

Re: FBI Privacy Appeal, 8/3/98

- The JFK Act, § 3(10) defines the public interest as "the *compelling* interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy."
- Under § 6(3), the invasion of privacy created by disclosure of a particular record must be "so substantial that it outweighs the public interest."
- Since the FBI has already been willing to publicly acknowledge that it had a "photograph of LANE as the subject of a masochistic rite" (See August 3 petition, footnote 4), the only invasion of privacy that is relevant to this appeal is the additional invasion created by the disclosure of the actual documents and the photograph itself.
- In its petition, the FBI argues that the release of these records "would add nothing to the public's understanding of the assassination or how that crime was investigated by the FBI." (See August 3 petition, p.3) However, the FBI's apparent interest in discrediting a critic of the Warren Commission through potentially embarrassing personal information does add to the public's understanding of how the FBI dealt with the issue of the assassination.
- The FBI also seeks to apply, by analogy, the balancing of privacy interests versus the public interest in disclosure that has been undertaken in FOIA litigation. The FBI cites the Reporters Committee case (489 US 749) as an example in which privacy interests were found to outweigh the public interest in disclosure. However, that case involved an attempt to gain access to personal information (rap sheets) that had no relevance to the operations of government. FOIA was enacted to inform citizens about the conduct and policies of government agencies. Therefore, the Court ruled, any public interest in obtaining criminal information about a private citizen "falls outside the ambit of the public interest that the FOIA was enacted to serve." (p. 775) In the present case, the materials in question were found by the Review Board to be assassination materials, and therefore the public interest in their disclosure is clearly within the public interest contemplated by the JFK Act. Furthermore, in Reporters Committee, the Court held narrowly that the balance is tipped in favor of privacy when the government has information about a private citizen, and "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to.'" The materials in question clearly are records of "what the Government is up to."
- The FBI also discusses the possibility that Lane was incorrectly identified as the individual in the picture. Release of the information, they argue, could therefore cause unnecessary embarrassment. It is difficult to understand, however, how release of the documents would cause such harm, whereas acknowledging and describing the photograph would somehow be less harmful. At least if the picture is released, people will be able to make judgments as to the identity of the individual in the photograph, rather than relying on the assessments of the Dallas District Attorney's Office and the FBI. In addition, the public's understanding of the FBI could be further informed by the fact that the FBI held such a picture

without even being sure that Mr. Lane was in fact the man in the photograph.

- The balancing test applied in FOIA litigation is not explicit in the statute itself. Rather, the need for balancing has been inferred from the statutory language (i.e. "an *unwarranted* invasion of personal privacy"). The JFK Act includes the same language, but adds that in addition, the unwarranted invasion of privacy must be "so substantial that it outweighs the public interest." Since the use of the word "unwarranted" already implies the need for a balancing of interests, the additional provision in the JFK Act must have some additional significance.(???)
- Under § 5(g)(D), the records would have to be released no later than 2017, since privacy is not among the acceptable reasons for further postponement. Should we simply assume that the three individuals involved will be dead by then?