

Does the Freedom of Information Act's Protection for "Personal Privacy" Protect the Privacy of Corporate Entities?

CASE AT A GLANCE

In 2004, AT&T provided the FCC with a variety of documents in connection with an investigation into possible overcharging by AT&T. Later, CompTel, a competitor of AT&T, requested those documents under the Freedom of Information Act (FOIA). AT&T argued the documents should not be released because to do so would violate AT&T's "personal privacy" in contravention of Exemption 7(C) of FOIA. The FCC concluded that corporations do not have personal privacy, and the Third Circuit reversed.

Federal Communications Commission v. AT&T, Inc.
Docket No. 09-1279

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From: The Third Circuit

by Stefan J. Padfield
University of Akron School of Law, Akron, OH

ISSUE

Does Exemption 7(C) of the Freedom of Information Act, which exempts from mandatory disclosure information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy," protect the privacy of corporate entities?

FACTS

In August 2004, AT&T, Inc. (AT&T) discovered that it might have overcharged the government for certain work done by AT&T in connection with a federal program entitled "E-Rate." AT&T voluntarily reported the matter to the Federal Communications Commission (FCC), and the FCC's Enforcement Bureau (Bureau) conducted an investigation. Ultimately, the two sides resolved the matter via a consent decree.

On April 4, 2005, CompTel, a trade association representing some of AT&T's competitors, submitted a Freedom of Information Act (FOIA) request for all correspondence contained in the Bureau's AT&T E-Rate investigation file. Those documents included invoices, internal e-mails providing pricing and billing information, responses to interrogatories, names of employees involved in the allegedly improper billing, and AT&T's own assessment of whether the involved employees violated its internal code of conduct. AT&T opposed CompTel's request, arguing that the FCC collected the documents for law enforcement purposes and therefore Exemption 7(C) of FOIA, which exempts from mandatory disclosure "information . . . that . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy," applies. Both the Bureau and the FCC rejected AT&T's argument, concluding that corporations lack any cognizable "personal privacy" under Exemption 7(C). AT&T appealed and the Third Circuit granted review.

On appeal, the Third Circuit rejected the FCC's conclusion that the protection of personal privacy under Exemption 7(C) did not extend to corporations and remanded for a determination of whether the disclosure requested in this case "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In reaching its conclusion, the Third Circuit first rejected arguments that it lacked jurisdiction to hear the case, as well as an argument based on AT&T's failure to originally designate the submitted information as confidential. Moving to the question of corporate personal privacy under the statute, the court concluded that the text of the provision unambiguously provided for such a concept and therefore declined to delve further into statutory purpose, contrary nonbinding precedent, or legislative history.

Specifically, the court noted that it would be highly unusual for "personal privacy" under FOIA not to extend to corporations when the statute specifically defines "person" to include corporations. This is particularly so in light of the fact that Congress demonstrated its ability to limit the scope of the statute to individual humans when it so desired—as it did in Exemption 7(F), which protects information that, if released, "could reasonably be expected to endanger the life or physical safety of any individual." Furthermore, the Third Circuit rejected the argument that Exemption 7(C) should be interpreted to extend only to individuals, and not corporations, because Exemption 6 of FOIA, which shields from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," has been interpreted that way. The court read the phrase "personnel and medical files" to serve the relevant limiting function in that provision, not the phrase "personal privacy." Finally, the court noted that while it was resting its decision on the unambiguous text of the statute, its ruling furthered the public policy of encouraging corporate cooperation with law enforcement investigations.

Having concluded that Exemption 7(C)'s protection of personal privacy extends to corporations, the court rejected AT&T's further argument against remand on the basis of CompTel not having requested any official information about a government agency. Since "documents in the FCC's investigative file may shed light on the FCC's administration of E-Rate," the request here did not fit within that "narrow category" of cases where the only connection between the information being sought and the government was that the government happened to be storing the requested documents.

The FCC then appealed and the Supreme Court granted review.

CASE ANALYSIS

Congress enacted the Freedom of Information Act (FOIA) in 1966 in order to improve public access to the government's internal communications. A federal agency may deny a request for information only if the information falls within one of the specifically enumerated exemptions. The relevant exemptions here are Exemptions 7(C), 6, and 4. Exemption 7(C) exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Meanwhile, Exemption 6 applies to "personnel and medical files and similar files" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Finally, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In addition to the foregoing, the Administrative Procedure Act (APA) is implicated in this case because it covers FOIA and defines the term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency." 5 U.S.C. § 551(2).

