No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC., ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

BRIEF FOR RESPONDENT AT&T INC.

D. WAYNE WATTS
AT&T INC.
208 S. Akard Street
Suite 3702
Dallas, Texas 75202
(214) 757-3300

PAUL K. MANCINI
GARY L. PHILLIPS
TERRI HOSKINS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3055

GEOFFREY M. KLINEBERG
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(gklineberg@khhte.com)

December 9, 2010

Counsel for AT&T Inc.

QUESTION PRESENTED

Whether the court of appeals properly granted the petition for review and remanded the matter to the Federal Communications Commission ("FCC") for further proceedings, where the FCC had concluded that corporations are categorically excluded from the protections of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), which prevents unwarranted invasions of "personal privacy," and where the statute defines the root word "person" to include "corporation[s]," *id.* § 551(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent AT&T Inc. states the following:

AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ADMINISTRATIVE DECISIONS

CONSTITUTION, STATUTES, AND REGULATIONS

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

STATEMENT OF THE CASE

Respondent CompTel—a trade association representing competitors of respondent AT&T Inc.—submitted a one-line request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), seeking documents that AT&T submitted to petitioner the Federal Communications Commission ("FCC" or "Commission"). AT&T provided those documents to the FCC as part of a confidential FCC investigation initiated after AT&T voluntarily and confidentially reported to the FCC irregularities in its billings in connection with a federal program. In granting CompTel's FOIA request, the FCC ruled that, as a categorical matter, corporations such as AT&T cannot have "personal privacy" within the meaning of FOIA's law-enforcement exemption, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), even though the statute defines "person"—the root of "personal"—to include corporations, *id.* § 551(2). Applying the statute's plain language to conclude that a corporation could have personal privacy interests under Exemption 7(C), the Third Circuit granted AT&T's petition for review of the FCC's order and remanded the case to the FCC to balance AT&T's privacy interest against the public interest in disclosure.

1. In August 2004, AT&T voluntarily and confidentially informed the FCC of concerns regarding certain invoices that one of its subsidiaries submitted to the independent administrator of a federal program designed to assist schools and libraries in obtaining affordable telecommunications services and Internet access. App. 2a-3a.[1] AT&T refunded to the independent administrator all amounts received

[1] "App." refers to the appendix accompanying the certiorari petition.

under the questionable invoices, and it cancelled outstanding invoices that raised similar issues. *See* Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24015, ¶ 3 (2004) ("Consent Decree").

In response to AT&T's voluntary disclosure, the FCC's Enforcement Bureau conducted an investigation. App. 3a. In the course of its investigation, the Bureau directed AT&T to produce a wide range of documents. *Id.* Those documents included detailed written responses to the Bureau's interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed invoice forms; internal AT&T emails (including documents attached to those emails) that provided cost, pricing, and billing information in connection with the services provided and that indicated how AT&T came to invoice the administrator for certain aspects of those services; emails describing details of discussions between AT&T and its customers; and AT&T's written views regarding whether and the extent to which its employees had violated AT&T's Code of Business Conduct. *Id.*

In December 2004, the FCC adopted a consent decree resolving its investigation; the order and consent decree involved no admission of wrongdoing by AT&T. Order, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The Consent Decree, which is publicly available, states that AT&T had voluntarily informed the Enforcement Bureau that AT&T's subsidiary had invoiced the administrator (i) "in one funding year for services provided in another"; (ii) "for services it provided to certain schools and other entities for which it had not sought and obtained authorization"; and (iii) "for services

that are not eligible for [federal] support." Consent Decree ¶ 3.

2. On April 4, 2005, CompTel submitted via email a one-sentence FOIA request demanding "[a]ll" materials in the Enforcement Bureau's investigative file. C.A. App. A27. CompTel did not reveal why it sought the contents of the Bureau's file. It has, however, long sought to use FCC investigations to tarnish AT&T's goodwill and reputation and to embarrass, harass, and stigmatize AT&T.[2] CompTel's members may have also desired to use the information in competing with AT&T.

