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302s - (FOIA + CONGRESS)

DELETION CODES

- A. Information which is properly classified pursuant to Executive Order, the disclosure of which could reasonably be expected to cause damage to the national security or the conduct of the Government's international relations.
- B. Information, the disclosure of which would tend to reveal the identity of an informant.
- C. Information obtained from a foreign government or international organization where there is an agreement or understanding that the information received will be treated confidentially.
- D. Information protected under the Grand Jury Secrecy provision -- Rule 6(e) of the Federal Rules of Criminal Procedure.
- E. Information, the disclosure of which would tend to identify a source of information, where confidentiality is expressed or implied.
- F. Administratively designated FBI file numbers, which represent individuals or matters which are not the subject of this file.
- G. Information, the disclosure of which would tend to jeopardize an ongoing investigation.
- H. Information, the disclosure of which would tend to compromise the effectiveness of an investigative method or technique.
- I. Information, the disclosure of which would divulge opinions, recommendations, and advice generated in the decision-making process of the Government.
- J. Information, the disclosure of which is prohibited by Federal statute (with citation to the appropriate statute).
- K. Information protected under the attorney-client privilege.
- L. Information or material protected under the attorney work product privilege.
- M. Information which is not relevant to the matters at issue in this administrative matter.
- N. Information originating with another Government agency which must be referred to that agency for review. The use of this code does not waive any applicable codes which may be applied by the originating agency.
- O. Other, as specified.
- P. Information, the disclosure of which would be an unwarranted invasion of the personal privacy of an individual not party to this administrative matter.

AA
John,
In thinking
some more, I
have become
agitated by this
issue. Could
you read
this over?
Jhx.
BK

MEMORANDUM

TO: All OIC Attorneys
Professor Dash
FROM: Brett Kavanaugh
DATE: March 28, 1995
RE: 302's -- FOIA and Congress

In recent weeks, witnesses in several investigations in Washington have become increasingly concerned that their 302's will be available to the public under FOIA; or if not, will be turned over to Congress by this Office. It is my view that our answers to these questions will affect (and have already affected) the willingness of witnesses to be fully forthcoming. (One witness all but said as much.) For that reason, it is imperative that we adopt a consistent and coherent policy on these issues. For now, I will simply outline the basic issues; a lengthier analysis and perhaps a team discussion likely will be necessary in the near future.

1. FOIA Exemption 7(d) exempts from disclosure records that "could reasonably be expected to disclose the identity of a confidential source" or "information furnished by a confidential source." The Supreme Court interpreted that provision in Department of Justice v. Landano, 113 S. Ct. 2141 (1993) (9-0). Quoting the legislative history, the Court stated that Exemption 7(d) applies if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." Id. at 2019. The Court then considered the circumstances under which an assurance of confidentiality could reasonably be inferred. First, the Court stated that an assurance of confidentiality could be inferred even in situations where the witness or the government anticipated or could have anticipated that Brady and applicable procedural rules such as the Jencks Act might ultimately require disclosure of the information. Id. at 2020. The Court reasoned that "an exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all." Id. The Court stated, therefore, that a confidential source is one who "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." Id.

The Court then considered the Government's argument that an assurance of confidentiality is inherently implicit whenever a source cooperates with the FBI in a criminal investigation -- a position that would render virtually all 302's automatically exempt from FOIA disclosure. The Court did not go as far as the Government wished; the Court stated: "[W]e have determined that

→ Why don't we just put that at the intro
to every new 302? "Witness X spoke to
us under an express assurance that the info. would
only be divulged to the extent FBI or OIC deem necessary
for law enforcement purposes."

it is unreasonable to infer that all FBI criminal investigative sources are confidential, [but] we expect that the Government can often point to more narrowly defined circumstances that will support the inference. . . . We agree that the character of the crime at issue may be relevant to determining whether a source cooperated with the FBI with an implied assurance of confidentiality. So too may the source's relation to the crime." Id. at 2023. The Court did not spell out this standard in much detail, however.

In an investigation of this nature and magnitude, I think we can make good arguments with respect to a large percentage of our sources that those sources "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." Id. at 2020. We have especially strong arguments with respect to information provided by someone "on the inside" who may face reprisals of one form or another if their information becomes public. See Landano, 113 S. Ct. at 2023 (listing such examples).¹

2. Upon request, we obviously should produce to Congress any 302's from closed investigations that we would be required to disclose under FOIA. But what about 302's from closed investigations that would not be disclosed under FOIA? That is an extremely delicate issue, one of great importance to many witnesses. (In that regard, I note that numerous witnesses have expressed extreme displeasure at the fact that their 302's on the Foster death are now publicly available at the Archives and have become the subject of press articles.)

While we will have to consider many issues in resolving this important question (for example, standard DOJ practice, executive privilege, etc.), my initial position is that we should treat 302's that are not subject to disclosure under FOIA as sacred (unless Congress decides to investigate our investigation under 28 U.S.C. §595(a)(1), as opposed to investigating the underlying facts). ~~Assuming that Congress is investigating only the underlying facts,~~ I fear that a policy of producing those 302's that would not be disclosed under FOIA will hinder and impede our continuing investigation and cause harm to future investigations. Under such a policy, I would expect that witnesses will be quite weary if, as often will be the case, they know that the information they provide might someday be disseminated to Congress and the public.

In short, Congress has every right to investigate the same subjects we are investigating, but it is not clear to me that Congress has any right to piggy-back on our investigation by using interviews that have been conducted in circumstances where the witnesses reasonably expected confidentiality.

¹ I have explored this issue and plan to explore it in more detail with the FOIA liaison at DOJ, Peggy Irving.

general principles

- will not

- routinely turn over 302's
to Congress
→ protective order

~~- don't withhold from Congress
something you would turn over
to FOIA
= closed~~

~~- clarify whether asking for
confidentiality
- ask whether want confidentiality~~

explicit assurance of
confidentiality would be
better than nothing

~~- doesn't come up that often
- rare that~~

⊕ historical practice of 302's

⊕ GAO doing studies + audits

NO PENDING

redactions

- red tape

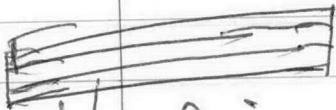
* 6(e) can be interpreted very broadly

→ non-6(e) material ⇒ no work product, deliberative material turned over in closed cases

→ executive privilege

↓
open ⇒ immediate fear of thwarting investigation

- chilling effect for future prosecutors



- line is wavy

- congressional subpoena

- work out accommodation

rational

firm at beginning ⇒ that helps

Dingell

- Andrea Symington
 - Monique
 - JoJo

Meeting

- ① 302's -
 when turned over?
 why?
- ② difference between investigation
 of investigation and investigation
 of events
- ③ chilling effect blurs distinction
 between open + closed !!

- Congress is going to be seeking
 our 302's because they are not
 going to be holding

Foster documents

⊗ confidential source

⊗ open v. closed

ACCOMMODATIONS

- closed hearings
- identities only to
 certain members

accommodation

↘
Main Justice

Vicki Sloan

dispute