No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

AT&T INC. AND COMPTEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

LEONARD SCHAITMAN
HENRY C. WHITAKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AUSTIN C. SCHLICK
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

MICHAEL A. KRASNOW
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act, 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.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

Respondent AT&T Inc. was the petitioner in the court of appeals. Respondent CompTel was an intervenor below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 09-1279

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

AT&T INC. AND COMPTEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission (FCC or Commission) and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 582 F.3d 490. The order of the Commission (App., *infra*, 19a-33a) is reported at 23 F.C.C.R. 13,704.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2009. A petition for rehearing was denied on November 23, 2009 (App., *infra*, 45a-46a). On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 23, 2010. On March 15, 2010, Justice Alito further extended the time to April 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act 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 * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Other pertinent provisions are set out in the appendix to the petition (App., *infra*, 47a-60a).

STATEMENT

1. a. In 1966, Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. 552, as an amendment to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, in order to limit the broad discretion that federal agencies previously had exercised concerning the publication of governmental records. *DOJ* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 754 (1989) (*Reporters Committee*); FOIA, Pub. L. No. 89-487, 80

Stat. 250 (amending APA § 3); see Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codifying FOIA as positive law at 5 U.S.C. 552). Under FOIA, federal agencies generally must make records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption applies. See 5 U.S.C. 552(a)(3)(A); 5 U.S.C. 552(b) (FOIA exemptions); *Reporters Committee*, 489 U.S. at 754-755. If an agency fails to comply with its disclosure obligations within FOIA's statutory time limits, 5 U.S.C. 552(a)(6)(A) and (B), the requester may file an action in district court to compel disclosure. 5 U.S.C. 552(a)(4)(B) and (6)(C).

Three FOIA exemptions are relevant to the Court's consideration of the issues in this case. First, 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). "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 6 was designed to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *Ibid.* (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*)); see *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976); *DoD* v. *FLRA*, 510 U.S. 487, 495 (1994) (discussing "basic principles" governing FOIA).

Second, Exemption 7, as enacted in 1966, exempted "investigatory files compiled for law enforcement purposes" unless the files were "available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). After courts construed the exemption to cover "all material found in [such] investigatory file[s]," Congress narrowed Exemption 7 in 1974 by enumerating six specific categories of law-enforcement records that are exempt from mandatory disclosure. *FBI* v. *Abramson*, 456 U.S. 615, 627 & n.11 (1982). As relevant here, one category is encompassed by Exemption 7(C), which exempts from mandatory disclosure records or information compiled for law-enforcement purposes if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).[1] "Congress gave special attention to the language in Exemption 7(C)," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 166 (2004), and added its "protection for personal privacy" in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

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). Because the exemption applies to information "obtained from a person," *ibid.*, and the APA (including FOIA) defines the term "person" to include "an individual, partnership, corporation, association, or public or

[1] Congress amended Exemption 7(C) to take its present form in 1986, but did not alter the type of "personal privacy" necessary to invoke the exemption. See *Reporters Committee*, 489 U.S. at 756 & n.9, 777 n.22.

private organization other than [a federal] agency," 5 U.S.C. 551(2). Exemption 4 protects commercial and financial information that the government obtains from a wide variety of sources, including private corporations and public organizations. Exemption 4 protects privileged and confidential material that "would not customarily be made public by the person from whom it was obtained," including "business sales statistics, inventories, customer lists," and "technical or financial data." *1966 House Report* 10.

b. "FOIA is exclusively a disclosure statute." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292 (1979). If one of its exemptions applies, FOIA does not forbid the agency from exercising its "discretion to disclose [the] information." *Id.* at 292-294. But in what is known as a "'reverse-FOIA' suit[]," *id.* at 285, a person seeking to prevent an agency's production of records may, in certain circumstances, seek judicial review under the APA of a final agency decision to disclose agency records. See *id.* at 317-318. In such a suit, a court may set aside an agency's decision to disclose if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). See *Chrysler Corp.*, 441 U.S. at 317-318 (reverse-FOIA suit alleging that disclosure of records was prohibited by the Trade Secrets Act, 18 U.S.C. 1905).

Regulations promulgated by the Federal Communications Commission provide that a FOIA requester who seeks FCC records that are exempt from mandatory disclosure under FOIA must specify the "reasons for inspection and the facts in support thereof." 47 C.F.R. 0.461(c); see 47 C.F.R. 0.457. Under the Commission's regulations, if the records contain material submitted to the agency by a third person, the Commission will pro-

vide a copy of the FOIA request to that person and afford the person an opportunity to object to disclosure in certain specified circumstances: if the person previously requested that the records be kept confidential (47 C.F.R. 0.459), if the records are exempt under FOIA Exemption 4 (see 47 C.F.R. 0.457(d)), or if the custodian of records has reason to believe that "the information may contain confidential commercial information." 47 C.F.R. 0.461(d)(3); cf. Exec. Order No. 12,600, §§ 1, 3-5, and 8, 3 C.F.R. 235-237 (1988), *reprinted in* 5 U.S.C. 552 note (directing agencies to provide submitters of certain confidential commercial information with notice of, and an opportunity to object to, agency disclosure). If the records fall within one of FOIA's exemptions and their "disclosure * * * is [not] prohibited by law," the Commission "will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection" and decide whether to produce the records. 47 C.F.R. 0.457; see 47 C.F.R. 0.461(f)(4).

2. This case arises from a FOIA request for FCC records concerning an investigation involving respondent AT&T Inc.[2] AT&T participated in a federal program, the E-Rate Program, administered by the FCC and designed to improve access to advanced telecommunications technology by educational institutions. App., *infra*, 2a. Under the E-Rate Program, AT&T provided equipment and services to elementary and secondary schools and billed the government for the cost. *Ibid.*

---

[2] At the time of the FCC's investigation, respondent AT&T was known as SBC Communications, Inc. See App., *infra*, 19a n.1. To avoid confusion, this petition consistently refers to that respondent as AT&T.

By letter dated August 6, 2004, AT&T informed the Commission that it had discovered "certain irregularities" that constituted an "apparent violation of the E-[R]ate rules," resulting in AT&T's over-billing the government for its services. C.A. App. A22; see App., *infra*, 2a-3a. On August 24, 2004, the Commission's Enforcement Bureau (Bureau) issued a Letter of Inquiry to AT&T, notifying the company that the Bureau had initiated an investigation and ordering AT&T to produce information relevant to that investigation. *Id.* at 35a, 41a. AT&T disclosed the information as directed. *Id.* at 41a.

In December 2004, the Bureau terminated its investigation pursuant to an administrative consent decree. See *SBC Commc'ns, Inc.*, 19 F.C.C.R. 24,014 (Enf. Bur. 2004) (order and consent decree). Under that decree, AT&T, without admitting liability, agreed to pay $500,000 to the government and to institute a two-year compliance plan to ensure future compliance with pertinent FCC rules by all AT&T subsidiaries. *Id.* at 24,016-24,019; App., *infra*, 35a-36a.

3. On April 4, 2005, respondent CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request to the Commission, seeking "[a]ll pleadings and correspondence contained in" the AT&T E-Rate investigation file. C.A. App. A27. The Commission notified AT&T of the FOIA request, and AT&T submitted an objection to disclosure. See *id.* at A28.

a. In August 2005, the Bureau granted CompTel's FOIA request in part and denied it in part. App., *infra*, 34a-44a. The Bureau concluded that portions of the information submitted to the FCC by AT&T were protected from mandatory disclosure under FOIA Exemp-

tion 4 because the information "constitute[d] commercial or financial information" that, if disclosed, "could result in substantial competitive harm to [AT&T]." *Id.* at 41a. Under that exemption, the Bureau declined to disclose "commercially sensitive information," including AT&T's "costs and pricing data, its billing and payment dates, and identifying information of [AT&T's] staff, contractors, and the representatives of its contractors and customers." *Id.* at 41a-42a. The Bureau also concluded that FOIA Exemption 7(C) protected from mandatory disclosure information in the agency's investigative file that would invade the privacy of individuals, *id.* at 42a-43a, and explained that it would "withhold the names and identifying information of those individuals." *Id.* at 43a.[3]

The Bureau, however, rejected AT&T's argument that Exemption 7(C) protected from mandatory disclosure all records that the FCC had obtained from AT&T during its investigation. App., *infra*, 42a-43a. The Bureau concluded that records that did not implicate the privacy interests of individuals fell outside Exemption 7(C) because AT&T itself did "not possess 'personal privacy' interests" protected by that exemption. *Ibid.*

b. AT&T filed an administrative appeal from the Bureau's determination, challenging the decision to release the agency's investigative records that the Bureau concluded were subject to mandatory FOIA disclosure. C.A. App. A47; App., *infra*, 22a & n.16. In September 2008, the Commission denied AT&T's administrative appeal. *Id.* at 19a-33a.[4]

---

[3] The agency further concluded that internal agency records were exempt from disclosure under Exemption 5. App., *infra*, 43a.

[4] CompTel also filed an administrative appeal from the Bureau's determination. App., *infra*, 22a & n.16. By October 5, 2006, CompTel had constructively exhausted its administrative remedies because the

As relevant here, the Commission rejected AT&T's argument that AT&T is a "corporate citizen" with "personal privacy" rights protected by Exemption 7(C), that AT&T should therefore be "protected from [a] disclosure that would 'embarrass' it," and that the FCC should accordingly withhold "all of the documents that [AT&T] submitted" to the FCC. App., *infra*, 26a (citation omitted). The agency concluded that "established [FCC] and judicial precedent" showed that the "personal privacy" protected under Exemption 7(C) concerns only the privacy interests of individuals, and corporations do not have "'personal privacy' interests within the meaning of [that] [e]xemption." *Id.* at 26a-28a.

FCC had not resolved its administrative appeal within FOIA's 20-day period for rendering a decision. See 5 U.S.C. 552(a)(6)(A)(ii) and (C)(i). On that date, CompTel initiated a FOIA action in the United States District Court for the District of Columbia to compel disclosure. App., *infra*, 23a & n.17. In light of CompTel's pending lawsuit and its conclusion that "FOIA permits such actions," the Commission did not address the merits of CompTel's administrative appeal. *Ibid.*

Meanwhile, AT&T intervened in CompTel's FOIA action, which the district court stayed pending the FCC's resolution of AT&T's administrative appeal. See App., *infra*, 23a & n.19. The district court explained that AT&T had asserted a reverse-FOIA claim against the FCC in district court, but that APA review was unavailable at that time because the FCC had yet to take "final agency action" subject to judicial review. *CompTel* v. *FCC,* Civ. No. 06-1718 (D.D.C. Mar. 5, 2008), slip op. 4 (citing 5 U.S.C. 704). Although the court noted that it had authority to decide CompTel's FOIA claim, it concluded that judicial economy warranted a stay until "there is a final agency action on AT&T's intra-agency appeal," in order to "permit[] the court to simultaneously address the issues raised by [all parties]." *Id.* at 6. The district court subsequently denied CompTel's motion to compel a final agency decision within 30 days. *CompTel* v. *FCC,* Civ. No. 06-1718 (D.D.C. May 5, 2008) (order). No further action has been taken in CompTel's FOIA case, which does not affect the question presented in this petition.

The Commission explained that this Court's decision in *Reporters Committee* indicated that the "personal privacy" interest protected by both Exemption 6 and Exemption 7(C) is "applicable only to individuals," because *Reporters Committee* relied on Exemption 6 to construe Exemption 7(C) and, as AT&T "admit[ted]," "Exemption 6 applies only to individuals." App., *infra*, 30a & n.46 (citing AT&T letter brief at C.A. App. A52). The Commission further reasoned that judicial decisions demonstrate that Exemption 7(C)'s purpose is to avoid damage to "personal reputation, embarrassment, and * * * harassment * * * that an individual might suffer from disclosure." *Id.* at 29a. Such harms, the Commission concluded, are distinct from the potential impact of disclosure on a purely "legal entity like a corporation." *Ibid.*

4. The court of appeals granted AT&T's petition for review under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and remanded for further agency proceedings. App., *infra*, 1a-18a.[5]

---

[5] The Hobbs Act vests the courts of appeals with exclusive jurisdiction over petitions for review of certain agency orders. 28 U.S.C. 2342. The "nature and attributes of judicial review" under the Hobbs Act are governed by the APA's judicial-review provisions. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); see *id.* at 277 (citing APA standard of review in 5 U.S.C. 706(2)(A)).

