

No. 09-1279

In The
Supreme Court of the United States

————— ♦ —————
FEDERAL COMMUNICATIONS COMMISSION,
et al.,

Petitioners,

v.

AT&T, INC., *et al.*,
Respondents.

————— ♦ —————
ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
————— ♦ —————

BRIEF OF AMICI CURIAE CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON, THE ELECTRONIC FRONTIER
FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION,
THE AMERICAN LIBRARY ASSOCIATION, THE ASSOCIATION OF
RESEARCH LIBRARIES, THE NATIONAL SECURITY ARCHIVE,
AND OPENTHEGOVERNMENT.ORG
IN SUPPORT OF PETITIONERS

————— ♦ —————
Anne L. Weismann
Counsel of Record
CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
1400 Eye Street, N.W.
Suite 450
Washington, D.C. 20005
(202) 408-5565
aweisman@citizensforethics.org

David L. Sobel
ELECTRONIC FRONTIER FOUNDATION
1818 N Street, N.W., Suite 410
Washington, D.C. 20036
(202) 797-9009
sobel@eff.org

Counsel for Amici Curiae *Dated: November 16, 2010*

QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of “personal privacy.” The question presented is whether Exemption 7(C)’s protection for “personal privacy” protects the “privacy” of corporate entities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT.....	7
I. EXEMPTION 7(C) OF THE FOIA DOES NOT AFFORD ANY PROTECTION FOR SO-CALLED “PRIVACY” INTERESTS OF CORPORATE ENTITIES	7
II. APPLYING THE PRIVACY PROTECTION OF EXEMPTION 7(C) TO CORPORATIONS WOULD UNDERMINE THE EXEMPTION’S PURPOSE AND BAR PUBLIC ACCESS TO DOCUMENTS LONG UNDERSTOOD TO BE ACCESSIBLE UNDER THE FOIA....	15

III. ACCEPTING THE THIRD
CIRCUIT'S INTERPRETATION
OF EXEMPTION 7(C) WOULD
UPSET THE ORDERLY
ADMINISTRATION OF THE
FOIA AND AFFORD
CORPORATE ENTITIES MORE
PRIVACY PROTECTIONS THAN
INDIVIDUALS ENJOY21

CONCLUSION23

APPENDIX

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>AFL-CIO v. Chao</i> , 409 F.3d 377 (D.C. Cir. 2005).....	13
<i>Aguirre v. Sec. & Exch. Comm'n</i> , 552 F. Supp. 3d 33 (D.D.C. 2008).....	19
<i>Associated Press v. U.S. Dep't of Defense</i> , 554 F.3d 274 (2d Cir. 2009)	9
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979).....	12
<i>Cohen v. Environmental Prot. Agency</i> , 575 F. Supp. 425 (D.D.C. 1983).....	11, 19
<i>Dep't of the Air Force v. Rose</i> , 425 U.S. 352 (1976).....	16
<i>FBI v. Abramson</i> , 456 U.S. 615 (1983).....	11
<i>Nat'l Archives & Records Admin. v. Favish</i> , 541 U.S. 157 (2004).....	8, 9
<i>Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978).....	15

<i>Nat'l Parks & Conservation Ass'n v. Morton</i> , 498 F.2d 765 (D.C. Cir. 1974)	12
<i>Santa Fe Indus. v. Green</i> , 430 U.S. 462 (1977)	13
<i>Seafarers Int'l Union v.</i> <i>U.S. Coast Guard</i> , 736 F.2d 19 (2d Cir. 1984)	13
<i>U.S. Dep't of Defense v.</i> <i>Fed. Labor Relations Auth.</i> , 510 U.S. 487 (1994)	16
<i>U.S. Dep't of Justice v.</i> <i>Reporters Comm. For Freedom of the Press</i> , 489 U.S. 749 (1989)	8, 9, 10, 16
<i>Washington Post Co. v. U.S. Dep't of Justice</i> , 863 F.2d 96 (D.C. Cir. 1988)	8

STATUTES

5 U.S.C. § 551(2)	13
5 U.S.C. § 552(a)	10, 13
5 U.S.C. § 552(b)(3)	12
5 U.S.C. § 552(b)(4)	4, 11
5 U.S.C. § 552(b)(6)	4, 9-10
5 U.S.C. § 552(b)(7)(C)	<i>passim</i>

6 U.S.C. § 133	12
15 U.S.C. §§ 78a <i>et seq.</i>	12
20 U.S.C. § 1232(g)	13

REGULATION

47 C.F.R. § 0.461(d)(3).....	21
------------------------------	----

OTHER AUTHORITIES

Executive Order 12600, “Predisclosure Notification Procedures for Confidential Commercial Information,” 52 Fed. Reg. 23781 (June 25, 1987)	21
--	----