After receiving notice of CompTel's request, AT&T submitted a letter opposing disclosure. C.A. App.

---

[2] *See*, *e.g.*, Letter from Maureen Flood, Director, Regulatory & State Affairs, CompTel, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, and David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 98-141, at 7 (Jan. 24, 2002) (charging AT&T with "flout[ing]" FCC rules and arguing that AT&T's supposed failure to implement internal controls "constitute[d] a willful omission that should be subject to criminal penalties, including a fine or imprisonment"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512980842; Letter from H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-194, at 1-2 (Aug. 31, 2001) (arguing, in a case in which AT&T voluntarily reported a concern that it may have violated FCC rules, that AT&T had "been caught red handed" and should be "swiftly and severely punish[ed]"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512765282; *see also* Letter from H. Russell Frisby, Jr., President, CompTel, to David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 01-88, at 1, 3, 7 (May 21, 2001) (charging that AT&T "is more than willing to falsify information," had engaged in "egregious conduct," had "'cheated'" the FCC, and deserved "severe sanctions"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512567860.

A28-A36. AT&T explained that the internal documents that AT&T had produced to the Enforcement Bureau had been "compiled for law enforcement purposes" and were protected from disclosure under FOIA Exemption 7(C) and 47 C.F.R. § 0.457(g)(3). Exemption 7(C) provides that FOIA "does not apply to matters that are . . . 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." 5 U.S.C. § 552(b)(7)(C). AT&T explained that the word "personal" in Exemption 7(C) is the adjective form of "person." The Administrative Procedure Act ("APA"), which FOIA amended, defines "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(2).

On August 5, 2005, the Enforcement Bureau issued a letter ruling in which it rejected AT&T's reliance on Exemption 7(C). App. 34a-44a. The Bureau reasoned that "businesses do not possess 'personal privacy' interests as required for application" of that exemption. App. 42a-43a. The Bureau stated that, unless AT&T filed an application for review by the full Commission, it would produce the records CompTel requested, except to the extent those records revealed internal FCC communications, names and identifying information of particular AT&T employees, or what the Bureau considered to be confidential commercial information protected under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), such as billing and payment dates, as well as costs and pricing data. App. 40a-44a.

On August 19, 2005, AT&T filed an application for review with the full Commission challenging the Enforcement Bureau's conclusion that Exemption 7(C) is categorically inapplicable to corporations. C.A. App. A47-A54.[3] On September 12, 2008, the FCC denied AT&T's application for review and ordered disclosure of AT&T's records as specified in the Bureau's decision. App. 19a-33a. The FCC concluded that, as a per se matter, a corporation has no "'personal privacy' interests within the meaning of Exemption 7(C)." App. 26a.

3. The Third Circuit granted AT&T's petition for review and remanded the case to the FCC. App. 1a-18a.[4]

The court began its analysis by noting that the FCC's interpretation of Exemption 7(C) is not entitled to deference, because "FOIA applies government-wide, and no one agency is charged with enforcing it." App. 9a-10a. Interpreting the statute de novo, the court rejected the FCC's categorical assertion

---

[3] CompTel filed its own application for review challenging the Enforcement Bureau's decision to withhold or redact certain categories of records. C.A. App. A55-A60. In October 2006, when the FCC had not ruled on either party's application for review, CompTel initiated a civil action in the District Court for the District of Columbia seeking disclosure. Compl., *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. filed Oct. 5, 2006); *see also* 5 U.S.C. § 552(a)(6)(A)(i), (C)(i). AT&T intervened and resisted disclosure. Since March 2008, that case has been stayed pending resolution of this proceeding. Memorandum Opinion and Order at 6, *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008).