Consistent with the government's position, the court of appeals concluded that it possessed Hobbs Act jurisdiction over this reverse-FOIA action because AT&T's suit challenged an "order of the Commission under [the Communications Act of 1934, 47 U.S.C. 151 *et seq.*]," 47 U.S.C. 402(a). See App., *infra*, 6a-7a. The court explained that AT&T's challenge to the Commission's order regarding disclosure based on that order's alleged inconsistency with FCC regulations was a challenge subject to Hobbs Act review, see 28 U.S.C. 2342(1), and that "[c]ourts

The court of appeals held, in pertinent part, that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." App., *infra*, 13a; see *id.* at 9a-14a. The court reasoned that "FOIA defines 'person' to include a corporation" and that the term "personal" is "derived" from the word "person" and is simply the "adjectival form" of that defined term. *Id.* at 10a-12a (discussing APA definition at 5 U.S.C. 551(2)). In light of that view, the court rejected the contention that the statutory phrase "personal privacy" should be construed to reflect the "ordinary meaning" of the word "personal." *Id.* at 12a.

The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but decided that this assumption did not undermine its understanding of the scope of "personal privacy" protected by Exemption 7(C). App., *infra*, 13a. The court reasoned that Exemption 6 expressly applies to "personnel and medical files," 5 U.S.C. 552(b)(6), and that particular statutory phrase "limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files." App., *infra*, 13a.

Having concluded that "FOIA's text unambiguously" resolved the case, the court of appeals declined to "consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." App., *infra*, 13a-14a. The court nevertheless expressed the view that its interpretation advanced Exemption 7(C)'s purpose by providing privacy protection

---

have consistently held that an [FCC] order" allegedly violating FCC regulations is subject to such review. App., *infra*, 7a & n.2.

to corporations because, as the court saw it, "[c]orporations, like human beings, are routinely involved in law enforcement investigations" and, "like human beings, face public embarrassment, harassment, and stigma because of that involvement." *Id.* at 14a n.5. The court also expressed the view that D.C. Circuit decisions indicating that the protections for privacy in Exemptions 6 and 7(C) apply to "individuals only" were based on atextual considerations that did "not impugn [the Third Circuit's] textual analysis." *Id.* at 14a n.6. The court accordingly "decline[d] to follow" the D.C. Circuit's decisions "to the extent that" they "can be read to conflict with [the] textual analysis" above. *Id.* at 15a n.6.

The court of appeals declined to examine how "AT&T's 'personal privacy'" should be balanced against any public interest in disclosure, explaining that the Commission had not conducted such Exemption 7(C) balancing in the first instance. App., *infra*, 15a-16a. The court accordingly "remand[ed] the matter to the FCC with instructions to determine" whether the requested "disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy'." *Id.* at 17a (quoting 5 U.S.C. 552(b)(7)(C)).

REASONS FOR GRANTING THE PETITION

The court of appeals has held that FOIA's statutory protection for "personal privacy" in Exemption 7(C) extends beyond the personal privacy interests of individuals and protects the so-called "privacy" of inanimate corporate entities. The court based that holding on what it viewed as the meaning of the phrase "personal privacy," reasoning that the word "personal" in that phrase must encompass all the types of entities that Congress included within the APA's definition of "person."

Under that reasoning, the "personal privacy" safeguarded by Exemption 7(C) would belong not only to corporations and other private organizations, but also to state, local, and foreign governments and governmental components. Thus, if the Third Circuit's decision is not overturned, federal agencies must attempt to balance previously non-existent "personal privacy" interests of business and governmental entities against the public interest in disclosure to determine whether releasing agency records would constitute an unwarranted invasion of such "privacy" under Exemption 7(C). The court of appeals' decision finds no support in FOIA's text or any judicial decision construing Exemption 7(C) in the 35 years since its enactment. The court's textual analysis disregards basic tenets of statutory construction, and it is in significant tension with the D.C. Circuit's long-standing interpretation of FOIA's privacy exemptions.

The court of appeals' ruling threatens to revolutionize the manner in which the federal government must process hundreds of thousands of FOIA requests each year.[6] Federal agencies have for decades processed FOIA requests under the previously settled understanding that corporations and other non-human entities have no interest in "personal privacy" protected by FOIA. The court's ruling, if allowed to stand, also threatens to impose barriers to the public disclosure of government records concerning corporate malfeasance in govern-

---

[6] In fiscal year 2008, the most recent year for which data has been compiled, the government received more than 605,000 FOIA requests and expended approximately $338 million on FOIA-related activities. See U.S. Dep't of Justice, Office of Information Policy, *FOIA Post: Summary of Annual FOIA Reports for Fiscal Year 2008*, http://www.justice.gov/oip/foiapost/2009foiapost16.htm.

ment programs that the public has a right to review. Certiorari is warranted.

I. THE COURT OF APPEALS ERRED IN CONSTRUING EXEMPTION 7(C) TO PROTECT CORPORATE "PERSONAL PRIVACY"

The court of appeals erred in holding that corporations possess "personal privacy" interests under FOIA Exemption 7(C). The court reasoned that Congress defined the term "person" to include corporations and that the phrase "personal privacy" must reflect that definition. But Congress did not define the relevant statutory phrase in Exemption 7(C)—"personal privacy"—and that phrase has been uniformly understood since the 1974 enactment of Exemption 7(C) to protect only the privacy interests of individuals. Traditional tools of statutory construction confirm that the prevailing understanding of Exemption 7(C) is correct: Corporations do not possess "personal privacy" under FOIA.

A. The meaning of the phrase "personal privacy" in Exemption 7(C) "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Those interpretive benchmarks—"the bare meaning of the word[s]" and their "placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)—demonstrate that Exemption 7(C)'s protection for "personal privacy" extends only to individuals.

1. The word "personal" by itself is most naturally understood to concern individuals alone. Dictionaries reflect that "personal" normally means "of or relating to a particular person" and "affecting one individual or

each of many individuals," "relating to an individual," or "relating to or characteristic of human beings as distinct from things." *Webster's Third New International Dictionary* 1686 (1966); see *The American Heritage Dictionary of the English Language* 978 (1976) ("personal" means "[o]f or pertaining to a particular person; private; one's own *personal affairs*," and "[c]oncerning a particular individual and his intimate affairs"). Under these definitions, characteristics of a corporation, in contrast to those of an individual, would not commonly be understood to be "personal" traits.

Moreover, when "personal" is joined with the word "privacy" in Exemption 7(C), the resulting statutory phrase invokes background principles that reflect an exclusive focus on individuals. The law ordinarily protects personal privacy to safeguard human dignity and preserve individual autonomy. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), cited in *Reporters Committee*, 489 U.S. at 763 n.15 (construing Exemption 7(C)). Such concepts do not comfortably extend to a corporation, which "exist[s] only in contemplation of law" as "an artificial being, invisible, [and] intangible." *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.); cf. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 779 n.14 (1978) (corporations possess no rights that are "purely personal"). Indeed, in other contexts, it is established that a "corporation * * * has no personal right of privacy," Restatement (Second) of Torts § 652I cmt. c (1977) (torts for invasion of privacy), and, for at least half a century it has been "generally agreed that the right to privacy is one pertaining only to individuals." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-409 & n.207 (1960) (citing cases). See also *United*

States v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (stating that "corporations can claim no equality with individuals in the enjoyment of a right to privacy" in the Fourth Amendment context).

2. FOIA's broader context likewise demonstrates that Exemption 7(C)'s protection for "personal privacy" applies only to individuals. Congress specifically modeled Exemption 7(C) on Exemption 6's "personal privacy" exemption, which itself protects only the privacy interests of individuals.

"[I]dentical * * * phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). That interpretive rule has particular force here, because Congress transferred the phrase "personal privacy" from Exemption 6 to Exemption 7(C) in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under" Exemption 7. 120 Cong. Rec. at 17,033 (statement of Sen. Hart); see *id.* at 17,040 (memorandum letter of Sen. Hart); cf. *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982) (discussing Senator Hart's role as "the sponsor of the 1974 amendment").

Exemption 6, in turn, has long been interpreted as applying only to individuals. This Court has emphasized that "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982). Accordingly, the process of determining whether a disclosure would result in a "clearly unwarranted" invasion of personal privacy triggering the exemption "require[s] a balancing of the *individual's* right of privacy against"

the public interest in disclosure. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (emphasis added). That specific focus on the individual derives directly from Congress's declared purpose to avoid "*harm [to] the individual*" from unwarranted disclosure. *Washington Post Co.*, 456 U.S. at 599 (quoting *1966 House Report* 11); see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Exemption 6 is designed to "protect[] * * * an individual's private affairs from unnecessary public scrutiny.").

Exemption 6's focus on the interest of real persons was clearly established in 1974, when Congress incorporated Exemption 6's "personal privacy" protection into Exemption 7(C). By 1970, the leading treatise on administrative law and FOIA had concluded that "a corporation cannot claim 'personal privacy'" under Exemption 6 because the phrase "'personal privacy' always relates to individuals." Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.). Professor Davis explained that the APA's "definition of 'person'" was "irrelevant" in this context because Congress "d[id] not use that term" in Exemption 6. *Ibid.* (Congress used "the statutory language of 'personal privacy,'" not "the privacy of any person"); see John A. Hoglund & Jonathan Kahan, Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB,* 40 Geo. Wash. L. Rev. 527, 540 (1972) (emphasizing that "the interest exemption 6 seeks to safeguard is that of individual privacy"); *id.* at 529-530 & nn.19-20 (examining legislative history).

Courts similarly emphasized that the "personal privacy" protected under Exemption 6 was limited to the privacy of individuals. Based on the "statute and its legislative history," lower courts had determined that

the exemption required a balancing of "the potential invasion of *individual* privacy" against "a public interest purpose for disclosure of [the] personal information." *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136 & n.12 (3d Cir. 1974) (emphasis added) (quoting *Getman* v. *NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971)); accord *Rural Housing Alliance* v. *USDA*, 498 F.2d 73, 77 & n.13 (D.C. Cir. 1974) (Exemption 6 is "designed to protect individuals from public disclosure of intimate details of their lives"); *Getman*, 450 F.2d at 674 & n.10 (Exemption 6 protects "the right of privacy of affected individuals"); see also *Rose* v. *Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974) (The "statutory goal of Exemption Six" is "a workable compromise between individual rights 'and the preservation of public rights to Government information'") (citation omitted), aff'd, 425 U.S. 352 (1976).

This Court "can assume that Congress legislated against this background of law, scholarship, and history * * * when it amended Exemption 7(C)" in 1974. *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004). In fact, the Congressional Record demonstrates that the prevailing interpretation of "personal privacy" was apparent to Congress in 1974. After Senator Hart proposed Exemption 7(C) and emphasized that it would, if enacted, extend Exemption 6's "protection for personal privacy" into the law-enforcement-record context, 120 Cong. Rec. at 17,033, a colleague introduced into the record a decision expressly holding that "the right to privacy envisioned in [Exemption 6] is personal and cannot be claimed by a corporation or association." *Id.* at 17,045 (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973) (holding that the identity of organizations, unlike the

"identity of * * * individuals," cannot be withheld under Exemption 6), aff'd in part on other grounds, 504 F.2d 238 (D.C. Cir. 1974)).

In the wake of the 1974 enactment of Exemption 7(C), Attorney General Edward Levi issued an interpretive memorandum concluding that Congress's use of "[t]he phrase 'personal privacy' [in Exemption 7(C)] pertains to the privacy interests of individuals" and "does not seem applicable to corporations or other entities." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (*1975 FOIA Memorandum*). The memorandum, which this Court has repeatedly cited as a reliable interpretation of the 1974 amendments, see *Favish*, 541 U.S. at 169; *Abramson*, 456 U.S. at 622 n.5, further explained that Exemption 7(C) should be interpreted in light of "the body of court decisions" that interpret Exemption 6. See *1975 FOIA Memorandum* 9.[7]

---

[7] Attorney General Levi's 1975 memorandum reflected an evolution in the Department of Justice's understanding of Exemption 6. In 1967, one year after Congress enacted FOIA, Attorney General Ramsey Clark described Exemption 6 as protecting "the privacy of any person" and stated that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967) (*1967 FOIA Memorandum*). Attorney General Clark then qualified his statement by observing that Exemption 6 normally would protect "the privacy of individuals rather than of business organizations." *Id.* at 37.