FDA, Warning Letters, www.ida.gov/ICECI/EnforcementActions/WarningLetters/default.htm	19
---	----

<i>Feds Launch Investigation into Mine Explosion</i> , CBS News (April 7, 2010), available at www.cbsnews.com/stories/2010/04/07/national/main6371864.shtml	17
--	----

FSIS, Quarterly Enforcement Reports, www.fsis.usda.gov/regulations & policies/Quarterly Enforcement Reports/index.asp	20
--	----

House Committee on Government Operations and Senate Committee on the Judiciary, 94 th Cong., 1 st Sess., <i>Freedom of Information Act Amendments of 1974</i> (P.L. 93-502) (“Joint Source Book”).....	11, 14, 16, 18
--	----------------

Inspection report for Quesos Mi Pueblino, LLC, available at www.fda.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM198180.pdf	20
<i>Merriam-Webster's Collegiate Dictionary</i> , Eleventh Edition 924 (2006)	7
ORA, Electronic Reading Room, http://www.Ida.gov/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/default.htm	19
Securities and Exchange Commission, Office of the Inspector General, <i>Investigation of Failure of the SEC to Uncover Barnard Madoff's Ponzi Scheme</i> , Report No. OIG-509 (August 31, 2009), available at www.sec.gov/news/studies/2009/oig-509.pdf	17
Elizabeth Shogren, <i>Cementing Becomes One Focus In Gulf Oil Probe</i> , National Public Radio (May 5, 2010), available at www.npr.org/templates/story/story.php?storyId=126536457	17

INTEREST OF *AMICI CURIAE*¹

Citizens for Responsibility and Ethics in Washington (“CREW”) is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government agencies and officials and to ensure the integrity of those officials. As part of its research, CREW uses government records made available to it under the FOIA. Currently, CREW has FOIA requests pending with multiple federal agencies on a wide range of issues, including, among others, requests for documents that would shed light on the causes of the BP oil spill and the government’s reaction to that spill.

The Electronic Frontier Foundation (“EFF”) is a non-profit public interest organization that examines the potential impact of cutting edge information technology on individual liberties and strives to inform the public about those issues. In

¹ No party or counsel for any party to this case authored this brief in whole or in part, except that current counsel for respondent CompTel, in her prior and exclusive capacity as counsel of record for *amici* CREW, EFF, the National Security Archive, and OpenTheGovernment.org, previously filed an *amicus* brief in support of the petition for a writ of certiorari from which parts of this brief are drawn, but did not author any of this brief in whole or in part since becoming counsel for CompTel. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

support of its mission, EFF pursues FOIA requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has relied extensively on the Freedom of Information Act in support of its mission, and has participated in numerous FOIA cases in this and other courts, both as direct counsel and as *amicus curiae*.

The American Library Association ("ALA") is the oldest and largest library association in the world, with more than 61,000 members. Its mission is to provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all. As part of its mission, ALA advocates for policies and programs that promote affordable access to broadband services to the American public through public and school libraries that are primary beneficiaries of the E-rate discounts. To maximize the effectiveness of the program, ALA provides training, information, and research to the library community, all of which require full information about the E-rate process.

The Association of Research Libraries (“ARL”) is a nonprofit organization of 126 research libraries in North America. ARL’s members include university libraries, public libraries, and government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and diverse communities they serve. Maintaining a strong and robust Freedom of Information Act is of primary interest to ensure transparency of government.

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters obtained under the FOIA. As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information.

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

SUMMARY OF ARGUMENT

1. The express language of Exemption 7(C) of the FOIA, 5 U.S.C. § 552(b)(7)(C), and the legislative intent behind the exemption point unmistakably to an interpretation that excludes any protection for so-called “privacy” interests of corporate entities. The term “personal privacy” used by the exemption to describe its reach applies exclusively to individuals, not abstract and artificial constructs like corporations. Congress enacted Exemption 7(C) to extend to information in agency law enforcement files the privacy protections of Exemption 6, 5 U.S.C. § 552(b)(6), long understood to apply only to individuals. Further reinforcing this view are the harms Exemption 7(C) was designed to protect against, such as the humiliation and embarrassment that accompany the invasion of an individual’s personal privacy. Exemption 7(C) affords protection from embarrassment and other disquieting human emotions experienced only by individuals, not corporate entities.

