

May 1, 1995

TO: David Marwell

FROM: Sheryl Walter

RE: Scope of Assassination Records Review Board discretion in applying postponement criteria to assassination records containing informant information

This memorandum examines alternatives available to the Assassination Records Review Board (Review Board) related to the review process for records, primarily ones originated by the FBI, that contain informant material. The Review Board is aware from previous briefings and material provided by representatives of the FBI, from reports by staff analysts, and from the Review Board's own inspection of FBI documents, of the range of information in FBI records that potentially triggers the Assassination Record Collection Act's (ARCA's) provisions allowing postponement of informant information. Material that has been postponed on informant grounds includes actual names of informants, symbol numbers, informant file names, and information provided by informants that the FBI believes would tend to reveal the informant's true identity.

One issue facing the Review Board is the scope of its power under the ARCA to exercise discretion in the application of the informant postponement standards. Discretion could be exercised by the Review Board through narrowing the universe of records or information contained in records for which the Review Board will require the FBI to produce the clear and convincing evidence of the need for postponement. The exercise of discretion may also arise through the Review Board's interpretation of what constitutes evidence sufficient to meet that clear and convincing standard.

The ARCA's postponement provisions governing informant information state that material may be postponed upon clear and convincing evidence that (a) public disclosure would reveal the identity of a living person who provided confidential information and would pose a substantial risk of harm to that person or (b) public disclosure would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or foreign government and disclosure would be so harmful it outweighs the public interest.¹ What Congress intended to constitute "clear and convincing evidence" is not addressed in the ARCA. Nor does the legislative history discuss the extent or nature of evidence that an agency must produce nor the degree of effort an agency must exert to meet this standard. However, the ARCA arguably gives the Review Board broad discretion in the extent to which it interprets and implements these standards.

¹ See ARCA Sec. 6 (2) and (4).

The legislative history provides scant guidance for the Review Board's application of the informant postponement standards. On the one hand, the ARCA emphasizes the "presumption of immediate disclosure, and [that] all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination."² The ARCA also states that "most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records."³ However, this presumption of disclosure must be read in conjunction with the fact that Congress did provide for postponement of information and clearly contemplated that those postponement provisions appropriately would be invoked in at least some instances. Moreover, both the ARCA's underlying purpose of disclosure and the application of the postponement standards should be read in conjunction with the legislative history's description of the statute's intent and the Review Board's powers to interpret and apply it. In this respect, the Senate Report states:

"The underlying principles guiding the legislation are independence, public confidence, efficiency and cost effectiveness, speed of records disclosures, and enforceability. In order to achieve these objectives, the Act creates a presumption of disclosure upon the government and it established an expeditious process for the review and disclosure of records."⁴

From this text, it appears that the act's presumption of disclosure is the vehicle by which Congress expected the Review Board to be able to meet the ARCA's primary goals of gaining public confidence in the review process, releasing as many records as quickly as possible in an efficient and cost-effective way, and enforcing the Review Board's actions. The legislative history also emphasizes that:

"It is intended that the [postponement] standards operate as discretionary, not compulsory, requirements for disclosure. The underlying principle for applying the standards for postponement remains the presumption of disclosure established by the Act. Any postponed records or information should be narrowly drawn to enable the majority of any record to [be] disclosed immediately, so that the redaction is minimal and subject to review and disclosure in the near future. It is intended that the Review Board should make its own determinations and that its judgments will be shaped by its experience, knowledge, and expertise during the course of its work."⁵

² Id. at Sec. 2(a)(2).

³ Id. at Sec. 7.

⁴ S.Rep. 102-328 at 17.

⁵ Id. at 27.

One conclusion that can be drawn from this language is that Congress recognized that it could not anticipate every circumstance and practical problem the Review Board may face in its work. By providing the Review Board with the discretion to apply its "experience, knowledge, and expertise" developed through its work with agencies, with the universe of assassination records, and with the practical problems presented by the review process, Congress's instruction that the Review Board "make its own determinations" can be interpreted as a grant to the Review Board of a broad range of discretion to see that the fundamental goals of the Act, particularly the release of the maximum amount of records possible, are met.

Additionally, while the ARCA does not precisely state how postponements should be applied, the Review Board presumably has the power and the responsibility to implement the act in a manner so as to effectuate all of the purposes of the act. For example, the Review Board might determine that certain categories of records contain information more "reasonably related" than others to the historical record of the assassination. The Review Board could also determine, based on its own experience and expertise, which records or record groups it will require the FBI (or any other agency) to produce "clear and convincing evidence" of the continued need for postponement. Such determinations could be based on how significant the document or information proposed for postponement seems to be to the broadening and enrichment of the historical record. For other records, it may be sufficient to devote less agency and Review Board resources than will presumably be required for meeting the "clear and convincing evidence" standard to devising acceptable substitute or summary documents as interim disclosure methods established in the ARCA,⁶ especially if there is only a small amount of material redacted from the record in the first place.

The practical aspects of the Review Board's limited lifespan, budgetary constraints, and the current political climate are factors for the Review Board to consider in the policy decisions it makes regarding postponement criteria. The result of requiring an exhaustive demonstration of evidence to satisfy the "clear and convincing evidence" standard for every informant occurrence in every FBI document could be that far fewer documents are released to the public at the end of the Board's tenure than could be released, at least in part, if mechanisms like substitute and summary documents are also used. Another result could be the release of documents less important to understanding the history of this event than others that are others which may end up not released due to lack of time and money. In this way, the overriding goal of public confidence in the review process through prompt release of as many records as possible could fail to be met. Thus, creative approaches to implementing the act, including broad use of the ability to provide summaries or substitute documents, can help maximize the timely and efficient implementation of the act while following Congress's mandate to maximize the disclosure of records that enrich, enhance and broaden the historical record of this tragic event.

⁶ See ARCA Sec. 9(c)(2)(A).