That initial description of Exemption 6 was promptly criticized as premised on an erroneous view that the statute protected "the privacy of any person," even though Congress employed the phrase "personal privacy" and did "not use th[e] term" "person." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 799 (1967). Moreover, the Attorney General's description found no

3. In the more than 35 years since the enactment of Exemption 7(C), until the decision below, there was unanimity among courts and commentators that the "personal privacy" protections in Exemptions 6 and 7(C) apply only to individuals. The D.C. Circuit, which has jurisdiction of appeals from the district court that has universal jurisdiction over FOIA actions, see 5 U.S.C. 552(a)(4)(B), has repeatedly emphasized that "businesses themselves do not have protected privacy interests under Exemption 6." *Multi AG Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (2008); see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."). And in *Washington Post Co.* v. *DOJ*, 863 F.2d 96, 100 (D.C. Cir. 1988), the court concluded that Exemption 7(C) provides no privacy protection for "[i]nformation relating to business judgments and relationships." Those decisions reflect judicial recognition that both exemptions protect the same interest in "per-

---

support in the legislative history cited in his analysis, which described Exemption 6 as protecting the "individual's right of privacy" and preventing "harm [to] the individual." *1967 FOIA Memorandum* 36 (quoting *1966 House Report* 11). No court subsequently endorsed this aspect of the Attorney General's analysis, and by 1974 courts and commentators had concluded that Exemption 6 protected individuals alone. See pp. 16-18, *supra*. In 1975, General Levi agreed with the uniform body of law and commentary and concluded that "[t]he phrase 'personal privacy' * * * does not seem applicable to corporations." *1975 FOIA Memorandum* 9.

sonal privacy,"[8] which does not encompass a purely corporate interest in confidentiality.[9]

Similarly, in 1981, then-Professor Scalia testified that "[p]erhaps the most significant feature" of the 1974 FOIA amendments to Exemption 7 was that they did not protect "what might be called associational or institutional privacy" from requests under FOIA for disclosure of investigatory records about "corporations, unions," and other "independent institutions." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*,

---

[8] See, *e.g.*, *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, 524 F.3d 1021, 1024 n.2 (9th Cir. 2008) ("[T]he only distinction between the balancing tests applied [by Exemptions 6 and 7(C)] is the 'magnitude of the public interest' required to override the respective privacy interests they protect."); *Horowitz* v. *Peace Corps*, 428 F.3d 271, 279 & n.2 (D.C. Cir. 2005) (analyzing Exemption 6 "privacy interest" based on Exemption 7(C) decisional law; explaining that "the difference between the standards for the two exemptions 'is of little import' except when analyzing 'the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions' ") (quoting *DoD*, 510 U.S. at 496 n.6); *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992) (explaining that the balance between personal privacy and any public interest in disclosure is different under Exemptions 6 and 7(C), but that the "degree of invasion to a privacy interest" necessary to trigger that balance is the same).

[9] Agency records concerning corporations will sometimes implicate "personal privacy" and therefore may be withheld on the ground that disclosure could constitute an unwarranted invasion of the privacy interests of an individual. For instance, Exemptions 6 and 7(C) "appl[y] to financial information in business records when the business is individually owned or closely held and 'the records would necessarily reveal at least a portion of the owner's personal finances.' " *Multi AG Media LLC*, 515 F.3d at 1228-1229 (Exemption 6) (citation omitted); see *Consumer's Checkbook* v. *HHS*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (Exemption 6), cert. denied, No. 09-538 (Apr. 19, 2010).

97th Cong., 1st Sess. 957-958 (1981). The Exemption 7 amendments, he explained, gave no "protection [to] those institutions' deliberate and consultative processes" and enabled FOIA requesters to "impair[]" the "privacy * * * of [such] institutions." *Id.* at 958. See also 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.12, at 373 (2010) (Exemption 6 "does not extend to information concerning corporations" because it "provides a qualified exemption only for 'personal privacy.'").

4. The structure of FOIA's other exemptions further confirms that Exemption 7(C) protects only the privacy of individuals. Corporations have a legitimate interest in preserving the secrecy of certain information, and Congress addressed the need to do so through a specific, circumscribed exemption. Congress enacted Exemption 4 to protect from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Congress's enactment of an exemption for commercial information (Exemption 4) at the same time as its adoption of a general exemption for "personal privacy" (Exemption 6) demonstrates that its subsequent incorporation of "personal privacy" into Exemption 7's law-enforcement context was not intended to protect organizations with business interests.

B. The court of appeals did not dispute that the "ordinary" meaning of "personal privacy" excludes corporate secrecy. App., *infra*, 12a. It concluded instead that Exemption 7(C) diverges from that normal understanding because the APA defines the term "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." *Ibid.* That analysis, which led the court to

conclude that "FOIA's text unambiguously" shows that corporations possess "personal privacy," *id.* at 13a, does not withstand scrutiny.

1. As Professor Davis explained, the statutory definition of "person" is "irrelevant." See p. 17, *supra*. The term "person" does not appear in Exemption 7(C), which instead uses the undefined phrase "personal privacy." Had Congress intended in Exemption 7(C) to invoke the APA's definition of "person" and protect the "privacy of a person," it would have used words to that effect. Cf. 5 U.S.C. 552(b)(4) (protecting "trade secrets or commercial or financial information obtained from a person"), 552(b)(7)(B) (protecting law-enforcement records that "would deprive a person of a right to a fair trial or an impartial adjudication").

The linguistic relationship between the words "person" and "personal"—*i.e.*, that the former is the "root" of the latter, App., *infra*, 12a—cannot itself support the Third Circuit's holding.[10] When Congress specifically intends to extend a statutory definition to such "variants" of a defined term, it has enacted definitional language that reflects this intent. See, *e.g.*, 15 U.S.C. 3802(f) (extending definition to "any variant" of defined term); 17 U.S.C. 101, 111(f); 33 U.S.C. 1122; 42 U.S.C. 7703(1) and (3); 45 U.S.C. 702(10), 802(5). And in the absence of such a provision, the meaning of such a "variant," as of any other term, "is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Indeed, "it is a 'fundamental principle of statutory construction * * * that

[10] Congress's use of the word "personnel" in "personnel * * * files," 5 U.S.C. 552(b)(6), for instance, shares the same "root" as "personal," but "personnel," unlike the APA definition of "person," cannot encompass a corporation.

the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div.* v. *United Auto. Workers*, 523 U.S. 653, 657 (1998) (*Textron*) (citations omitted).

Viewed in light of that principle, the error of the Third Circuit's decision becomes clear. The phrase "personal privacy" must be understood as a textual unit. See *Textron*, 523 U.S. at 656-657 (explaining that the term "for" cannot be properly understood in isolation from "the meaning of '[s]uits for violation of contracts'"). And the phrase must additionally "be read in [its] context and with a view to [its] place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Given its context and purpose in the overall framework of FOIA, the term "personal privacy" refers only to the interest of individuals, and not of corporations. See pp. 14-19, *supra*.

2. The logical implications of the Third Circuit's analysis also underscore the flaws in its decision. The APA defines "person" to include not only an individual and a corporation but also a "public * * * organization other than [a federal government] agency." 5 U.S.C. 551(2). Foreign, state, and local governments and governmental entities therefore are deemed "persons" under the APA and FOIA.[11] The Third Circuit's rationale

---

[11] See *Maryland Dep't of Human Res.* v. *HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985); see also *Kansas* v. *United States*, 249 F.3d 1213, 1221-1222 (10th Cir. 2001); *Stone* v. *Export-Import Bank*, 552 F.2d 132, 136-137 (5th Cir. 1977) (foreign governmental agency); cf. *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988) (concluding that a State was a "person suffering legal wrong because of agency action," 5 U.S.C. 702); 5 U.S.C. 701(b)(2) (adopting definition of "person" in 5 U.S.C.

would entitle all such entities to "personal privacy" under Exemption 7(C). It would be exceedingly difficult to identify the parameters of a government agency's so-called "personal privacy," and still more to determine whether disclosure would "constitute an unwarranted invasion" of that privacy, 5 U.S.C. 552(b)(7)(C), by balancing this wholly non-intuitive privacy interest against the public interest in disclosure. Such an endeavor would place federal agencies and the courts in uncharted waters, and there is no reason to believe that Congress intended that extraordinary result.

The court of appeals asserted that, like an individual, a corporation can suffer "public embarrassment, harassment, and stigma." App., *infra*, 14a n.5. But beyond this attempted personification of an entity whose very existence is a legal construct, the court of appeals provided no insight into how a corporation's experience of "personal privacy" is analogous to that of an individual. FOIA Exemption 7(C) protects the privacy of a corporation's employees, and Exemption 4 protects the corporation's confidential commercial information. The FCC properly withheld such information from disclosure under both provisions. *Id.* at 40a-43a. There is no basis for withholding the balance of the FCC's investigative file in the name of a freestanding concept of corporate dignity or autonomy or other attribute of "personal privacy" as that term is understood with reference to human beings.

551(2)). Congress recognized that foreign governments are "persons" that could invoke FOIA, cf. 5 U.S.C. 552(a)(3)(A), and amended FOIA to ensure that the U.S. intelligence community would not produce agency records in response to FOIA requests from such "persons." See 5 U.S.C. 552(a)(3)(E).

3. Finally, the court of appeals erred in concluding that, even if "Exemption 6 applies only to individuals," the term "personal privacy" in Exemption 7(C) properly extends to corporations. App., *infra*, 13a. The court indicated that its understanding of the phrase "personal privacy" would apply uniformly to both provisions but that the separate "phrase 'personnel and medical files'" in Exemption 6 might limit that exemption "to individuals because only individuals (and not corporations) may be the subjects of such files." *Ibid.* That distinction does not withstand analysis.

The disclosure of personnel and medical files may reveal information about corporations and their internal affairs as well as about individuals. Such files, for example, may disclose whether a company discriminated against its employees or has a pattern of providing substandard medical care. Moreover, Exemption 6 applies to individuals who are not the subject of the specific files. The exemption concerns records on an individual that can be "identified as applying to that individual" and therefore can implicate her privacy interests; it does not "turn upon the label of the file" itself. *Washington Post Co.*, 456 U.S. at 601-602 (citation omitted); cf. *Favish*, 541 U.S. at 166 (explaining that Exemption 7(C) protects individuals whose personal information is in law-enforcement files by "mere happenstance"). The phrase "personnel and medical files" therefore cannot justify limiting Exemption 6 to the privacy of individuals if "personal privacy" encompasses corporate privacy interests. Both Exemptions 6 and 7(C) protect only individuals because each includes the same term—"personal privacy"—imposing that limitation. Cf. *Reporters Committee*, 489 U.S. at 768-770 (applying Exemption 6 precedents to analyze an "invasion of privacy" under Ex-

emption 7(C)).

In sum, the Third Circuit's Exemption 7(C) ruling failed to examine the context of FOIA's exemptions, made no effort to explore the lengthy history behind Exemption 6 and 7(C), and offered no convincing textual rationale for its holding. Moreover, the court of appeals did not dispute that its extension of "personal privacy" protection to a corporation was in tension with the decisions of the D.C. Circuit; it instead stated that it "decline[d] to follow" the D.C. Circuit's cases "to the extent that [they] can be read to conflict with [the Third Circuit's] textual analysis" of "personal privacy." App., *infra*, 15a n.6. Review is warranted to correct the court of appeals' unprecedented departure from 35 years of uniform FOIA jurisprudence and commentary interpreting "personal privacy" as limited to individuals.

II. THE COURT OF APPEALS' RULING THREATENS SIGNIFICANT ADVERSE CONSEQUENCES.

The Third Circuit's decision threatens to disrupt the government's administration of FOIA—under which hundreds of thousands of request are filed annually—by dramatically expanding the scope of "personal privacy" interests for FOIA officers to evaluate in responding to requests.

By declaring that a corporation (presumably like any APA "person") possesses "personal privacy" rights under Exemption 7(C), the court of appeals has altered a tenet of FOIA law under which the government has operated for decades. Federal agencies routinely collect information from companies as a result of law-enforcement or regulatory investigations. But agencies have never considered, in processing FOIA requests, whether this information invades so-called corporate privacy in-

terests. Instead, agencies have processed FOIA requests pursuant to the uniform body of jurisprudence confirming that "personal privacy" belongs only to individuals and not to corporations or other entities. The court of appeals' ruling thus throws longstanding FOIA practices and procedures into doubt on a government-wide basis. The decision may require numerous significant changes in the administration of FOIA in order to accommodate a hitherto unknown set of privacy interests.[12]

---

[12] For example, an agency processing FOIA requests under its governing regulations not infrequently must determine whether a FOIA exemption applies to the specific documents requested. See, *e.g.*, 10 C.F.R. 9.17(a), 9.25(f) (Nuclear Regulatory Commission); 10 C.F.R. 1004.7(a) and (b)(1) (Department of Energy); 12 C.F.R. 4.12(a) and (b) (Office of the Comptroller of the Currency); 29 C.F.R. 102.117(a)(1), (c)(2)(iii) and (v) (NLRB); 45 C.F.R. 5.33(a), 5.61 (HHS). Under the Third Circuit's holding, an agency making this determination now must analyze whether disclosure would implicate a corporation's privacy interest. And even when an exemption does apply and FOIA does not compel disclosure, an agency's decision whether to exercise discretion to release agency records may turn on the agency's evaluation of the interests protected by FOIA's exemptions. See, *e.g.*, 10 C.F.R. 9.25(f) (authorizing discretionary release of records that are subject to a FOIA exemption if disclosure "will not be contrary to the public interest and will not affect the rights of any person"); 29 C.F.R. 102.117(a)(1) (authorizing discretionary release of certain records if "disclosure would not foreseeably harm an interest protected by a FOIA exemption"); 45 C.F.R. 5.2 (stating general policy of providing "the fullest responsible disclosure consistent with" the need for confidentiality "recognized in [FOIA]" and "the legitimate interests of organizations or persons * * * affected by [the] release"). But cf. 10 C.F.R. 1004.1 (authorizing discretionary release when agency "determines that such disclosure is in the public interest"); 12 C.F.R. 4.12(c) (authorizing discretionary release on a "case-by-case basis").