This is not to say corporations have no protection for their interests under the FOIA. Exemption 4, 5 U.S.C. § 552(b)(4), shields corporations from the harm caused by the disclosure of trade secrets and other confidential business information. The different treatment the FOIA affords corporations (by protecting their confidentiality interests) and individuals (by protecting their personal privacy), reflects the differing relationships each has with the federal government. Corporations are heavily regulated entities, subject to federal and state laws that

require them routinely to make public a host of financial and other data. Individuals, by contrast, enjoy a zone of privacy from the government, and Exemption 7(C) recognizes the primacy of their privacy interests.

2. Extending the privacy protections of Exemption 7(C) to corporations also would frustrate the purposes of the FOIA and bar access to documents long considered to be publicly accessible. As a mandatory disclosure statute, the FOIA's nine exemptions are construed narrowly. With the enactment of Exemption 7(C), Congress understood specifically that information collected by agencies as part of their investigation into corporate misdeeds would continue to be available to the public under the FOIA. But if the decision of the Third Circuit is not overturned, that legislative intent will be thwarted and documents on a wide range of topics sought by the *amici* and others – from the BP oil spill to coal mine explosions to the corporate misdeeds of Bernard Madoff and his company – would no longer be accessible.

Agencies also routinely post investigative reports and other investigative data on agency websites even without a specific FOIA request. If the reasoning of the U.S. Court of Appeals for the Third Circuit is adopted, they will be chilled in making these kinds of affirmative disclosures, fearing a lawsuit from a corporation seeking to prevent the economic harm such disclosures purportedly may cause. Such a result would transform Exemption 7(C) from a narrow instrument facilitating transparency and accountability to a

broad shield preventing the public from knowing what its government is up to.

3. Finally, accepting the Third Circuit's unprecedented interpretation of Exemption 7(C) would upset the orderly administration of the FOIA and grant corporate entities more privacy protections than the FOIA currently affords individuals. Agencies would be required to consult with corporations on any information arguably implicating corporate "privacy" interests and to implement a concept that as yet has no commonly understood meaning or parameters under the FOIA. Already lengthy delays in agency processing of FOIA requests would only grow longer, and agencies would be more likely to defer to corporate interests, given the greater financial resources corporations have to protect their asserted corporate interests.

Recognizing corporate privacy interests under Exemption 7(C) also would grant corporations greater rights and protections than individuals currently enjoy under the FOIA. Unlike corporations, which would get notice of any request for potential corporate privacy information, individuals would be afforded no notice and opportunity to weigh in, even though Congress enacted Exemption 7(C) with the specific intent of protecting individual privacy interests.

ARGUMENT

I. EXEMPTION 7(C) OF THE FOIA DOES NOT AFFORD ANY PROTECTION FOR SO-CALLED “PRIVACY” INTERESTS OF CORPORATE ENTITIES

Exemption 7(C) of the FOIA, by its express terms, protects from mandatory disclosure law enforcement records the production of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). The Third Circuit in its decision below construed the term “personal privacy” to encompass privacy rights and interests asserted on behalf of corporate entities as well as individuals. This extension of the term “personal privacy” conflicts directly with its plain language, especially when considered in the context of the FOIA as a whole and Congress’ clear intent in enacting Exemption 7(C).

Because the FOIA generally defines the word “person” to include corporations, respondents argue the term “personal” in Exemption 7(C) must likewise embrace corporations. The two terms, however, are not the same and “personal” -- which is not separately defined in the FOIA -- generally is understood to pertain to an individual human being. Defined in part as “having the qualities of a person rather than a thing or abstraction,”² personal connotes the character or characteristics of a living person, rather than an abstract and artificial

² *Merriam-Webster’s Collegiate Dictionary*, Eleventh Edition 924 (2006).

corporate entity. Beyond that, the term “personal” does not appear in isolation. Rather, it is linked in Exemption 7(C) to the word “privacy,” which under “both the common law and the literal understandings of privacy encompass[es] the *individual’s* control of information concerning his or her person.” *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763 (1989) (“*Reporters Comm.*”) (emphasis added). The range of “intimate personal” information recognized as falling within the protection of Exemption 7(C) – “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation”³ – consists of information uniquely about and concerning individuals and thus also supports the construction of “personal privacy” as applying exclusively to individuals.

To be sure, this Court has clarified that an individual’s personal privacy protected by Exemption 7(C) is not limited only to information about that particular individual. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004). In *Favish*, disclosing gruesome photographs of a dead family member may not have revealed any private information about the decedent, but certainly would have invaded the personal privacy of living relatives by disturbing their “peace of mind and tranquility.” *Id.* at 166. Accordingly, the Court concluded that Exemption 7(C) exempted those photographs from the FOIA’s mandatory disclosure provisions, construing the exemption as “requir[ing] us to

³ *Washington Post Co. v. U.S. Dep’t of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988).

protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State.” *Id.* at 172.

