



Date: August 21, 2017

To: John P. Fitzpatrick, Senior Director, Records Access and Information Security Management, National Security Council

From: William J. Bosanko, Chief Operating Officer *WJB*

Subject: FBI's Proposed Postponements of JFK Assassination Records

NARA has conducted an analysis of the first batch of 7,469 documents proposed by FBI for further postponement. Overall, our analysis found no problems in the quality of the FBI's review; the redactions appeared to be consistent within documents and between documents. We also found no instances in our sample of information being released in one place and held in another, nor did we find instances of previously released information being redacted. However, while the review appears consistent, NARA is concerned that the FBI did not apply the standards of review necessary under the JFK Act.

Background

We sampled 525 documents from the FBI's LCN/Violent Organization's appeal bucket (a 9% sample) and all of the remaining 1,377 documents from all other appeal buckets (a 100% sample). Of the documents sampled, 233 of the documents proposed for continued postponement would release information that was withheld previously. None of these documents are from the La Cosa Nostra (LCN) appeal bucket, from which our sample found that no additional information was being proposed for release.

The type of information proposed for continued postponement breaks down as follows:

| Type of Information | Number of Documents |
|---|---------------------|
| Foreign Information (from foreign law enforcement agencies and named foreign law enforcement sources) | 555 |
| Digits (the numerical part of an FBI confidential informant code) | 523 |
| Named sources | 444 |

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| Other (includes file numbers, code names, information about sources, information about investigations) | 313 |
| 3 rd agency information | 282 |
| Source codes (other than foreign) | 103 |
| Nexus | 83 |

In addition, there were 34 instances of Grand Jury information being proposed for continued postponement; this information is exempt under the JFK Act and is not subject to release in 2017. There were also 14 instances of PII and other privacy information proposed for postponement, along with scattered instances of tax information.

The FBI presented their appeal justifications according to “buckets,” grouping their appealed documents in one of the buckets. The grouping was not consistent. For example, a document in the LCN bucket might have proposed postponements for foreign law enforcement information that would otherwise be covered in the Foreign Relations bucket.

While imperfect, we provide the following evaluation of each of the FBI’s appeal buckets based on the survey data presented above:

Nexus

NARA does not object to the continued postponement of documents containing this type of information.

3rd agency information

Decisions on this type of information will be handled by the equity holder; NARA will wait until those decisions are made before weighing in on these documents.

Other

The FBI is asking for the continued postponement of a variety of information, including but not limited to:

- case file numbers;
- case codenames;

- information provided by sources or about sources;
- details of investigations;
- location of wiretap monitoring facilities;
- information from overhears; and
- information labeled NBR.

Because this type of information is unique to specific documents and an opinion cannot be offered in a categorical manner, NARA recommends that requests for postponements of this type of information be accompanied by document-level justifications.

Named Sources and Source Codes

In their justification for the further postponement of information concerning confidential sources, the FBI stated that they seek “continued postponement for only those named individuals who are either still alive or for whom the status could not be determined.” They applied the same standard to sources identified only by a source number and identifying information. However, in their appeal justification, the FBI is seeking continued postponement of 3 other types of information:

- The names and identifying information of living third parties who were merely mentioned in these documents.
- The names and identifying information of living third parties who were merely of investigative interest to the FBI.
- The names and identifying information of living individuals who provided information during the course of its investigations.

As justification for each of these, the FBI relies on broad statements concerning possible stigmatization, harassment, or even violent retribution. As the information is concerning events more than 50 years ago, while there may be a residual privacy interest by the individuals named, it is difficult to imagine circumstances under which an individual could be harmed by the release of their name in a file in the JFK Collection. The standard set by the JFK Act and the Assassination Records Review Board during their deliberations is a high one: there has to be “clear and convincing evidence” of a “substantial risk of harm,” and any invasion of privacy is “so substantial that it outweighs the public interest.” Baring specific document-level justifications for continued postponement, NARA recommends that appeals of this type of information be denied.