In this case, for instance, the FCC's regulations "outline[]" the "underlying policy considerations" justifying withholding under each

The new consideration of "corporate personal privacy" likely will also result in the withholding of agency records to which the public should have access, including records documenting corporate malfeasance. At the least, the creation of this new category of privacy interests will increase the burden on agencies of processing and potentially litigating FOIA requests. The decision will undoubtedly spawn objections to FOIA disclosure from companies (or other "persons") that desire the government's investigation of their possible malfeasance to remain secret. And conversely, the decision will generate a new class of FOIA litigation by requesters seeking to restrict the as-yet-undefined category of "personal privacy" held by corporations.

In addition, the new and significant tension between Third Circuit and D.C. Circuit precedent creates especial problems with respect to FOIA litigation. Suits to compel an agency to disclose documents under FOIA may always be brought in the D.C. District Court. 5 U.S.C. 552(a)(4)(B). A FOIA requester seeking agency records that concern a corporation may therefore bring a FOIA suit that will be governed by D.C. Circuit precedent, which does not recognize corporate

---

FOIA exemption (*e.g.*, "personal privacy") and specify that, when an exemption authorizes the Commission to withhold the requested records, the Commission "will weigh [such] policy considerations favoring non-disclosure" against the reasons favoring disclosure. 47 C.F.R. 0.457 and (g)(3), 0.461(f)(4). If an agency decision to disclose documents fails to analyze the interests at stake as specified in such regulations, its disclosure order may be set aside on APA review as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). In this case, the court of appeals directed the Commission to evaluate AT&T's purported interest in "personal privacy" under the Commission's regulations. See App., *infra*, 7a & n.2, 15a-16a.

"personal privacy" interests. Reverse-FOIA actions under the APA, in turn, may normally be brought where the plaintiff resides or has its principal place of business. See 28 U.S.C. 1391(e) (district court fora); 28 U.S.C. 2343 (court of appeals fora for Hobbs Act cases). Any corporation or entity having a principal place of business in the Third Circuit (which includes Delaware, New Jersey, and Pennsylvania) may therefore elect a forum for a reverse-FOIA action in which the Third Circuit's decision would be binding precedent. As a result, an agency attempting to comply with FOIA will have no way of knowing in advance in which judicial forum—or fora if simultaneous suits are filed—it must defend its decision or which lower court precedents will govern that defense, as this case itself reflects. See p. 8 note 4, *supra* (discussing CompTel's FOIA action in the District of Columbia). The Third Circuit's unprecedented decision will therefore impose substantial legal uncertainty on federal agencies attempting to process vast volumes of FOIA requests.

Certiorari is warranted to restore the interpretation of "personal privacy" that has governed Exemption 7(C) since its enactment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
LEONARD SCHAITMAN
HENRY C. WHITAKER
Attorneys

AUSTIN C. SCHLICK
General Counsel
DANIEL M. ARMSTRONG
Associate General Counsel
MICHAEL A. KRASNOW
Counsel
Federal Communications Commission

APRIL 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4024

AT&T INC, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENT

COMPTEL, INTERVENOR

[Filed: Sept. 22, 2009]

On Petition for Review of an Order of the
Federal Communications Commission

OPINION OF THE COURT

Before: FUENTES, CHAGARES, and TASHIMA[*], Circuit Judges.

CHAGARES, Circuit Judge.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 551-59 [*sic*], requires a federal agency to disclose cer-

[*] Honorable A. Wallace Tashima, Senior Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

tain documents within its possession. But FOIA exempts from mandatory disclosure "records or information compiled for law enforcement purposes . . . 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," § 552(b)(7)(C) ("Exemption 7(C)"), and defines "person" to "include an individual, partnership, corporation, association, or public or private organization other than an agency," § 551(2). Human beings have such "personal privacy." This case requires us to determine whether corporations do, as well.

AT&T, Inc. ("AT&T") argued that the Federal Communications Commission ("FCC") could not lawfully release documents obtained during the course of an investigation into an alleged overcharging on the ground that disclosure would likely invade the company's "personal privacy." The FCC rejected AT&T's argument and held that a corporation, as a matter of law, has no "personal privacy" in the first place. AT&T filed a petition for review. We will grant the petition and remand to the FCC for further proceedings.

I.

AT&T participated in a federal program administered by the FCC, called "E-Rate," that was designed to increase schools' access to advanced telecommunications technology. As part of the program, AT&T provided equipment and services to elementary and secondary schools, and then billed the Government for the cost of the equipment and services. In August 2004, AT&T discovered that it might have overcharged the Government for certain work done for the New London, Connecticut

school district. AT&T voluntarily reported the matter to the FCC, and the FCC's Enforcement Bureau ("Bureau") conducted an investigation. The two sides ultimately resolved the matter via a consent decree.

During the course of the investigation, the Bureau ordered AT&T to produce, and the company did indeed produce, a range of documents related to its work with the New London schools. Those documents included invoices, internal e-mails providing pricing and billing information for the work done in New London, responses to Bureau interrogatories, names of employees involved in the allegedly improper billing, and AT&T's own assessment of whether and to what extent the employees involved in the overcharging violated its internal code of conduct.

On April 4, 2005, CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request for "[a]ll pleadings and correspondence contained in" the Bureau's AT&T E-Rate investigation file. Appendix ("App.") 27. AT&T submitted a letter to the Bureau opposing CompTel's request, arguing that the FCC collected the documents that AT&T produced for law enforcement purposes and therefore that the FCC regulations implementing FOIA's exemptions prohibited disclosure. CompTel submitted a reply letter.

On August 5, 2005, the Bureau issued a letter-ruling rejecting AT&T's argument that Exemption 7(C) and the FCC's regulations implementing that exemption prohibit disclosure. That exemption, the Bureau held, does not apply to corporations because corporations lack "personal privacy." AT&T filed an application requesting the FCC to review the Bureau's ruling. On Septem-

ber 12, 2008, the FCC issued an order denying the application and compelling disclosure, again on the ground that Exemption 7(C) does not apply to corporations.

Before addressing the merits, the FCC held that AT&T failed to comply with the FCC's regulations in filing its application for review of the Bureau's order. Generally, only a FOIA requester may file an application for the FCC to review the Bureau's resolution of that request. But, there is an exception. According to 47 C.F.R. § 0.461(i)(1), when a FOIA request for inspection of records submitted in confidence pursuant to §§ 0.457(d) or 0.459 is granted (even if only in part), the submitter of the information—in addition to the requester—may file an application for review. The FCC determined, however, that AT&T did not submit the material it provided to the FCC in confidence pursuant to either of those regulations, because AT&T failed to include with that material a request that the FCC treat that material as confidential. Nevertheless, the FCC stated that it would, "on [its] own motion," consider the merits of AT&T's application for review. App. 10.

The FCC then held that a corporation lacks "personal privacy" within the meaning of Exemption 7(C). It determined that FCC precedent supports this view, App. 10 (citing *Chadmoore Commc'n, Inc.*, 13 FCC Rcd. 23943, 23946-47 ¶ 7 (1998)), as does judicial precedent, App. 11-12 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989); *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100-01 (D.C. Cir. 1988); *Cohen v. EPA*, 575 F. Supp. 425, 429-30 (D.D.C. 1983)). The FCC also concluded that this interpretation accords with the Exemption's purpose to protect key players in an investigation—

targets, witnesses, and law enforcement officers—from the "literal embarrassment and danger" that an individual might suffer, rather than from the "more abstract impact" that a corporation might suffer. App. 12. The FCC stated that a corporation's privacy interests in other contexts—such as Fourth Amendment search-and-seizure law and the discovery regime created by the Federal Rules of Civil Procedure—have no bearing on whether a corporation has a privacy interest in the context of Exemption 7(C). App. 13.

AT&T filed a petition for review of the FCC's order, arguing that the FCC incorrectly interpreted Exemption 7(C) to prevent a corporation from claiming a "personal privacy" interest. AT&T further argues that, should we interpret the statute to allow a corporation to claim a "personal privacy" interest, disclosure of AT&T's documents is, as a matter of law, reasonably likely to constitute an "unwarranted invasion" of that interest. The FCC and CompTel (who entered this case as an intervenor) oppose on the merits and also raise certain threshold issues. CompTel argues that this Court lacks subject matter jurisdiction over AT&T's petition for review and therefore must dismiss. The FCC argues that we should deny the petition for review because AT&T failed to challenge the FCC's determination that AT&T did not comply with certain procedural requirements during the administrative proceedings.[1]

II.

The FCC had jurisdiction to issue its order denying AT&T's application for review. *See* 47 U.S.C. §§ 154(i) (providing that the FCC "may perform any and all acts,

[1] Disclosure is currently stayed pending the outcome of this appeal.

make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act of 1934 ("Communications Act"), 47 U.S.C. §§ 151-615b], as may be necessary in the execution of its functions"), 155(c)(5) (authorizing the FCC to adjudicate applications for review of order issued by delegated panel). CompTel argues that we lack appellate jurisdiction. We disagree.

CompTel asserts that because the Administrative Procedure Act ("APA") confers AT&T's cause of action, and because 28 U.S.C. § 1331 provides jurisdiction to review an APA claim, the district courts have jurisdiction to hear AT&T's petition for review. CompTel acknowledges that 28 U.S.C. § 2342(1) gives the courts of appeals exclusive jurisdiction over orders "under" the Communications Act within the meaning of 47 U.S.C. § 402(a), but argues that the FCC's order in this matter is not such an order.

CompTel made this argument for the first time to this Court in opposing AT&T's petition for review (which is the first time it could have made this argument). Therefore, there is no decision on this issue to review, and we will address the issue in the first instance.

Section 2342 provides that "[t]he court[s] of appeals . . . ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). A "final order[] of the [FCC] made reviewable by section 402(a) of title 47," § 2342(1), is, with certain exceptions not relevant here, "an[] order of the [FCC] under th[e Communications] Act . . . . " 47 U.S.C. § 402(a).

Thus, we have jurisdiction to review the FCC's order adjudicating AT&T's application for review if that order is an order "under" the Communications Act.

Courts have consistently held that an order adjudicating an alleged violation of FCC regulations is an order "under" the Communications Act within the meaning of § 402(a). *See*, *e.g.*, *Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1119, 1121-23 (10th Cir. 1998) (holding that an order determining that a business violated FCC regulations governing the marketing of radar-jamming devices is an order "under" the Communications Act within the meaning of § 402(a)); *Maier v. FCC*, 735 F.2d 220, 224 (7th Cir. 1984) (holding that order determining that a broadcasting company did not violate FCC regulations governing personal attacks on news subjects is an order "under" the Communications Act within the meaning of § 402(a)).

The FCC's order that is the subject of AT&T's petition for review adjudicated AT&T's claim that disclosure of the information collected by the FCC concerning the E-Rate program in New London would violate FCC regulations implementing Exemption 7(C).[2] Therefore, the order constituted an order "under" the Communications

[2] FOIA itself does not prohibit disclosure of information falling within its exemptions. When information falls within an exemption, no party can compel disclosure, but the FCC can still make a disclosure on its own accord unless some independent source of law prohibits the agency from doing so. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (explaining that, standing alone, FOIA's exemptions "do[] not give [courts] the authority to bar disclosure"). Thus, the disclosure of information falling within an exemption does not violate FOIA itself, but rather an independent source of law. Here, FCC regulations provide this independent source. *See* 47 C.F.R. § 0.457(g)(3) (prohibiting disclosure of information covered by Exemption 7(C)).

Act within the meaning of § 402(a). As a result, § 2342(1) provides that the courts of appeals have exclusive jurisdiction to review that order.[3]

III.

Next, the FCC argues that we must affirm the order because AT&T has failed to challenge the FCC's determination that AT&T failed to comply with relevant procedural requirements in filing its application for review of the Bureau's order. We disagree.

The FCC made this argument for the first time in opposing AT&T's petition for review (which is the first time it could have made this argument). Therefore, there is no decision on this issue to review, and we will address the issue in the first instance. When a decision rests on multiple, independent grounds, a reviewing court should affirm it if one of those grounds is correct. *See Levy v. Sterling Holding Co.*, 544 F.3d 493, 508-09 (3d Cir. 2008). An appellant waives an argument in support of reversal if he does not raise that argument in his opening brief. *FDIC v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000).