An examination of the harms Exemption 7(C) was designed to protect against reinforces the exemption’s protections as limited to individuals. Privacy is one of the qualities valued by an individual because it relates to “an individual interest in avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762,⁴ and the “embarrassment and humiliation” such disclosure may cause. *See Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 287(2d Cir. 2009). In other words, Exemption 7(C) affords protection from embarrassment and other disquieting human emotions experienced only by individuals, not inanimate corporate entities.

Exemption 6 of the FOIA shares with Exemption 7(C) this same focus on the personal privacy of individuals by permitting the withholding of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C.

⁴ *See also Favish* at 764 n.16 (cataloging various definitions of “privacy” as including “the right to control the flow of information concerning the details of one’s individuality.”) (citation omitted).

§ 552(b)(6).⁵ This provision long has been construed as applying uniquely to individuals in recognition of their “privacy interest in keeping personal facts away from the public eye” that are “potentially embarrassing or harmful if disclosed.” *Reporters Comm.*, 489 U.S. at 749-750 (citation omitted). When Congress enacted Exemption 7(C) as part of the 1974 amendments to the FOIA, it purposefully adopted the “personal privacy” language of Exemption 6 to ensure congruency between the protections afforded by both exemptions. Senator Hart, remarking on the connection between Exemptions 6 and 7(C) and their use of the term “personal privacy,” explained:

The protection of personal privacy included in [Exemption 7] . . . is part of the sixth exemption in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish to also make it clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files . . .

⁵ The Privacy Act, 5 U.S.C. 552(a), also lends support for the FOIA’s focus on the privacy of individuals. Enacted “largely out of concern over ‘the impact of computer data banks on individual privacy,’” *Reporters Comm.*, 489 U.S. at 766 (citation omitted), the Privacy Act reflects the same “basic policy concern” as the FOIA with the repercussions on personal privacy of disseminating private information about an individual. *Id.* at 767.

House Committee on Government Operations and Senate Committee on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act Amendments of 1974* (P.L. 93-502) (“Joint Source Book”), p. 333.⁶ Thus, while the provisions differ in some material ways,⁷ the nature of the protection they afford – the personal privacy of individuals – does not.

This is not to say the FOIA provides no protection for corporations, just that the nature and source of that protection differ from that for individuals and their personal privacy. Corporations, as inanimate objects, are incapable of experiencing the range of negative emotions that invasion of one’s personal privacy engenders, but they nevertheless have a recognized interest in the confidentiality of business information that, if disclosed, could cause them economic harm. Exemption 4 of the FOIA protects that interest by excluding from the FOIA’s mandatory disclosure requirements “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” 5 U.S.C. § 552(b)(4), to

⁶ Senator Roman Hruska also confirmed Congress’ intent that the protection for “personal privacy” in Exemption 7(C) applied exclusively to individuals, a protection he deemed to be “in some respect the most important rights an individual may possess, his right to privacy and his right to personal safety.” Remarks of Senator Hruska, *id.* at 342. This history confirms Congress’ understanding that the personal privacy protection of Exemption 7(C) pertains only to the privacy rights of individuals, not corporate entities such as respondent AT&T.

⁷ The two exemptions differ in the standard of review, not the privacy interests each affords. *Cohen v. Environmental Prot. Agency*, 575 F. Supp. 425, 429 and n.6 (D.D.C. 1983), citing *FBI v. Abramson*, 456 U.S. 615, 621 n.13 (1983).

protect those “who submit financial or commercial data to government agencies from . . . competitive disadvantages.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974).⁸ As with personal privacy, protecting that confidentiality often is in tension with the FOIA’s goal of providing public access to documents in agency files, but the courts have always recognized that the two interests are distinct. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (noting the conflict between public access to information in government files and “concerns about personal privacy and business confidentiality.”).