The government argues that the Third Circuit's decision below was in error for five reasons: (1) the text of Exemption 7(C), as well as the broader context of FOIA, demonstrates that corporations do not possess personal privacy for purposes of the statute; (2) the legislative history of Exemption 7(C) demonstrates that Congress intended to protect only the privacy interests of individuals; (3) the Third Circuit's conclusion contradicts thirty-five years of precedent; (4) it was error to effectively equate the term "person" with the phrase "personal privacy" for purposes of conducting a textual analysis of the statute; and (5) the Third Circuit's conclusion will lead to anomalous and unprecedented results.

As to the first argument, the government notes that the relevant text of Exemption 7(C) was taken directly from Exemption 6, which AT&T concedes is limited to individuals. Furthermore, the government claims, corporations already have sufficient protection for confidential information under Exemption 4. AT&T responds that, as articulated by the Third Circuit, to the extent Exemption 6 is limited to individuals, such limitation is best understood as arising from the exemption's focus on "personnel and medical files." As for Exemption 4, AT&T notes that while that exemption prevents disclosure of proprietary information, "it does not protect the reputational interests that Exemption 7(C) is designed to safeguard."

Second, the government argues that the legislative history of Exemption 7(C) demonstrates that Congress intended to protect only the privacy interests of individuals. Specifically, the government notes that:

The Exemption originated as an amendment to extend Exemption 6's "personal privacy" protections to the law-enforcement context and, in the ensuing debate, it became apparent that Exemption 6 did not protect corporate interests. Congress's debates on Exemption 7(C) accordingly focused exclusively on the privacy rights of individuals, with nothing suggesting analogous protection for corporate interests.

AT&T responds that to the extent an examination of legislative history is proper, the government's reading of that history is by no means uncontroversial. For example, "shortly after FOIA's enactment, the Attorney General ... recognized that the phrase 'personal privacy' in Exemption 6 could be applied to a corporation."

Third, the government argues that the Third Circuit's conclusion contradicts thirty-five years of precedent. For example, the government cites a law review article from 1960 written by William Prosser asserting that it has been "generally agreed that the right to privacy is one pertaining only to individuals," *Privacy*, 48 Cal. L. Rev. 383, 408–409 & n.207, as well as a Massachusetts Supreme Court case from 1998 concluding that "[c]ases from other jurisdictions unanimously deny a right of privacy to corporations." *Warner-Lambert Co. v. Execuquest Corp.*, 691 N.E.2d 545. In fact, the government notes that then-Professor, now Justice, Scalia testified before Congress in 1981 that Exemption 7 did not protect "what might be called associational or institutional privacy." AT&T responds by noting that while it is true that the common-law tort of invasion of privacy has been held not to extend to corporations, "the statutory privacy right protected by Exemption 7(C) goes beyond the common law." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). Furthermore, corporate privacy-like rights have been recognized by courts in a number of similar contexts such as, for example, defamation.

Fourth, the government argues that it was error to effectively equate the term "person" with the phrase "personal privacy" for purposes of conducting a textual analysis of the statute. Here, the government notes that Congress could have used the phrase "the privacy of any person" if it wanted to extend protection to corporations and thus, as Professor Kenneth Davis noted, the APA's definition of "person" is irrelevant because Congress did not use that term in Exemption 7(C). AT&T, however, notes that Congress could just as easily have used the term "individual" in Exemption 7(C) if it wanted to exclude corporations. In fact, Congress did precisely this in Exemption 7(F), which protects information that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Furthermore, while common understandings of personal privacy may be limited to individuals, "in the context of FOIA, a statute that defines 'person' to include corporations—one has a different expectation." In that case, "the word 'personal' refers to both individuals and corporations, because the noun from which it is formed also includes both individuals and corporations." This is particularly so in light of the fact that the Supreme Court has noted that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Department of Social Servs.*, 436 U.S. 658, 687 (1978).