AT&T's procedural default was not an independent ground supporting the FCC's decision. The FCC, in its

[3] CompTel cites two cases, *Chrysler*, 441 U.S. 281, and *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, 598 F.2d 790 (3d Cir. 1979), which it claims stand for the proposition that the district courts, not the courts of appeals, have jurisdiction to review reverse-FOIA claims. CompTel is mistaken. True, in each of those cases, the district courts, rather than the courts of appeals, had jurisdiction to hear a reverse-FOIA claim. But neither of those opinions indicate that the laws allegedly barring disclosure in those cases contain any provision triggering the operation of a statute that would have vested jurisdiction exclusively in another court.

order, specifically stated that although it recognized AT&T's default, it would consider AT&T's claims on the merits "on [its] own motion." App. 10. This belies the FCC's claim that procedural default was an alternative holding. If it truly was an alternative holding, the FCC would not have needed to make its "own motion" to excuse the default in order to reach the merits. It could have discussed procedural default and then, separately and without any justifying segue, discussed the merits. Had the FCC done this, the procedural default holding would stand as an independent, sufficient ground for denial. That the FCC did not do this tells us that it did not (even in the alternative) base its decision on procedural default.[4]

IV.

AT&T argues that the FCC incorrectly interpreted Exemption 7(C) when it held that a corporation lacks the "personal privacy" protected by that exemption. We agree with AT&T.

The FCC's interpretation of Exemption 7(C) is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because FOIA applies government-wide, and no one agen-

---

[4] If the FCC lacked the authority to consider the merits on its own motion, then perhaps its order actually did consist of two alternative holdings. If the FCC lacked such authority, then its justification for issuing a merits holding—its "own motion" to excuse procedural default—would have been erroneous, and all that would have remained would be one procedural default holding and one merits holding, with nothing connecting the two. But CompTel does not appear to argue that the FCC lacked such authority, and for good reason: the FCC had it. *See* 47 C.F.R. § 1.3 (allowing the FCC to waive any regulation "for good cause shown").

cy is charged with enforcing it. *ACLU v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008) (declining to accord deference to Department of Defense interpretation of FOIA). Thus, we exercise plenary review of the FCC's interpretation of FOIA, and will set aside the FCC's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

A.

In 1966, dissatisfied with then-existing statutory mechanisms compelling disclosure of Government records, Congress enacted FOIA to improve public access to information controlled by federal agencies. *See OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000) (describing Congress's intent). FOIA embodies a philosophy of full disclosure: an agency may deny a reasonable request for information only if the information falls into a statutorily delineated exemption. *Id.*

This case concerns the so-called law enforcement exemption, Exemption 7(C), which shields 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). FOIA's Exemption 6 also uses the phrase "personal privacy," shielding from compulsory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). FOIA does not define "personal," but it does define "person"

to "include[] an individual, partnership, corporation, association, or public or private organization other than an agency." § 551(2).

Neither the Supreme Court nor this Court has ever squarely rejected a proffered personal privacy interest of a corporation. The most that can be said of the Supreme Court's cases and of our cases is that they suggest that Exemptions 7(C) and 6 frequently and primarily protect—and that Congress may have intended them to protect—the privacy of individuals. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 764 n.16; *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982); *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995) (citing *Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 426 (3d Cir. 1992)); *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995); *Cuccaro v. Sec'y of Labor*, 770 F.2d 355, 359 (3d Cir. 1985) (citing *Lame v. U.S. Dep't of Justice*, 654 F.2d 917, 923 (3d Cir. 1981)).

B.

As the Supreme Court has held, a court must "begin by looking at the language of the [statute]. . . . When [the court] find[s] the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quotation marks and citation omitted)).

AT&T argues that the plain text of Exemption 7(C) indicates that it applies to corporations. After all, "personal" is the adjectival form of "person," and FOIA defines "person" to include a corporation. We agree. It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term. *See*

Del. River Stevedores v. DiFidelto, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring) (stating that it is a "grammatical imperative[]" that "a statute which defines a noun has thereby defined the adjectival form of that noun"). Further, FOIA's exemptions indicate that Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to. Exemption 7(F), for example, protects information gathered pursuant to a law enforcement investigation that, if released, "could reasonably be expected to endanger the life or physical safety of any *individual*." 5 U.S.C. § 552(b)(7)(F) (emphasis added). Yet, Congress, in Exemption 7(C), did not refer to "the privacy of any individual" or some variant thereof; it used the phrase "personal privacy."

The FCC and CompTel's text-based arguments to the contrary are unconvincing. They cite Supreme Court case law for the proposition that, whenever possible, statutory words should be interpreted "in their ordinary, everyday senses." *Malat v. Riddell*, 383 U.S. 569, 571 (1966). The ordinary meaning of "person" is human being, so, the argument concludes, "personal" must incorporate this ordinary meaning. This argument is unpersuasive. It fails to take into account that "person"—the root from which the statutory word at issue is derived—is a defined term. *See Biskupski v. Att'y Gen.*, 503 F.3d 274, 280 (3d Cir. 2007) ("If, as here, 'a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.'" (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000))).

The FCC and CompTel next argue that FOIA's other uses of the phrase "personal privacy" indicate that the

phrase does not encompass corporations. They point to Exemption 6, 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," 5 U.S.C. § 552(b)(6), and observe that courts have held that this exemption applies only to individuals and not to corporations. Thus, the FCC and CompTel argue, the phrase "personal privacy" in Exemption 6 applies only to individuals, and therefore "personal privacy" in Exemption 7(C) applies only to individuals, as well. This argument is flawed. Suppose (though we express no opinion on the issue) that Exemption 6 applies only to individuals (and not to corporations). This does not mean that *each and every component phrase* in that exemption, taken on its own, limits Exemption 6 to individuals. It means only that *some* language in that exemption does so. The phrase "personnel and medical files" serves this function. It limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files. Therefore, nothing necessarily can be gleaned about the scope of "personal privacy," because Exemption 6 would apply only to individuals even if "personal privacy," taken on its own, encompasses corporations.

Thus, we hold that FOIA's text unambiguously indicates that a corporation may have a "personal privacy" interest within the meaning of Exemption 7(C). This, for us, ends the matter. *Rubin*, 449 U.S. at 429-30. We need not consider the parties' arguments concer-

ning statutory purpose,[5] relevant (but non-binding) case law,[6] and legislative history.[7]

---

[5] Nevertheless, we note that interpreting "personal privacy" according to its plain textual meaning serves Exemption 7(C)'s purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators. Corporations, like human beings, are routinely involved in law enforcement investigations. Corporations, like human beings, face public embarrassment, harassment, and stigma because of that involvement. Reading "personal privacy" to exclude corporations would disserve Exemption 7(C)'s purpose of encouraging corporations—like human beings—to cooperate and be forthcoming in such investigations. Finally on this topic, "[t]he best evidence of th[e] purpose [of a statutory text] is the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). That text, we have explained, demonstrates that a corporation may have "personal privacy" within the meaning of Exemption 7(C).

[6] The Court of Appeals for the District of Columbia Circuit cases discussed by the parties—*Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), and *Washington Post*, 863 F.2d 96—do not impugn our textual analysis. The court in *Multi Ag Media* suggested that "personal privacy" within the meaning of Exemption 6 extends to individuals only. But it appears to have inferred this conclusion from its observation that Congress's main purpose in enacting Exemption 6 was to protect individuals (and not necessarily corporations). *See* 515 F.3d at 1228. We do not believe that inferring the statute's meaning merely from evidence of the enacting Congress's chief purpose is analytically appropriate: " 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1988) (quotation marks omitted)). The *Judicial Watch* court, in applying Exemption 6, considered only individuals' privacy interests in balancing "personal privacy" against the need for public disclosure. Yet the court's description of the parties' arguments

V.

AT&T next argues that, as a matter of law, the invasion of personal privacy caused by the release of the documents the company submitted to the FCC could reasonably be expected to be "unwarranted" within the meaning of Exemption 7(C). We disagree.

AT&T made this argument to the FCC during the administrative proceedings, but because the FCC held that "personal privacy" does not apply to corporations, the FCC did not have occasion to discuss whether a potential invasion of AT&T's "personal privacy" would be

---

indicates that the FDA (the federal agency holding the documents in that case), in its attempt to resist disclosure, only cited individual privacy interests in the first place. *See* 449 F.3d at 152-53. Thus, the court never had the occasion to pass on whether "personal privacy" encompasses corporate privacy. Finally, the court in *Washington Post* noted that Exemption 7(C) concerns only "intimate" details, including "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." 863 F.2d at 100. But a corporation, too, has a strong interest in protecting its reputation.

In any event, to the extent that these cases can be read to conflict with our textual analysis, we decline to follow them.

[7] We decline the FCC and CompTel's invitation to examine the legislative history of Exemption 7(C) because we find the text of FOIA to be unambiguous. *See In re Mehta*, 310 F.3d 308, 311 (3d Cir. 2002) ("We look to the text of a statute to determine congressional intent, and look to legislative history only if the text is ambiguous."); *see generally Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 244 (3d Cir. 2009) ("We have recognized that legislative history is not without its shortcomings as a tool of interpretation. 'As a point of fact, there can be multiple legislative intents because hundreds of men and women must vote in favor of a bill in order for it to become a law.'") (quoting *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006)).

"unwarranted." Therefore, there is no decision on this issue to review.

"[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (quoting *PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)). AT&T attempts to avoid this bedrock principle by noting that "when [a FOIA] request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing," granting that request would, as a matter of law, constitute a "clearly unwarranted" invasion of personal privacy within the meaning of Exemption 7(C), *Reporters Comm.*, 489 U.S. at 780, so remand would be unnecessary. AT&T argues that none of the AT&T records that CompTel wants disclosed contains "official information" about the FCC or otherwise pertain to the FCC's conduct. Rather, AT&T contends that the request is aimed at gathering information about AT&T, contained in AT&T documents, that "the Government happens to be storing," *id.*, by virtue of the Bureau's investigation. We cannot agree. CompTel's FOIA request does not fit into that narrow category.

CompTel has indeed alleged that it seeks "'official information' about a Government agency." *Id.* For example, in its opposition to AT&T's letter-request to block disclosure, CompTel explains that it seeks information about "the receipt of universal service support [the E-Rate program] for the New London Connecticut

Public Schools." App. 37. CompTel notes that the FCC "terminated the investigation upon issuing an Order adopting a Consent Decree." App. 37. E-Rate has (at least) two participants: AT&T, which provides services to the local school districts (and bills the Government), and the FCC, which actually administers the entire operation. It stands to reason, then, that documents in the FCC's investigative file may shed light on the FCC's administration of E-Rate. This is especially true given that CompTel made (as it was entitled to make) a very broad request for "all" the documents in the investigative file, not merely for those limited to, say, employee home addresses, which would be less likely to provide any insight into the functioning of a federal agency.[8]

We therefore abide by long-established principles of administrative law and will remand the matter to the FCC with instructions to determine, in accordance with our construction of Exemption 7(C), whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy," § 552(b)(7)(c).

---

[8] Further, determining that each document AT&T submitted to the FCC contains *some* protected content would be difficult enough, but FOIA requires more. We would have to be convinced that every "reasonably segregable *portion*" of each document contains protected information. 5 U.S.C. § 552(b) (flush language) (emphasis added). Holding, on the very limited record before us, that Exemption 7(C) protects every reasonably segregable jot and tittle of each document that AT&T submitted would be truly extraordinary, and, in our view, not an appropriate course of action for a reviewing court to undertake in the first instance.

VI.

For the above reasons, we will grant AT&T's petition for review and remand the matter to the FCC for further proceedings consistent with this opinion.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF SBC COMMUNICATIONS INC.
ON REQUEST FOR CONFIDENTIAL TREATMENT

Adopted: Sept. 9, 2008
Released: Sept. 12, 2008

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it an application for review filed by SBC Communications, Inc. (SBC),[1] seeking review of a decision of the Enforcement Bureau (EB or Bureau), which rules on a Freedom of Information Act (FOIA) request by CompTel. SBC appeals that portion of EB's decision that denied in part SBC's request for confidential treatment of records responsive to

---

[1] SBC adopted the name AT&T, Inc. (AT&T) following its acquisition of the company by that name. *See http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21850* (company press release). Because, however, the pleadings and rulings before us refer to "SBC," we will generally use the name "SBC" in this memorandum opinion and order to avoid confusion. We will use the name "AT&T" only where the context makes it more appropriate.