The different treatment the FOIA affords individuals with their personal privacy interests and corporations with their business confidentiality interests flows in part from the different relationships the two have with the federal government. Unlike individuals, corporations are highly regulated entities that through a host of federal statutes are obligated to make public a wide range of information. For instance, the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, requires publicly traded companies to file and make available to the public broad categories of detailed

⁸ Corporate submitters of information are also protected by a wide range of statutory provisions that are given force under Exemption 3 of the FOIA, which applies to information “specifically exempted from disclosure by [other] statute,” 5 U.S.C. § 552(b)(3). For example, companies voluntarily submitting information to the Department of Homeland Security detailing vulnerabilities in the “critical infrastructure” may mark such submissions as “critical infrastructure information” and thereby preclude disclosure under the FOIA. *See* 6 U.S.C. § 133.

financial and operating information on a regular basis. *See generally Santa Fe Indus. v. Green*, 430 U.S. 462, 477-478 (1977) (“the Court repeatedly has described the ‘fundamental purpose’ of the [1934] Act as implementing a ‘philosophy of full disclosure.’”) (citations omitted).⁹ Individuals are subject to no comparable disclosure requirements and, indeed, statutes such as the Privacy Act, 5 U.S.C. § 552(a), and the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g), expressly protect individuals against the disclosure of personal information.

Finally, the legislative history of Exemption 7(C) makes clear Congress quite consciously chose to protect the privacy interests of individuals but not corporations, recognizing that information in investigative files about corporate activities – even if its disclosure cast the corporation in a bad light – was precisely what the FOIA was enacted to make publicly accessible. Concerned about court decisions broadly construing Exemption 7, Congress amended the exemption in 1974 to clarify that law enforcement records were exempt only where

⁹ It is worth noting that the Third Circuit’s rationale would also apply to the purported privacy interests of other entities, such as labor unions. *See, e.g., Seafarers Int’l Union v. U.S. Coast Guard*, 736 F.2d 19, 25 (2d Cir. 1984) (“The APA explicitly creates a cause of action for ‘persons’ (including unions, *see* 5 U.S.C. § 551(2) (1982)) aggrieved by agency action.”) (citation omitted). Like corporations, labor unions are required to disclose a broad range of detailed information about their finances and activities. *See, e.g., AFL-CIO v. Chao*, 409 F.3d 377, 394 (D.C. Cir. 2005) (Roberts, J., concurring in part and dissenting in part) (“the whole point of the [Labor Management Reporting and Disclosure Act of 1959] is to ensure . . . broad financial disclosure”) (citation omitted).

disclosure would interfere with certain enumerated interests. Senator Hart, who introduced the amendment to Exemption 7 on behalf of himself and 14 co-sponsors, explained its necessity:

Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in House Committee on Government Operations, Senate Committee on the Judiciary, 94th Cong., *Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, & Other Documents* (Joint Comm. Print) (1975) (“*Source Book*”). That is, Congress determined that disclosure of investigative records concerning various corporate activities lay at the core of the functioning of the FOIA as a mandatory disclosure statute and amended Exemption 7 specifically to ensure public access to such records. That purpose would be thwarted if Exemption 7(C)

were now interpreted to embrace corporate privacy interests.¹⁰

II. APPLYING THE PRIVACY PROTECTION OF EXEMPTION 7(C) TO CORPORATIONS WOULD UNDERMINE THE EXEMPTION'S PURPOSE AND BAR PUBLIC ACCESS TO DOCUMENTS LONG UNDERSTOOD TO BE ACCESSIBLE UNDER THE FOIA.

If allowed to stand, the decision of the Third Circuit allowing corporate entities to rely on Exemption 7(C) to protect from disclosure records that implicate their so-called “personal privacy” will undermine one of the core purposes of the FOIA. Congress designed the FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Toward that end, the

¹⁰ In a recent statement, Senator Patrick Leahy (D-VT) confirmed Congress’ intent behind Exemption 7(C): “to shield from public disclosure sensitive personal information about individuals who may be mentioned in Government files. However, Congress never intended for this exemption to apply to corporations.” As Senator Leahy explained, extending Exemption 7(C) to corporations “would close a vital window into how our Government works” by “shield[ing] from public view critical information about public health and safety, environmental dangers, and financial misconduct among other things— to the great detriment of the people’s right to know and to our Democracy.” Statement Of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On *FCC v. AT&T And The Freedom of Information Act* (Nov. 15, 2010). A copy of his statement is attached as an appendix.

FOIA protects the public's right to know "what their government is up to," *Reporters Comm.*, 489 U.S. at 773, by "pierc[ing] the veil of administrative secrecy" and "open[ing] agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Understanding how agencies oversee the spending of public tax dollars and enforce laws and regulations comprises a core purpose of the FOIA. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

While the FOIA's nine enumerated exemptions permit federal agencies to withhold records that fall within those exemptions, they are to be construed narrowly given the FOIA's "dominant objective" of "disclosure, not secrecy . . ." *Rose*, 425 U.S. at 361. As discussed above, Congress enacted Exemption 7(C) with the specific objective of providing "protection for *personal* privacy" in law enforcement records, just as it already had protected personal privacy in other types of records under Exemption 6. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). Extending that protection to corporate entities would deny the public access to broad categories of records that reveal the operations of government and how it exercises its oversight of corporate activities, in contravention of the FOIA's purpose.