With regards to individuals who meet the definition of confidential sources (those who had an ongoing relationship with the FBI providing information), the FBI appears to have done their due diligence in attempting to determine if named or symbolled sources were still alive in

documents, outside of the LCN files. Some of the sources being protected, however, are in the main investigative case files for Jack Ruby, Oswald, and the JFK investigation. Because the intent of the Act was to release information concerning the assassination, and these events are 50 or more years old, and these files clearly relate directly to the assassination, NARA opposes the continued postponement of any confidential source information in these files, barring clear and convincing evidence of a substantial risk of harm. NARA otherwise has no objection to the continued postponement of source information in other files, with the exception of documents in the LCN bucket (see the discussion for the LCN bucket, below).

Digits

According to the ARRB's Final Report, "the Review Board routinely agreed to postpone for ten years the 'numeric' portion of informant symbol numbers and the 'case number' portion of informant file numbers." (see page 70). In its justification, the FBI states categorically that "the FBI is no longer seeking protection of the previously postponed number if the only information redacted was the source number," which NARA takes as referring to the number portion referred to above. However, our analysis found scores of instances where the number portions (referred to here as "digits") are proposed for continued postponement. It is clear that the ARRB did not consider that the numeric portion of the symbol number should be postponed at all past 2017, and in fact should be released prior to 2017. Unless there is specific justification for the continued holding of the digits, NARA recommends that these postponements be rejected.

Foreign Information

The FBI is asking for the continued protection of information received from foreign law enforcement agencies, the identities of foreign law enforcement agencies that appear in the records, and specific named foreign law enforcement and other foreign government sources. They are grounding their withholdings on their Foreign Government Information Classification Guide. As such, they are categorically withholding such information, stating

[D]isclosure of this material would reveal the existence of such confidential relationships with current and long-term foreign government partners in contravention of law enforcement/national security information sharing agreements. As a result, disclosure could reasonably be expected to strain relations between the United States and those foreign governments, triggering negative diplomatic, political, or economic repercussions. Furthermore, a breach of these relationships would have a chilling effect on the free flow of vital law enforcement/national security information to the FBI, thereby impeding the FBI's effectiveness in solving crimes and protecting our national security.

The application of this standard runs counter to the “clear and convincing evidence” standard and ignores the balancing test written into JFK Act Section 6(4), which concerns the relationship between government agents and cooperating foreign governments. The FBI’s assertion that the information would do little to further the public’s understanding of the assassination, because, “in nearly all instances, the foreign government information at issue concerns a specific investigation of an individual and does not speak directly or indirectly about the assassination,” ignores the Review Board’s broad view of what constitutes an assassination record. In many instances, the foreign government information at issue concerns a now-deceased critic of the Warren Commission, a subject clearly related to the assassination. In any event, the weight is on showing harm that outweighs the public interest, not the other way around.

Granting the FBI’s position that it cannot unilaterally release other government’s information, however, NARA could support the FBI’s appeal if the FBI seeks the views of the foreign governments at issue to release information in the JFK Collection, with the understanding that such a release will not change the status of their government’s information in other FBI records.

The La Cosa Nostra files (LCN)

Of the 7,469 documents in the FBI’s first appeal set, 6,097 come from various files of members of organized crime or La Cosa Nostra (LCN). As mentioned above, the FBI has released no additional information from the LCN files. Indeed, they do not seem to have applied the same review standards to these files as they have to postponed documents from other files. To all appearances, no attempt was made to determine if sources were living or dead, or what other information could now be released. In seven instances, in a sample mostly drawn from one LCN member’s case file, we were able to identify named sources as deceased. In justifying the continued postponement of postponed LCN documents, the FBI’s appeal justification relies on broad statements of potential harms, instead of the “clear and convincing evidence” standard of the JFK Act. Because we can find no indication that the FBI made any attempt to determine if additional information could be released, NARA cannot support the continued postponement of these records absent additional work by FBI.

Recommendation

Given the large volume of records recommended for postponement and the limited time available for further review, NARA recommends that the President authorize a temporary postponement of one year for the FBI’s proposed postponements. We also recommend that the President establish an interagency working group to review, during the temporary postponement, all of the records proposed for postponement by FBI and the other departments and agencies to ensure that only information that meets the strict standards of the JFK Act are considered for further postponement beyond 25 years.

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Sent time: 08/21/2017 11:26:13 AM
To: Mark Bradley <mark.bradley@nara.gov>
Subject: Just FYI - re JFK Act (CIA & FBI)
Attachments: WJB to JPF re CIA.pdf WJB to JPF re FBI (1).pdf

See attached (2 files).

Jay