CompTel's FOIA request. For the reasons set forth below, we deny SBC's application for review.[2]

I. BACKGROUND

2. On December 16, 2004, EB issued a consent decree[3] terminating its investigation into SBC's compliance with section 254 of the Communications Act, as amended, and Part 54 of the FCC's regulations.[4] CompTel, on April 4, 2005, filed a FOIA request seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [*i.e.,* the investigation of SBC]."[5] In opposing release of the requested documents, SBC, on May 27, 2005, for the first time requested confidential treatment of its submissions in that investigation.[6]

---

[2] The procedural history of this case is somewhat complex. For reasons explained in greater detail below, CompTel's own application for review of EB's decision is not before us. We will discuss CompTel's FOIA request and application for review only to the extent necessary to clarify the matters under consideration.

[3] *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The consent decree addressed alleged irregularities in invoices submitted by SBC Connecticut to the Schools and Libraries Division of the Universal Service Administrative Company (USAC) for services provided to certain schools and other entities subsidized under the Universal Service Fund "E-Rate" program.

[4] *See* 47 U.S.C. § 254; 47 C.F.R. Part 54.

[5] E-FOIA request from Mary C. Albert, CompTel/ALTS (Apr. 4, 2005).

[6] Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau (May 27, 2005). SBC's request for confidentiality specifically applied to financial documents that it submitted to EB in response to a letter of inquiry issued during the investigation. CompTel opposed SBC's request for confidentiality. Letter from Mary C. Albert, Vice President, Regulatory Policy to Judy Lancaster, Enforcement Bureau (Jun. 28, 2005).

3. The Bureau granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's FOIA request.[7] The Bureau found that SBC had not complied with the procedures for seeking confidential treatment specified by section 0.459 of the Commission's rules.[8] EB held that SBC "failed to provide a statement of specific reasons for withholding its responses in their entirety," especially because it failed to meet the requirements of section 0.459 that it explain "how disclosure of the information could result in substantial competitive harm" and "whether any of the information for which it seeks protection is already available to the public."[9] The Bureau, however, examined SBC's submissions and determined that certain information in SBC's submissions should be treated as confidential, including "costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.[10] EB also determined that this in-

---

[7] Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau to Jim Lamoureux, SBC Services, Inc. and Mary C. Albert, Vice President Regulatory Policy, CompTel/ALTS (Aug. 5, 2005) (*FOIA Decision*).

[8] 47 C.F.R. § 0.459.

[9] *FOIA Decision* at 4, *citing* 47 C.F.R. § 0.459(b)(5) and (7).

[10] *FOIA Decision* at 5. *See* 5 U.S.C. § 552(b)(4). Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

formation was not in the public domain.[11] In addition, the Bureau determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).[12] EB ruled, however, that SBC itself, as opposed to the individuals mentioned in SBC's submissions, did not possess personal privacy interests protected by Exemptions 6 and 7(C).[13] Finally, the Bureau withheld from release pursuant to FOIA Exemption 5[14] drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation,[15] which EB determined would disclose the Commission's deliberative process.

4. Both CompTel and SBC filed applications for review of EB's decision.[16] While these pleadings were pending before the Commission, CompTel filed a civil

[11] *FOIA Decision* at 5. Specifically, EB found that 47 C.F.R. § 54.501(d)(3), which states that service providers' records of rates charged and discounts allowed shall be made available for public inspection, did not require the disclosure of all pricing data in SBC's submissions.

[12] *FOIA Decision* at 5-6, citing 5 U.S.C. §§ 552(b)(7)(C) (records complied for law enforcement purposes . . . [that] could reasonably be expected to "constitute an unwarranted invasion of personal privacy") and 552(b)(6) (. . . files the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy").

[13] *FOIA Decision* at 6.

[14] 5 U.S.C. § 552(b)(5) (inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency).

[15] *FOIA Decision* at 6.

[16] Letter from Mary C. Albert to Samuel Feder (Sept. 6, 2005) (*CompTel Application for Review*); Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, [then] Acting General Counsel (Aug. 19, 2005) (*SBC Application for Review*).

action, pursuant to 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking a judicial order compelling disclosure of the records withheld by EB.[17] AT&T[18] (as successor to SBC) intervened in CompTel's action as a defendant, and, on March 5, 2008, the court stayed the case.[19] The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.[20] The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal. Accordingly, SBC's application for review is now before us.

5. SBC seeks review of the Bureau's denial in part of its request for confidential treatment. SBC challenges the Bureau's conclusion that FOIA Exemption 7(C) does not apply to corporations, contending that corporations are persons that have a privacy interest within the meaning of Exemption 7(C), and that this proposi-

---

[17] *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. filed Oct. 5, 2006). The FOIA permits such actions where the agency does not act on a FOIA request or appeal within the statutory time period. *See* 5 U.S.C. § 552(a)(6)(C)(i) (agency's failure to comply with statutory time period deemed to exhaust administrative remedies). Because the CompTel's judicial action is still pending, we will not address the merits of its application for review here.

[18] *See* note 1, *supra*.

[19] *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. memorandum opinion and order Mar. 5, 2008).

[20] *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (discussing reverse FOIA requests).

tion is consistent with precedent.[21] Accordingly, SBC argues that its internal documents should be withheld pursuant to Exemption 7(C), because disclosure would embarrass SBC without serving any public policy interest.[22] CompTel responds that there is no precedent supporting the proposition that corporations have a personal privacy interest for purposes of Exemption 7(C).[23]

II. DISCUSSION

A. Procedural Matter

6. As an initial matter, we find that SBC's application for review does not conform with the Commission's Rules. In general, an application for review of an initial action on a request for inspection may be filed only by the person making the FOIA request (here CompTel).[24] There is an exception to this limitation where a request for inspection of records submitted to the Commission in confidence under section 0.457(d) or section 0.459 is granted or partially granted, in which case the person who submitted the records or the third party owner of the records may file an application for review.[25] However, despite notice from EB of its right to do so,[26] SBC

---

[21] SBC Application for Review at 2-8.

[22] *Id*. at 4-5.

[23] Letter from Mary C. Albert, Vice President, Regulatory Policy to Samuel Feder, Esq.,, [then] Acting General Counsel (Sept. 1, 2005) (*CompTel Opposition*) at 3-6.

[24] 47 C.F.R. § 0.461(j).

[25] 47 C.F.R. § 0.461(i)(1) and (2), *citing* 47 C.F.R. §§ 0.457(d) and 0.459.

[26] EB's letter of inquiry specifically advised SBC: "If the Company [SBC] requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall

did not seek confidential treatment of its submissions in accordance with section 0.459(a) by filing a timely request for confidentiality when it submitted the material, and thus does not qualify to file an application for review pursuant to the terms of section 0.461(i).[27] This failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment. Although we admonish SBC that it should have complied with section 0.459, we are mindful of the provisions of FOIA Exemption 4 and the Trade Secrets Act[28] to prevent disclosure of confidential information and to consider the views of the submitter when making disclosure determinations. Therefore, we have considered the information and arguments subsequently submitted by SBC on our own motion.

---

submit, along with responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearing Division, EB to Michelle A. Thomas and Christopher Heimann [SBC] (Aug. 24, 2004) at 1-2.

[27] SBC's response to CompTel's FOIA request states: "All of the records responsive to the CompTel/ALTS [FOIA] request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 0.457, are not routinely available for public inspection." Letter from Jim Lamoureux to Judy Lancaster (May 27, 2005). SBC thus implies that it was not required to comply with section 0.459. We disagree. Because the material submitted by SBC was not specifically listed as confidential commercial and financial information under section 0.457(d)(l), section 0.457(d)(2) required SBC to submit a request for confidentiality under section 0.459. Section 0.461(i) does not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as SBC did, until a FOIA request is filed.

[28] 18 U.S.C. § 1905.

B. Exemption 7(C)

7. We disagree with SBC's contention that we should withhold all of the documents that it submitted in response to EB's letter of inquiry under Exemption 7(C).[29] SBC argues that disclosure of these records, all indisputably "compiled for law enforcement purposes," could reasonably be expected to "constitute an unwarranted invasion of personal privacy."[30] In this regard, SBC characterizes itself as a "private corporate citizen" with personal privacy rights that should be protected from disclosure that would "embarrass" it.[31] However, SBC's position that a corporation has "personal privacy" interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent. In *Chadmoore Communications, Inc.*,[32] the Commission held that information regarding an individual acting in the capacity of a commercial licensee, that is, in a business capacity, did not implicate a privacy interest for purposes of Exemption 7(C). The clear implication of *Chadmoore* is that information regarding a corporation would not be exempt either.[33] Our holding is

---

[29] FOIA Exemption 7(C) applies to "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably expected to constitute an unwarranted invasion of personal privacy."

[30] *See* 5 U.S.C. § 552(b)(7)(C).

[31] *SBC Application for Review* at 4.

[32] 13 FCC Rcd 23943, 23946-47 ¶ 7 (1998).

[33] *Chadmoore* references a line of cases holding that corporations do not have a "personal privacy" interest for purposes of Exemption 6. *See* 13 FCC Rcd at 23946-47 ¶ 7 and *Electronic Privacy Information Center v. Dep't of Homeland Security,* 384 F. Supp. 2d 100, 118 n.29 (D.D.C. 2005); *Hill v. Dep't of Agriculture*, 77 F. Supp. 2d 6, 7 (D.D.C. 1999); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567

consistent with judicial decisions in *Washington Post Co. v. U.S. Dep't of Justice*[34] and *Cohen v. EPA*.[35] In *Washington Post*, the United States Court of Appeals for the District of Columbia Circuit stated that the disclosures with which Exemption 7(C) is concerned are those of "an intimate personal nature" such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation."[36] In *Cohen*, the United States District Court for the District of Columbia cited the same examples.[37] These cases hold that Exemption 7(C) does not cover information relating to business judgments and relationships, even if disclosure might tarnish someone's professional reputation.[38] Thus, in *Washington Post*, the D.C. Circuit held that

---

(D.D.C. 1985). "While it has been established that Exemption 7(C) and Exemption 6 are not completely congruent, the difference lies in the standard of review and not the relevant privacy interest covered by the exemption." *Cohen v. EPA,* 575 F. Supp. 425, 429 n.6 (D.D.C. 1983), *citing FBI v. Abramson*, 456 U.S. 615, 630 n.13 (1982) (Exemption 6 protects against the disclosure of information that would constitute a "clearly unwarranted" invasion of personal privacy, whereas Exemption 7(C) does not require the harm to privacy to be "clearly unwarranted"); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 756 (1989) (noting the same distinction and that Exemption 6 uses the word "would" while Exemption 7(C) uses "could reasonably").

[34] 863 F.2d 96, 100-01 (D.C. Cir. 1988).

[35] 575 F. Supp. 425, 429-30 (D.D.C. 1983).

[36] 863 F.2d at 100.

[37] 575 F. Supp. at 429.

[38] 863 F.2d at 100 ("Information relating to business judgments and relationships does not qualify for exemption [7(C)]"); 575 F.2d at 429 ("The privacy exemption [in Exemption 7(C)] does not apply to information regarding professional or business activities").

Exemption 7(C) did not cover the report of an internal corporate investigation that mentioned individual employees by name but did not identify them as being personally the target of the investigation.[39] In *Cohen*, the district court held that Exemption 7(C) did not cover the names of individuals, such as corporate officials, mentioned in EPA hazardous waste notices, since they were identified only in their "public role" of being the users of hazardous waste disposal sites and would no more be subject to harassment than if the name of the corporation were disclosed.[40] Like *Chadmoore*, these cases imply that Exemption 7(C) does not cover a corporation's "privacy interest," since a corporation's interests are of necessity business interests. SBC points to no Exemption 7(C) cases that are to the contrary.

8. SBC urges us to depart from this precedent on several grounds, none of which are persuasive. Unlike SBC, we do not believe that protecting a corporation from "embarrassment" falls within the purposes of Ex-

---

[39] The D.C. Circuit, in *McCutcheon v. U.S. Dep't of Health and Human Services*, 30 F.3d 183, 187 (D.C. Cir. 1994), clarified that, although the exemption does not generally cover business judgments and relationships, information that accused individual employees of having a committed a crime in connection with their employment would implicate "the privacy interest of personal honor" and that "the protection accorded reputation under Exemption 7(C) would generally shield material" that "would show that an individual was the target of a law enforcement investigation." As noted, however, the internal corporate report in *Washington Post* did not identify any individual employees as being the targets of investigation and no such information is at issue in the present case.

[40] To the extent that the notices identified individuals as being potentially responsible for hazardous waste violations, the court held that the public interest outweighed the individuals' privacy interests.

emption 7(C), as interpreted by the courts.[41] Judicial discussion of the purposes of Exemption 7(C) focus on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of harassment.[42] We read the courts' discussion in these cases to refer to the literal embarrassment and danger that an individual might suffer from disclosure of information of a personal nature and not to the more abstract impact that disclosure might have on a legal entity like a corporation.