Recent events of national importance demonstrate how records obtained or created during government investigations into corporate activities can contain information of crucial public importance. For example, the BP oil rig explosion and resultant

massive oil spill in the Gulf of Mexico – the subject of multiple FOIA requests by, among others, *amicus* CREW – already have affected hundreds of thousands of residents and businesses and prompted numerous government investigations.¹¹ The Department of Labor’s Mine Safety and Health Administration is investigating the myriad alleged safety violations by Massey Coal and their connection to the company’s West Virginia mine where an explosion claimed the lives of 29 mine workers.¹² The Securities and Exchange Commission launched multiple investigations into the \$65 billion Ponzi scheme perpetrated by Bernard Madoff and his company, Bernard L. Madoff Investment Securities, LLC.¹³

The public has a strong interest in knowing how the government is responding to these crises, whether the response is adequate, and what more should be done. If companies like BP, Massey Coal, and Bernard L. Madoff Investment Securities can inject a claim of corporate privacy into an exemption

¹¹ See, e.g., Elizabeth Shogren, *Cementing Becomes One Focus In Gulf Oil Probe*, National Public Radio (May 5, 2010), available at www.npr.org/templates/story/story.php?storyId=126536457.

¹² See, e.g., *Feds Launch Investigation into Mine Explosion*, CBS News (April 7, 2010), available at www.cbsnews.com/stories/2010/04/07/national/main6371864.shtml.

¹³ See Securities and Exchange Commission, Office of the Inspector General, *Investigation of Failure of the SEC to Uncover Barnard Madoff's Ponzi Scheme*, Report No. OIG-509 (August 31, 2009), available at www.sec.gov/news/studies/2009/oig-509.pdf.

designed to protect only “valid governmental and *individual* interests in confidentiality,”¹⁴ then each time a requester seeks records under the FOIA concerning newsworthy topics like the economic downturn, oil spill, and mine explosion, delay and withholding are likely to result. If the Third Circuit’s decision is not reversed, agencies will be reluctant or unwilling to release records in their investigative files that contain unfavorable facts about a corporation, fearing a lawsuit by the company seeking to protect its so-called personal privacy. Far from being an instrument for learning what our government is up to, the Third Circuit’s decision, if upheld, would transform Exemption 7(C) into a shield to protect corporations’ economic interests to the detriment of transparency and accountability. And it would deny access to the very kinds of records Congress intended to make publicly available under Exemption 7(C): “meat inspection reports, civil rights compliance information, and medicare nursing home reports.” Source Book (statement of Sen. Hart).

Agencies routinely release records in response to FOIA requests that under the Third Circuit’s analysis could become the subjects of protracted Exemption 7(C) disputes. For example, the Environmental Protection Agency did not assert any sort of corporate privacy claim in response to a FOIA request for “notice letters” sent to corporations potentially liable for cleanup of hazardous wastes, but those letters might have been subject to withholding under the Third Circuit’s novel

¹⁴ 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added).

construction of Exemption 7(C). *See Cohen v. Envtl. Prot. Agency*, 575 F. Supp. 425 (D.D.C. 1983). Likewise, in *Aguirre v. Sec. & Exch. Comm'n*, the SEC, in response to a FOIA request, released government records concerning a company's potentially unlawful trading practices, withholding under Exemption 7(C) only information that pertained to individuals. 552 F. Supp. 3d 33, 47 (D.D.C. 2008). Had a claim of corporate privacy been available, the agency might have withheld many more records that would have shown how the SEC failed to properly investigate the company. *See id.* at 56-57.

Beyond those records made available upon request under the FOIA, government agencies affirmatively disclose substantial amounts of information through on-line postings on agency websites that could be affected by the Third Circuit's ruling. For example, the Food and Drug Administration's Office of Regulatory Affairs ("ORA"), which describes itself as having "investigators" who "enforce [food and drug safety] laws," routinely posts inspections reports¹⁵ and warning letters to companies about legal violations,¹⁶ subject only to Exemption 4 redactions of trade secrets and other confidential business information. These records contain information that might well cast the company in a bad light, such as

¹⁵ See ORA, Electronic Reading Room, <http://www.fda.gov/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/default.htm>.

