killed because they were doing their job  
Premise should be that all information provided by a police officer or law enforcement agency should be disclosed; can make an argument for the disclosure of names
3. Private citizens who cooperate with law enforcement personnel, dead or alive, are the most difficult issue. Question is can you safely release the information. Is there a revenge motive. Dead informants are arguably easier to deal with than live ones. But who bears the burden of deciding whether they are dead. Here, given the clear and convincing evidence standard, its presumably the FBI

Also, in this instance where the documents are 30 plus years old, its likely that a fair number of the people involved are dead or the persons who might be expected to wreak revenge are dead or feeble.

Major issue is whether you withhold all information on the grounds they are identified as a source?

Two person scenario -- Can they be identified? Are they passing on rumor? (Even if it is rumor, its legitimate to pursue these leads.

Most difficult scenario is when its a member of the organization that's the informant

Try testing the issue via a sample of documents to see how attenuated the source is, the nature of the source (technical, alive, dead). Can you identify the source via the information.

Need to educate on the nature of law enforcement

RE Dir. Freeh -- "not Mr. Glasnost" . Has closed approach but is very savvy re public relations. Not adverse to jumping on a glitzy issue to make a splash. Loaded up his personal office with attorneys who tend to take a nitpicky approach

Approach -- draw some reasonable lines

Pitch should be the importance of credibility of the bureau in this process

Need to find a way to do this that is reasonable

Do not want the result of this review process to be that there are still questions and its because the FBI dragged its feet and was less open than they could have been

Also, remind them that the law only provides for postponement, not withholding

How FBI files are organized. Generally, have lost of reports on individual contacts with sources, or interviews with contractors source, requests for information , background checks,

Electronic surveillance (elsur) files are kept separately from the case files.

Letterhead memos (LHM) are case summaries of current status of the case.

Informant files.

Get this book: Anne Marie Buitrago, "Are you now or have you ever been in the FBI's files?" (Center for Constitutional Rights)

Current case law --

Requires an objective analysis of the degree of risk

Look at law enforcement techniques based on extent to which they are routine or already well known to the public.

Is it a closed file?

RE alleged interference with law enforcement proceedings:

information to be released must relate to a pending or prospective law enforcement proceeding (concrete, not speculative, but may be revived) (exception -- Moorefield, where records qualify where no law enforcement proceeding contemplated but documents were prepared to assist Secret Service in fulfilling its duty to ensure the lives and safety of the President)

Intent to use information in a related future enforcement effort; need actual showing how release would actually interfere

Generic showings of interference --

Witnesses, if will constitute intimidation (premature release issue)

Generalized claims of future harm insufficient, especially if are applied to entire files containing a variety of documents from different sources

Unwarranted invasion of personal privacy -- info that under normal circumstances would prove personally embarrassing to an individual of normal sensibilities. Examples include:

-- info indicating a named individual has been investigated for suspected wrongful/criminal activity -- embarrassment, harassment issues, fact of being the subject of an investigation is an invasion of privacy --but courts have found there's no per se rule re this

But even highly intrusive nature of disclosures is overruled in the cases where "exceptional interests militate in favor of disclosure. (Fund for Constitutional Govt); especially where public interest include circumstances where the third party is a public figure, the individual has a diminished expectation of privacy that tips the balance in favor of disclosure. (4.3.4.6

Protect identity of FBI agents and others involved? Balancing of interests is in not being harassed in the performance of their duties v. the public's interest in disclosure -- don't need actual showing of harm. Doesn't apply across the board; can be overcome where the performance of particular agents called into question. Focus on need for public supervision and investigation.

What's been previously released?

Schmerler -- if agent dead need a particularized showing of need

What's the damage from disclosure

What's the expectation of continuing privacy

Is what's revealed of a private nature

Agreement to testify as waiver of confidentiality

In this context will disclosure prohibit other potential informants from coming forward

Routine v. secret techniques

Clear and convincing evidence of danger to personal safety.

Previous case law (Schmerler) has said that courts don't require agencies to look through past their files to determine if a source is dead

Need showing of promise of express or implied confidentiality

JFK act explicitly reverses the presumption in statute and case law that persons talking to the FBI are implicitly confidential.

Landano (113 U.S. 2014 (1993): Decides nature of FBI's evidentiary burden under 7(D)

Inmate convicted for murder of police officer sought exculpatory evidence in FBI files through FOIA.