---

[41] We have previously held that public embarrassment to a corporation did not warrant withholding material under Exemption 4. *Liberty Cable Co., Inc.*, 11 FCC Rcd 2475, 2476 ¶ 7 (1996), *aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997), *citing CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) *and General Electric Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

[42] *See, e.g., Washington Post*, 863 F.2d at 100-01; *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) (" . . . individuals have an obvious privacy interest . . . in keeping secret the fact that they were subjects of a law enforcement investigation," as do witnesses and informants); *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996) ("Law enforcement officers, interviewees, suspects, witnesses, and other individuals named in investigatory files all have substantial privacy interests" because revelation could result in "embarrassment or harassment"). SBC notes that in *Alexander & Alexander Services, Inc. v. SEC*, 1993 WL 439799 (D.D.C. 1993) at * 10, the district court held that Exemption 7(C) applies when "a private citizen seeks information regarding another private citizen *or corporation.* . . . " SBC Application for Review at 8. [Emphasis added.] However, that case, like *Washington Post*, concerned the personal privacy of individuals named in corporate documents, not the privacy of the corporation itself.

9. SBC also argues that in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*,[43] the United States Supreme Court did not limit the applicability of Exemption 7(C) to individuals.[44] This argument is inapposite because *Reporters Committee* involved a rap sheet unique to a particular individual and the Court had no reason to address the applicability of its holding to corporations. Nonetheless, to the extent that *Reporters Committee* is at all relevant, it is fully consistent with EB's determination that Exemption 7(C) applies only to individuals' privacy interests. In analyzing the intent of Congress with respect to Exemption 7(C), *Reporters Committee* relies on both the Privacy Act[45] and FOIA Exemption 6, both of which apply only to individuals,[46] suggesting that the privacy interest involved in all three provisions is similar and applicable only to individuals.

10. SBC's remaining arguments amount to the assertion that because a corporation may be treated as a "person"[47] and have "privacy interests" for some pur-

---

[43] 489 U.S. 749 (1989).

[44] *SBC Application for Review* at 4.

[45] 5 U.S.C. § 552a.

[46] *See Reporters Committee for Freedom of the Press*, 489 U.S. at 766-68. SBC admits that Exemption 6 applies only to individuals. *SBC Application for Review* at 6. The Privacy Act provides on its face that it applies only to individuals. *See* 5 U.S.C. § 552a (titled "Records maintained on individuals"). *Reporters Committee* effectively rebuts SBC's argument that EB erred in equating the protection afforded by Exemptions 6 and 7(C). *SBC Application for Review* at 6. *See also* note 36, *supua.*

[47] A corporation is defined as a "person" under the Administrative Procedure Act (APA), of which the FOIA is a part. *See* 5 U.S.C. § 551(2). Thus, a corporation falls within the scope of FOIA Exemption

poses, it has personal privacy interests for purposes of Exemption 7(C). Such reasoning cuts too broadly. The privacy interests relevant to Exemption 7(C) are those discussed in paragraphs 8 and 9, *supra.* The interests underlying other forms of "privacy" that might be relevant in other contexts are not controlling for purposes of Exemption 7(C).[48] Thus, for example, it is not relevant that a corporation may have a constitutionally protected privacy interest against unreasonable search and seizure of its property under the Fourth Amendment, as found in *U.S. v. Hubbard*,[49] cited by SBC. SBC has not demonstrated that the holding in *Hubbard* compels or even supports a finding that a corporation has any personal privacy interest that justifies withholding of documents under the FOIA.[50] Likewise, the privacy inter-

4, which speaks of commercial and financial records obtained from a person. *See Lakin Law Firm, P.C.,* 19 FCC Rcd 12727, 12729 n.24 (2004), *citing Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The APA does not, however, define "personal" or "personal privacy." It is therefore irrelevant, for example, whether FOIA Exemption 7(B), which applies to records or information that "would deprive a person of a right to a fair trial or an impartial adjudication," applies to corporations, as SBC contends. SBC Application for Review at 6. A corporation's right to a fair trial is not based on any personal privacy interest.

[48] *See Reporters Committee*, 489 U.S. at 762 n.13 ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."), *citing Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records).

[49] 650 F.2d 293, 306 (D.C. Cir. 1980), *cited in SBC Application for Review* at 6.

[50] *In Hubbard*, the government seized documents from non-public areas of the premises of the Church of Scientology. Subsequently, the Church proffered the documents in support of a motion asserting that

ests found in *Tavoulareas v. Washington Post Co.*,[51] and cited by SBC, involved the "constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information [obtained in civil discovery and not used at a trial between private parties]."[52] It had nothing to do with FOIA Exemption 7.[53] The constitutional privacy analysis applied by the panel in *Tavoulareas* was, in any case, vacated on rehearing by the court *en banc*.[54]

11. For all of the reasons discussed above, we find that Exemption 7(C) has no applicability to corporations such as SBC. Accordingly, we deny SBC's application for review.

---

the seizure was unconstitutional. The appellate court reversed the trial judge's order unsealing the documents. It held that the "single most important element" in its decision to protect the documents was that they had been put in the record solely to support a motion to demonstrate the unlawfulness of the seizure and that it would undermine the Fourth Amendment for the documents to be disclosed under those circumstances. The fact that a corporation may have an interest in protecting itself from the unlawful seizure of its property does not imply that it has the distinctly different "personal privacy" interest relevant to Exemption 7(C).

[51] 724 F.2d 1010, 1018 (D.C. Cir. 1984), *reh. granted en banc and vacated*, 737 F.2d 1170 (D.C. Cir. 1984), *cited in SBC Application for Review* at 5. The court *en banc* directed the District Court to apply a discretionary "good cause" analysis under Rule 26(c) of the Federal Rules of Civil Procedure, which relates to protective orders.

[52] 724 F.2d at 1023.

[53] The privacy interest protected in *Tavoulareas* seems somewhat similar to the interest protected by FOIA Exemption 4, which applies to corporations as well as individuals. 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential").

[54] *See supra* note 51.

III. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that SBC Communications Inc.'s application for review IS DENIED. If SBC does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to CompTel, as specified in the Enforcement Bureau's decision. *See* 47 C.F.R. § 0.461(i)(4).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX C

[SEAL OMITTED]

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations and Hearings Division
445 12th Street, S.W., Room 4-C320
Washington, D.C. 20554

Aug. 5, 2005

Via Certified Mail, Return Receipt Requested, Facsimile and E-Mail

Mr. Jim Lamoureux
SBC Services, Inc.
1401 I Street N.W., Suite 400
Washington, D.C. 20005

Ms. Mary C. Albert
Vice President, Regulatory Policy
CompTel/ALTS
1900 M Street, N.W.
Washington, D.C. 20036

Re: Freedom of Information Act Request
FOIA Control No. 2005-333

Dear Mr. Lamoureux and Ms. Albert:

I. INTRODUCTION

This letter concerns a Freedom of Information Act ("FOIA") request from Comptel/ALTS ("Comptel") for information submitted by SBC Communications, Inc. ("SBC") in response to a Letter of Inquiry ("LOI") from

the Enforcement Bureau. SBC has requested confidential treatment of its submissions. As explained below, we grant SBC's request in part and deny it in part. Therefore, we will release to Comptel SBC's responses as described herein unless we receive an application for review from SBC within ten working days from the date of this letter. If Comptel believes that any portion of this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter.

II. BACKGROUND

On August 24, 2004, the Investigations and Hearings Division of the Enforcement Bureau (the "Bureau") sent SBC an LOI notifying the company that the Bureau was investigating whether it violated Part 54, Subpart F, of the Commission's rules, 47 C.F.R. §§ 54.500-54.521, and the Commission's orders regarding universal service funding.[1] SBC responded to this LOI on September 13, 2004.[2]

On December 16, 2004, the Bureau terminated its investigation by adopting a Consent Decree in which SBC agreed to make a voluntary contribution to the United States Treasury in the amount of $500,000 and to institute a compliance plan, as specified therein, "to en-

---

[1] Letter to Michelle A. Thomas, Executive Director, Federal Regulatory, SBC Communications, Inc., and Christopher Heimann, General Attorney, SBC Telecommunications Inc. from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 24, 2004 (" LOI").

[2] Letter to David Janas, Special Counsel, Investigations and Hearings Division, Enforcement Bureau from Christopher Heimann, General Attorney, SBC Telecommunications Inc., dated September 13, 2004 ("LOI Response").

sure SBC's wholly-owned subsidiaries' future compliance with the Commission's rules governing the E-Rate program."[3] The Consent Decree specifies that "it does not constitute an admission, denial, adjudication on the merits, or a factual or legal determination regarding any compliance or noncompliance with the requirements of section 254 of the Act or Part 54 of the Commission's rules.[4]

On April 4, 2005, the Bureau received Comptel's FOIA request for copies of "all pleadings and correspondence contained in file number EB-04-IH-0342,"[5] the investigative file for the investigation referenced in the December 16, 2004, Consent Decree. On May 27, 2005, SBC filed its response to the FOIA request, opposing release of the requested documents and seeking confidentiality for the materials.[6] SBC argues in its Opposition that the requested documents were "compiled for law enforcement purposes," and, thus, are exempt from disclosure under FOIA Exemption 7. Specifically SBC argues that disclosure is prohibited by FOIA Exemption 7(C) because it would cause an unwarranted invasion of personal privacy. SBC also contends that FOIA Exemption 4 prohibits release of the requested documents be-

---

[3] *SBC Communications Inc.*, Order and Consent Decree, 19 FCC Rcd 24014 (Enf. Bur. 2004).

[4] *Id*. at 24019, ¶ 13.

[5] *See* Electronic FOIA (E-FOIA) request form from Mary C. Albert ("Requester"), Comptel/ALTS, dated April 4, 2005 ("FOIA 2005-333"). In a telephone conversation with IHD staff on April 12, 2005, the Requester modified and clarified her FOIA request to seek only pleadings filed by SBC and correspondence between SBC and the Commission.

[6] *See* Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, dated May 27, 2005 ("Opposition").

cause the documents "clearly pertain to SBC's business dealings with one of its customers" and because many of the documents contain information pertaining to SBC's systems, processes and operations, and include cost, pricing and other "commercially sensitive" information.[7]

By letter dated June 28, 2005, Comptel replied to SBC's Opposition.[8] Comptel challenges SBC's claims that FOIA Exemptions 7(C) and 4 prohibit disclosure of the requested documents. Although Comptel does not object to redaction from the requested documents of the names, telephone numbers, and home and email addresses of SBC employees, it argues that Exemption 7(C) is inapplicable to SBC because it is "a large, publicly traded corporation . . . that . . . possesses no protectable personal privacy interest."[9] Comptel also asserts that SBC's "conflicting positions" regarding whether its submissions were provided to the Bureau voluntarily or under compulsion do not support SBC's reliance upon Exemption 4 to prohibit disclosure of the requested documents, that SBC's "conclusory and generalized" characterizations of the records as confidential commercial information are "insufficient to demonstrate the likelihood of substantial competitive injury" as required by Exemption 4, and that the cost and pricing information that SBC wishes to withhold from disclosure is already in the public domain because E-Rate service providers are required under section 54.501(d)(3) of the

---

[7] Opposition at 6.

[8] Letter from Mary C. Albert, Vice President Regulatory Policy, CompTel/Ascent/ALTS to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 28, 2005 ("Reply")

[9] *Id.* at 2.

Commission's rules[10] to make those records available for public inspection.[11]

III. DISCUSSION

A. SBC's Requests To Keep Its Responses Confidential In Their Entirety Are Deficient

Section 0.459 of the Commission's rules establishes a procedure by which parties may request that information or materials that they have submitted to the Commission not be made routinely available for public inspection. *See* 47 C.F.R. § 0.459. This rule requires that a party seeking confidentiality provide a statement of the reasons for withholding the materials in question from public inspection and set forth specific categories of materials for which such treatment is appropriate. A request for confidentiality "shall include," *inter alia*, an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;"[12] an "[e]xplanation of how disclosure of the information could result in substantial competitive harm;"[13] and "[i]dentification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties."[14]

We find that SBC's requests for confidential treatment of its submissions substantially fail to comply with the standards set forth in section 0.459(b) of the Commission's rules. The rules clearly state that casual requests

---

[10] 47 C.F.R. § 54.501(d)(3).

[11] Reply at 3.

[12] *See* 47 C.F.R. § 0.459(b)(3).

[13] See 47 C.F.R. § 0.459(b)(5).