¹⁶ See FDA, Warning Letters, www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm.

the observation that a cheese manufacturer's "[p]lumbing constitutes a source of contamination to food, equipment, and utensils."¹⁷ Similarly, the United States Department of Agriculture Food Safety and Inspection Services ("FSIS") publishes a Quarterly Enforcement Report that lists various types of enforcement proceedings and names companies that have been subject to those actions.¹⁸ If the posting agencies had to scrub these documents of information arguably implicating vague and undefined corporate "privacy" concerns, the public usefulness of the documents would be significantly reduced.

Even if a court victory might eventually provide public access to these types of records, for requesters without the resources to pursue administrative appeals and litigation, an agency's initial denial effectively would be a final denial.¹⁹ Further, the delay attendant to litigation likely would render much of the information stale and of limited utility, given the years that litigation typically consumes. In the end, even if a requester

¹⁷ Inspection report for Quesos Mi Pueblino, LLC, available at www.fda.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM198180.pdf.

¹⁸ See FSIS, Quarterly Enforcement Reports, www.fsis.usda.gov/regulations_&_policies/Quarterly_Enforcement_Reports/index.asp.

¹⁹ As this case demonstrates, even where the agency rejects a claim of corporate privacy and determines to disclose the requested records, a requester may still be obligated to defend against a "reverse-FOIA" suit brought by the corporation asserting a "privacy" interest.

successfully litigates an Exemption 7(C) claim of corporate privacy, the agency's initial denial would still result in greater expense for both the agency and requester, and would delay release of important records Congress never intended to protect from disclosure.

III. ACCEPTING THE THIRD CIRCUIT'S INTERPRETATION OF EXEMPTION 7(C) WOULD UPSET THE ORDERLY ADMINISTRATION OF THE FOIA AND AFFORD CORPORATE ENTITIES MORE PRIVACY PROTECTIONS THAN INDIVIDUALS ENJOY.

The unprecedented ruling of the Third Circuit threatens to upset the orderly administration of the FOIA by imposing enormous administrative burdens on agencies and lengthening the already significant delay in providing requesters access to documents under the FOIA. Agencies likely would be required to expand the consultative process between an agency and a corporate submitter of information to include not only confidential business information, but any information in an agency's investigative files that arguably has some impact on corporate "privacy." *See* Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information," 52 Fed. Reg. 23781 (June 25, 1987) (requiring agencies to notify "submitters of records containing confidential commercial information" when such records are sought under the FOIA, and to establish procedures for the receipt and consideration of submitter objections to disclosure); 47 C.F.R. § 0.461(d)(3)

(FCC regulation implementing the notification requirement). Corporate submitters of material they designate as “confidential commercial information” to protect its disclosure under Exemption 4 will have a new adversarial leg to stand on when the agency determines the disputed information is not entitled to Exemption 4’s protection. Indeed, this case arose when the Commission notified AT&T of CompTel’s FOIA request and AT&T objected to disclosure. C.A. App. A28. Determining what information might be protected on privacy grounds – as opposed to the “confidential commercial” standard of Exemption 4 – is of no small moment, as there are no standards to apply in determining what constitutes corporate privacy under the FOIA. Establishing a new consultative process and determining how to assess claims of corporate privacy would consume scarce agency resources, with the predictable result that far fewer documents would be publicly available.

Implementing the Third Circuit’s opinion also would increase the inherent imbalance that already exists in the FOIA between individual requesters, who typically have limited resources, and corporate submitters, with their much deeper pockets to challenge disclosure of information they deem damaging to corporate interests. In this conflict, agencies would be more likely to defer to corporate claims of privacy, viewing corporations as the more likely litigants in a dispute over whether Exemption 7(C) applies. In either case, agencies would be required to expend ever diminishing resources and all requesters would face even longer processing delays.

Finally, recognizing corporate privacy interests under Exemption 7(C) would grant corporations greater rights and protections than individuals currently enjoy under the FOIA. Under the submitter notification requirements mandated by Executive Order 12600 and implementing agency regulations, corporate submitters receive notice of any request for potential corporate privacy information and be afforded an opportunity to object to disclosure citing Exemption 7(C) as well as Exemption 4. Corporate submitters have the opportunity – as this case demonstrates – to initiate a “reverse FOIA” suit to bar disclosure. By contrast, individuals whose personal privacy information is requested from an agency’s investigative files are not entitled to such notice or an opportunity, either before the agency or a court, to weigh in on whether or not their information should be withheld under Exemption 7(C). As a result, individuals would receive less protection for their privacy interests than corporate entities, even though it is individuals, not corporate entities, that fall within the ambit of those Congress intended to include when it enacted Exemption 7(C).

CONCLUSION

The Court should reject the Third Circuit’s interpretation of Exemption 7(C) as protecting the privacy of corporate entities.