FBI withheld info provided by five types of sources:

- regular FBI informants
- ind. witnesses not regular informants
- state/local law enf. agencies
- other local agencies
- pvt financial/commercial institutions

FBI argued all these should be presumed confidential  
2019

DCT said FBI didn't meet burden of establishing each doc. "reasonably could be expected to disclose the identity of, or information provided by, a 'confidential source'." (2018)

For FOI purposes, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential. " Under the 1974 conference report, "a source is confidential . . . if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred."

2020

Court notes that proof of explicit promises of confidentiality to particular sources is often not possible, given that the FBI does not have a policy of discussing confidentiality with every source, and when such discussions do occur agents do not always document them." The question is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality.

What is confidential?

Can, absent specific evidence to the contrary, an implied assurance of confidentiality always be inferred from the fact that a source cooperated with the FBI during a criminal investigation.

Court notes that in common usage is not limited to complete anonymity\ or secrecy. Webster's Third: a statement can be made in confidence even if the speaker knows the communication will be shared with limited others as long as the speaker expects that the information will not be published indiscriminately.

Prior knowledge of whether communication will be disclosed in particular ways is ordinarily not available at the time of an interview.

So confidential is less than total secrecy. "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes.

2021

Explicitly rejects the government's argument of inherently implicit confidentiality whenever a source cooperates with the FBI and that the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality.

Rejects notion of universality

Sources not presumptively confidential are newspaper clippings, wiretaps, and witnesses speaking to an undercover agent who therefore do not realize they are communicating with the FBI. This "sweeping presumption [does not] comport[] with 'common sense and probability'."

Variety of sources collected from. by FBI. Sensitivities will vary based on circumstances. While claiming need for inference of assurance of confidentiality because of risk of reprisal or negative attention, FBI acknowledges that reprisal may not be threatened or even likely in any given case. Court concludes that only "ease of administration" is "why that expectation always should be presumed."

2022 the court also notes that there's not argument that disclosure ordinarily would affect cooperating agencies adversely or that the agencies otherwise would be deterred from providing even the most nonsensitive information.

FBI's arguments found to be conclusory.

Rejects an outcome that's all but "irrebuttable". Who besides FBI is in a position to offer persuasive evidence that the source in fact had no interest in confidentiality.

2023

types of sources likely to require confidentiality:

paid ones  
nature of an ongoing relationship  
circumstances of communication

"locations

and under conditions which assure

the

contact will not be noticed."  
character of the crime \*  
sources related to the crime \*

### FBI's argument

Buitrago:

pg 69 -- 1968 Hoover memo -- "as a general rule, all of our security information are considered available for interview by Department attorneys and for testimony, if needed

70 -- "potential witness" rule -- a person is not a confidential source if he might be later called to testify by the agency. Fact of confidentiality expectation/promise is noted on the document.

Lists classes of confidential informants:

1. Criminal informants
    - Potentiall criminal informants
    - Organized Crime informants/top echelon informaints
  2. National security informants
    - Double agents
    - Defector Sources
    - Recruitments in Place
  3. Cooperating witnesses
  4. Sources given expressed promises of confidentiality
  5. Persons providing information requirieng that confidentiality be afforded
- its
- source.
6. Informant symbol numbers, asset code names and mosaic theory
  7. Recruitment and operation of informants and other sources

Ask -- what is their expectation of continued confidentiality?  
isn't it especially a weak argument where cooperating witnesses are concerned?  
persons providing info that would require a subpoena today won't be affected  
necessarilyt by the revelation of what they provided 30 years ago  
What about the consideration that the substantive event is the death of a president,  
a situation with much less expectation of confidentiality  
Doesn't the voluntary nature of provided information make for a lessened degree  
of possibility of reprisall?  
Would they be potentially called to testify?  
Many of the FBI's arguments are conclusory.  
Why would a particular symbol number still be secret?  
Are sources then really likely to be reactivated after decades?  
In Landano, the Supreme Court said the risk of realitaiton if cooperation is  
discovered is not presumptive, and FBI there agreed it would not always be an issued  
FBI doesn't differentiate between finding out about past penetration v. details of  
current penetration  
In concluding paragraph, FBI argues that inof from sources will dry up,  
presumably if info here is released.

There's no discussion of how the passage of time affects sensitivity  
Also no discussion of what percentage of sources as listed make up the source  
information being postponed.

Are these arguments intended to apply to documents that already have  
postponements? Or documents that have not yet been reviewed? Are there classes of documents  
that have not been reviewed yet?

How does the FBI address Congressional intent re release of as much as  
possible?

Aren't they to some extent re-fighting fights they fought with Congress?