[14] See 47 C.F.R. § 0.459(b)(7).

for confidentiality that do not comply with the requirements set forth in sections 0.459(a) and (b) will not be considered.[15] Further, the LOI issued to SBC by the Bureau explicitly warns SBC that requests for confidential treatment must comply with the requirements specifically mandated by section 0.459(b), and that the Bureau will not consider confidentiality requests that do not so comply.

Nevertheless, SBC has failed to provide a statement of specific reasons for withholding its responses in their entirety. While generally categorizing the information contained in its submissions, SBC does not, as required by section 0.459(b)(3), explain the degree to which specific information is commercial or financial or contains a trade secret. Nor does it explain, as required by section 0.459(b)(5), how disclosure of such information could result in substantial competitive harm. SBC also fails to state whether any of the information for which it seeks protection is already available to the public.[16]

We find SBC's request for the confidential treatment of all its submissions to be overly broad. Portions of the documents submitted by SBC appear to contain commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. But most of those pages also contain information that is not confidential, such as FRN numbers, lists of equipment, and references to ordinary administrative matters. Some of that information is already within the public domain.[17] Release of such information appears

[15] *See* 47 C.F.R. § 0.459(c).

[16] *See* 47 C.F.R. § 0.459(b)(7).

[17] Federal Registration Numbers ("FRN"s), including those of SBC, are available to the public on the Commission Registration System

unlikely to result in competitive harm to SBC and SBC offers no justification for withholding such information as commercial, financial or trade secret information. Consequently, that information will be disclosed.

Accordingly, we conclude that SBC has failed to demonstrate by a preponderance of the evidence a case for nondisclosure of all of its submissions. We therefore deny SBC's requests that we grant confidential treatment of the entirety of its submissions.

B. Portions of SBC's Submissions Are Subject To Protection From Disclosure As "Commercially Sensitive Information"

We base confidentiality determinations under section 0.459 of the Commission's rules relating to commercial or financial materials on Exemption 4 of the FOIA which permits us to withhold "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential."[18] Exemption 4 protects "any financial or commercial information provided to the Government on a *voluntary* basis if it is of a kind that the provider would not customarily release to the public." (emphasis added)[19] However, under Exemption 4 commercial or financial materials that are part of *required* submissions are held to be confidential only when disclosure would either impair the government's ability to obtain necessary information in the future or would

---

("CORES") database which is located on the Commission's internet web page. *See also* 47 C.F.R. 54.501(d)(3).

[18] 5 U.S.C. § 552(b)(4).

[19] *See Critical Mass Energy Project v. NRC*, 975 F.2d 87 1,880 (D.C. Cir. 1992) *("Critical Mass").*

be likely to substantially harm the competitive position of the submitter.[20]

SBC's LOI responses were *required* submissions for the purposes of our FOIA analysis.[21] An LOI is an administrative order that compels the production of information. Failure to respond properly to an LOI may subject an entity to forfeiture action.[22] Because we directed SBC to submit its written responses to the Bureau's LOI, its responses were required.

We find that certain information in SBC's submissions constitutes commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. Such commercially sensitive information includes, but is not limited to, SBC's costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers. Accordingly, such information is exempt from disclosure under FOIA Exemption 4.[23]

Although section 54.501(d)(3) of the Commission's rules requires telecommunications service providers

---

[20] *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) *("National Parks"); Critical Mass,* 795 F.2d at 878 (citing *National Parks).*

[21] *See Critical Mass* (establishing separate tests for confidential treatment of voluntary submissions and required submissions). See also

[22] *See SBC Communications, Inc.,* Order of Forfeiture, 17 FCC Rcd 7589 (2002) (forfeiture paid); *Globcom Inc.,* Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, n.36 (2003), *response pending.*

[23] *See, e.g., In Re The Lakin Law Firm, P.C.*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004).

such as SBC to allow public inspections of the rates it charges and the discounts it allows to schools and libraries eligible for universal service support,[24] SBC can comply with the rule's requirements by maintaining a "public inspection file" containing the required rate information. The rule does not mandate disclosure here of all of the pricing data contained in SBC's submissions. In this instance, disclosure of SBC's invoice and discount amounts could disclose the total value of its contract, information that would not otherwise be publicly available. That information is not in the public domain and its release is not required by the rule. Because release of SBC pricing information in this case is likely to substantially harm SBC's competitive position, such information is exempt from disclosure under FOIA Exemption 4.

C. Names of SBC Employees And Customers Are Protected From Disclosure Due To Personal Privacy Concerns

The FOIA statute, 47 [*sic*] U.S.C. § 552(b)(7)(C), provides that records or information compiled for law enforcement purposes are exempt from disclosure to the extent that the production of such records could reasonably be expected to "constitute an unwarranted invasion of personal privacy" are exempt from disclosure.[25] Generally, businesses do not possess "personal privacy" in-

---

[24] 47 C.F.R. § 54.501(d)(3) provides that "[Telecommunications] Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries—on their own or as part of a consortium. Such records shall be available for public inspection."

[25] 5 U.S.C. § 552(b)(7)(C). *See also* 5 U.S.C. § 552(b)(6); *In re William McConnell, Broadcasting and Cable,* Order, 18 FCC Rcd 26371 (2003).

terests as required for application of FOIA Exemption 7(C).[26] However, the individuals identified in SBC's submissions do have such privacy rights and, pursuant to this provision, portions of SBC's submissions will be redacted to withhold the names and identifying information of those individuals to prevent unwarranted invasions of their personal privacy.

D. Documents Which Disclose an Agency's Deliberative Process Are Protected Prom Disclosure

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[27] Pursuant to this exemption we will withhold from public disclosure drafts of Bureau pleadings and correspondence, and memoranda and emails, distributed among Commission staff, which discuss the issues and investigation related to this matter.

IV. CONCLUSION

For the reasons stated above, we grant in part and deny in part SBC's request for confidentiality. If SBC believes that this decision is in error, it must file an application for review of this action with the Commission's Office of General Counsel within ten working days of the date of this letter. *See* 47 C.F.R. § 0.461(i). We will produce the documents requested as noted above if no such application for review is filed. We will assess copying charges, if any, at that time. If Comptel believes that this decision is in error, it may file an application for review of this action with the Commission's Office of

---

[26] *See, e.g., Chadmore Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23943 (1998)

[27] 5 U.S.C. § 552(b)(5).

General Counsel within 30 days of the date of this letter. *See* 47 C.F.R. § 0.461(j).

We are providing SBC's counsel with a copy of the documents as redacted pursuant to this decision.

Sincerely,

/s/ WILLIAM H. DAVENPORT
WILLIAM H. DAVENPORT
CHIEF, INVESTIGATIONS AND
HEARINGS DIVISION
ENFORCEMENT BUREAU

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4024

AT&T INC, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENT

COMPTEL, INTERVENOR

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, MCKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ MICHAEL A. CHAGARES
MICHAEL A. CHAGARES
Circuit Judge

DATED: November 23, 2009

APPENDIX E

1. 5 U.S.C. 551, provides in pertinent part:

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

2. The Freedom of Information Act, 5 U.S.C. 552,[1] provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947

---

[1] As amended by the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564(b), 123 Stat. 2184 (amending 5 U.S.C. 552(b)(3)), and the OPEN Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2528 (amending 5 U.S.C. 552(f)(2)).

(50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

* * * * *

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

* * * * *

3. 47 C.F.R. 0.457 provides in pertinent part:

Records not routinely available for public inspection.

The records listed in this section are not routinely available for public inspection pursuant to 5 U.S.C. 552(b). The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of closed agency meetings will be considered under § 0.607 rather than under the provisions of this section.

(a) *Materials that are specifically authorized under criteria established by Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).* * * * *

(b) *Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).* * * * *

(c) *Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b, provided that such statute either requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of materials to be withheld).* * * * *

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this paragraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests submitted under § 0.461 for inspection of such materials.

(i) Financial reports submitted by radio or television licensees.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or ad-

vance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see § 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(e)(3) of this chapter.

(vi) Outage reports filed under Part 4 of this chapter.

(vii) The following records, relating to coordination of satellite systems pursuant to procedures codi-

fied in the International Telecommunication Union (ITU) Radio Regulations:

* * * * *

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

(e) *Interagency and intra-agency memoranda or letters, 5 U.S.C. 552(b)(5).* * * * *

(f) *Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6).* * * * *

(g) *Under 5 U.S.C. 552(b)(7), records compiled for law enforcement purposes, to the extent that production of such records:*

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source;

(5) Would disclose investigative techniques or procedures or would disclose investigative guidelines if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

4. 47 C.F.R. 0.461 provides in pertinent part:

Requests for inspection of materials not routinely available for public inspection.

Any person desiring to inspect Commission records that are not listed in § 0.453 or § 0.455 shall file a request for inspection meeting the requirements of this section. The FOIA Public Liaison is available to assist persons seeking records under this section. See § 0.441(a).

(a)(1) Records include:

* * * * *

(b)(1) Requests shall be captioned "Freedom of Information Act Request," shall be dated, shall list the telephone number (if any), street address, and e-mail address (if any) of the person making the request, and

should reasonably describe, for each document requested (see § 0.461(a)(1)), all information known to the person making the request that would be helpful in identifying and locating the document.

* * * * *

(c) If the records are of the kinds listed in § 0.457 or if they have been withheld from inspection under § 0.459, the request shall, in addition, contain a statement of the reasons for inspection and the facts in support thereof. In the case of other materials, no such statement need accompany the request, but the custodian of the records may require the submission of such a statement if he or she determines that the materials in question may lawfully be withheld from inspection.

(d)(1) Requests shall be

(i) Delivered or mailed to the Managing Director, FCC, 445—12th Street, SW., Room 1-A836, Washington, DC 20554;

(ii) Sent by e-mail to *foia@fcc.gov*;

(iii) Filed electronically though the Internet at *http://www.fcc.gov/foia/#reqform*; or

(iv) Sent by facsimile to (202) 418-2826 or (202) 418-0521. If the request is filed by mail or facsimile, an original and two copies of the request shall be submitted. If the request is enclosed in an envelope, the envelope shall be marked, "Freedom of Information Act Request."

(2) For purposes of this section, the custodian of the records is the Chief of the Bureau or Office where the records are located. The Chief of the Bureau or Office

may designate an appropriate person to act on a FOIA request.

(3) If the request is for materials submitted to the Commission by third parties and not open to routine public inspection under § 0.457(d), § 0.459, or another Commission rule or order, or if a request for confidentiality is pending pursuant to § 0.459, or if the custodian of records has reason to believe that the information may contain confidential commercial information, one copy of the request will be provided by the custodian of the records (see § 0.461(e)) to the person who originally submitted the materials to the Commission. If there are many persons who originally submitted the records and are entitled to notice under this paragraph, the custodian of records may use a public notice to notify the submitters of the request for inspection. The submitter or submitters will be given ten calendar days to respond to the FOIA request. See § 0.459(d)(1). If a submitter has any objection to disclosure, he or she is required to submit a detailed written statement specifying all grounds for withholding any portion of the information (see § 0.459). This response shall be served on the party seeking to inspect the records. The requester may submit a reply within ten business days unless a different period is specified by the custodian of records. The reply shall be served on all parties that filed a response. In the event that a submitter fails to respond within the time specified, the submitter will be considered to have no objection to disclosure of the information.

* * * * *

(f) Requests for inspection of records will be acted on as follows by the custodian of the records.

(1) If the Commission is prohibited from disclosing the records in question, the request for inspection will be denied with a statement setting forth the specific grounds for denial.

(2)(i) If records in the possession of the Commission are the property of another agency, the request will be referred to that agency and the person who submitted the request will be so advised, with the reasons for referral.

(ii) If it is determined that the FOIA request seeks only records of another agency or department, the FOIA requester will be so informed by the FOIA Control Officer and will be directed to the correct agency or department.

(3) If it is determined that the Commission does not have authority to withhold the records from public inspection, the request will be granted.

(4) If it is determined that the Commission does have authority to withhold the records from public inspection, the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented, and the request will be granted, either conditionally or unconditionally, or denied.

(5) If there is a statutory basis for withholding part of a document from inspection, that part will be deleted and the remainder will be made available for inspection. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted and

the exemption under which the deletion is made also shall be indicated on the record, if technically feasible.

(6) In locating and recovering records responsive to an FOIA request, only those records within the Commission's possession and control as of the date of its receipt of the request shall be considered.

* * * * *

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d), § 0.459, or another Commission rule or order is granted in whole or in part, an application for review may be filed by the person who submitted the records to the Commission, by a third party owner of the records or by a person with a personal privacy interest in the records, or by the person who filed the request for inspection of records within the ten business days after the date of the written ruling. The application for review and the envelope containing it (if any) shall be captioned "Review of Freedom of Information Action." The application for review shall be filed within ten business days after the date of the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records and any other parties to the proceeding. The person who filed the request for inspection of records may respond to the application for review within ten business days after it is filed.

* * * * *