Respectfully Submitted,

Anne L. Weismann
Counsel of Record
CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
1400 Eye Street, N.W.
Suite 450
Washington, D.C. 20005
(202) 408-5565
aweisman@citizensforethics.org

David L. Sobel
ELECTRONIC FRONTIER FOUNDATION
1818 N Street, N.W., Suite 410
Washington, D.C. 20036
(202) 797-9009
sobel@eff.org

Counsel for Amici Curiae

Dated: November 16, 2010

APPENDIX

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On *FCC v. AT&T* And The Freedom Of
Information Act
November 15, 2010**

MR. PRESIDENT. In the coming months, the Supreme Court of the United States will consider *Federal Communications Commission v. AT&T* -- a monumental Freedom of Information Act (FOIA) case that could vastly expand the rights of corporations to shield their activities from public view. Like many Americans who deeply value openness, transparency and accountability in our Government, I urge the Court to reject efforts to broaden the personal privacy exemption to FOIA to include corporate information.

A decade after Congress first enacted the Freedom of Information Act, Congress created an exemption to this law for law enforcement records that contain sensitive personal information. The so-called "personal privacy exemption" for law enforcement records -- FOIA Exemption 7 (C) -- allows the Government to withhold information contained in its investigatory files that "*could reasonably be expected to constitute an unwarranted invasion of personal privacy.*"

By creating this exemption, Congress intended to shield from public disclosure sensitive personal information about individuals who may be mentioned in Government files. However, Congress never intended for this exemption to apply to corporations.

The legislative history for the personal privacy exemption makes clear that Congress intended for this exemption to protect an individual's right to privacy. Indeed, when the Senate debated this exemption in May of 1974, Senator Philip Hart, who drafted the personal privacy exemption, remarked that "*the protection for personal privacy included in [the exemption] . . . is part of the sixth exemption [to FOIA] in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish to also make it clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files, and not only the person who is the object of the investigation.*" See *House Committee on Government Operations & Senate Committee on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act Amendments of 1974 (P.L. 93-502) ("Joint Source Book"), page 333 (emphasis supplied).*

Former Senator Roman Hruska also confirmed that Congress intended for the exemption to address individual privacy rights. Regarding the personal privacy exemption, he said "*we are dealing in this matter with what I believe to be the most important rights, and in some respect the most important rights, an individual may possess, his right to privacy, and his right to personal safety.*" See, *Remarks of Senators Hruska, Id.* at 342. The universal understanding that the personal privacy exemption pertains only to the privacy rights of individuals is further confirmed by the remarks of former Senator Strom Thurmond, who noted during

the Senate debate that “[a]ll of us are aware of the general feeling permeating the country, that our citizens want to know what their Government is doing However, by the same token, we are also concerned about a mutual problem of invasion of an individual’s privacy.” See *Remarks of Senator Thurmond*, *Id* at 342.

During the more than four decades since the Congress enacted the personal privacy exemption to FOIA, our Federal courts and Federal agencies have consistently interpreted this exemption to apply only to individuals. Over the years, the Congress -- with the full knowledge of how the courts have interpreted this exemption -- has never amended this exemption, nor called into question the universally held view that the exemption protects the personal privacy rights of individuals.

Given the clear legislative history and the longstanding case precedent in this area, I am deeply troubled by recent efforts to vastly -- and I believe improperly -- expand the scope of this exemption to reach corporations. While I do not quibble with the notion that certain corporate information should be exempt from public disclosure, I firmly believe that Congress has provided meaningful and adequate protections for sensitive corporate information in other parts of FOIA. Indeed, Congress specifically enacted FOIA Exemption 4 to protect trade secrets and other sensitive corporate information from public disclosure. Tellingly, American corporations have successfully relied upon Exemption 4 for decades, to

safeguard their sensitive business information when it is shared with the Government.

I fear that vastly expanding the personal privacy exemption for law enforcement records would close a vital window into how our Government works. I also fear that extending this exemption to corporations would permit corporations to shield from public view critical information about public health and safety, environmental dangers, and financial misconduct, among other things -- to the great detriment of the people's right to know and to our Democracy.

As Senator Hart wisely noted during the debate of the 1974 FOIA Amendments, "*survival for a society such as ours hinges very importantly on the access that a citizen can have to the performance of those he has hired.*" *Id.* at 346. I sincerely hope that our Nation's highest Court will carefully consider these words and that the Court will narrowly construe the personal privacy exemption, consistent with Congressional intent. Should the Court decide to do otherwise, I will work with others in the Congress to ensure that FOIA, and specifically the personal privacy exemption for law enforcement records, remains a meaningful safeguard for the American people's right to know.