Finally, the government argues that the Third Circuit's conclusion will lead to anomalous and unprecedented results because there are no meaningful benchmarks for defining the "wholly nonintuitive interest" of corporate personal privacy ("A corporation itself can no more be embarrassed, harassed, or stigmatized than a stone.") and because the APA's definition of "person" includes state, local, and foreign governmental entities. Here, AT&T responds by noting that the government's argument "ignores the numerous contexts—most notably the Fourth Amendment—in which courts regularly adjudicate corporate privacy claims." In addition, FOIA already "contains multiple protections for the federal government's privacy interests," so it is hard to see how reading "personal privacy" in Exemption 7(C) to extend to all statutorily defined persons creates anomalous results. Finally, as the Third Circuit recognized, denying corporations the protection of Exemption 7(C) would undermine the congressional purpose of encouraging cooperation with law enforcement.

SIGNIFICANCE

If the Court rules in favor of AT&T and finds a corporate right to personal privacy under FOIA, critics will likely be quick to complain that this is yet another case in which the Roberts Court has expanded the power of corporations at the expense of individual citizens. This case follows on the heels of *Citizens United v. FEC*, 558 U.S. ____ (2010), wherein the Court struck down federal limitations on corporate campaign contributions based solely on corporate status as violative of corporate political free speech rights. If the Court places its imprimatur on the arguably counterintuitive concept of corporate personal privacy, some may claim *AT&T* is indicative of a probusiness, anticonsumer bias within the Court. And to the extent that such a decision would add to the list of cases supporting a popular "business wins" perception of the Supreme Court, there may be something to be said for that criticism. However, a decision supportive of corporate personal privacy here would be very different from the *Citizens United* decision; in that case not only did the Court affirm that corporations have political free speech rights, the Court further held that there was nothing inherent in the nature of corporations to justify limiting that speech on the basis of corporate status alone. Here, on the other hand, the Court would be merely affirming the existence of a corporate personal privacy interest under FOIA, but would be leaving to the relevant agency the determination of the impact of corporate status on the scope of the privacy interest to be protected. As AT&T acknowledges in its brief, "in the balancing that takes place under FOIA, corporate privacy interests may not be entitled to the same treatment as individual privacy interests in all cases."

A decision in favor of the FCC, on the other hand, would be interesting because it would mean that the Court had found the Third Circuit's textual analysis to be flawed and then proceeded to accept some version of the FCC's multifaceted attack on the notion of corporate personal privacy under FOIA. Given the views of a majority of the current Court on both statutory construction and corporate personhood, this seems unlikely and would be at least somewhat surprising. The one possible wrinkle here is Justice Scalia's earlier testimony before Congress when he was a law professor, which might somehow constrain his decision-making. But even if that turns out to be the case, the less controversial nature of the issue here (as compared to the issue in *Citizens United*) makes it more likely that Justice Scalia's vote may not be necessary for the Court to uphold the Third Circuit's decision.

One thing to watch for is the extent to which corporate theory plays a role in the decision. "Corporate legal theories offer competing stories about how and why corporations originate and how they operate." Thomas W. Joo, Narrative, *Myth and Morality in Corporate Legal Theory*, 2009 Mich. St. L. Rev. 1091 (2009). The two most prominent theories of the corporation are nexus-of-contracts theory and concession theory. Cf. Liam Seamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 Geo. Wash. L. Rev. 201 (2006) ("Not all theorists use the language of contract and concession, with several preferring 'property' and 'entity,' but the contract and property theories are roughly the same, as are the concession and entity theories."). In *Citizens United*, the majority and dissent clearly had very different ideas about what the corporation is, with the majority arguably viewing the corporation as primarily an association of citizens (i.e., a nexus of contracts), while the dissent arguably viewed the corporation more as a creature of the state (i.e., a state concession). However, the majority opinion was silent as to corporate theory and the dissent expressly disavowed any role for corporate theory. Given that part of the issue in this case is whether there is something about corporations that makes the concept of personal privacy a poor fit, it will be interesting to see to what extent, if any, the justices delve into the various theories of the corporation.

Stefan J. Padfield is an associate professor of law at the University of Akron School of Law and coeditor of the Business Law Prof Blog. He specializes in corporate and securities law. He can be reached at spadfie@uakron.edu or 330.972.2328.

PREVIEW of United States Supreme Court Cases, pages 156–159.
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