[4] On AT&T's motion, which the FCC did not oppose, the court of appeals had granted a stay of the FCC's order pending appeal. App. 5a n.1. In its opinion, the court of appeals first addressed, and rejected, CompTel's contention that the court lacked jurisdiction to review the FCC's order. App. 6a-8a.

that the phrase "personal privacy" in Exemption 7(C) excludes corporations. The court explained that FOIA's plain text compels the conclusion that corporations can have "personal privacy" under Exemption 7(C), because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation." App. 11a; *see* 5 U.S.C. § 551(2). It further noted that another FOIA exemption—Exemption 7(F)—protects information that "could reasonably be expected to endanger the life or physical safety of any *individual*," 5 U.S.C. § 552(b)(7)(F) (emphasis added), demonstrating that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." App. 12a.

The Third Circuit also addressed the FCC's and CompTel's argument that, because FOIA Exemption 6—which protects "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)—applies only to individuals, and because the phrase "personal privacy" must have the same meaning in Exemptions 6 and 7, the phrase "personal privacy" in Exemption 7 must exclude corporations. Without accepting the premise that only individuals can invoke Exemption 6—an issue on which it "express[ed] no opinion," App. 13a—the court explained that Exemption 6 contains other language not found in Exemption 7(C)—namely, the phrase "personnel and medical files"—that could be read as limiting the application of Exemption 6 to natural persons. *Id.* Thus, the court reasoned, to the extent Exemption 6 does not protect corporations, it is not because the provision contains the phrase "personal privacy" but because other words in the

statute arguably limit its application to human beings.

Having concluded that Exemption 7(C)'s language is "unambiguous[]," the Third Circuit did not reach the parties' disputes regarding statutory purpose, legislative history, and the applicability of cases from other circuits. App. 13a-14a. Even so, it observed 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." App. 14a n.5.

Having concluded that the FCC's per se rule excluding corporations from invoking Exemption 7(C) could not be reconciled with the statutory text, the Third Circuit remanded the matter to the FCC to balance the public and private interests at stake to determine "whether disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" App. 17a (quoting 5 U.S.C. § 552(b)(7)(C)).

4. The government's petition for rehearing and rehearing en banc was denied. App. 45a-46a. The Court granted the Solicitor General's petition for certiorari.

SUMMARY OF ARGUMENT

Exemption 7(C) provides that FOIA "does not apply to matters that are . . . 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." 5 U.S.C. § 552(b)(7)(C). The Third Circuit correctly concluded that the phrase "personal privacy" can encompass not only privacy of an individual but also privacy of a corporation.

A. The statute's plain language establishes that a corporation can have "personal privacy" within the meaning of Exemption 7(C). The ordinary meaning of the adjective "personal" is "[o]f or pertaining to a particular person." *Webster's New International Dictionary* 1828 (2d ed. 1950) ("*Webster's*"). Here, Congress has defined the root noun "person" to include both individuals and corporations. 5 U.S.C. § 551(2). Accordingly, the phrase "personal privacy" in Exemption 7(C) means the privacy of a particular person—i.e., an individual or a corporation.

The government does not deny the basic principle of grammar and usage that the adjective form of a noun takes its meaning from that noun. Even so, it maintains that the word "personal" relates only to individual human beings. To support that claim, the government eschews the primary dictionary definition of the word "personal" in favor of other definitions that refer to individuals. But none of those definitions suggests that "personal" is anything other than the adjective form of "person." Thus, in non-legal usage, where a "person" is a human being, it is entirely unsurprising that the word "personal" is used to refer to human beings. But, in a legal

context—and especially in the context of FOIA, a statute that defines "person" to include corporations—one has a different expectation: the word "personal" refers to both individuals and corporations, because the noun from which it is formed also includes both individuals and corporations. Any other interpretation would improperly disregard the express statutory definition of "person."

B. Common legal usage belies the government's claim that the words "personal privacy" cannot be used in connection with corporations. For at least 140 years, it has been "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Department of Social Servs.*, 436 U.S. 658, 687 (1978). Accordingly, privacy protections and other rights have been extended to corporations in many areas of law. Corporations have privacy rights under the Fourth Amendment and are rights-bearing persons under the First Amendment, the Due Process Clause, the Equal Protection Clause, and the Double Jeopardy Clause. The Fourth Amendment and the Double Jeopardy Clause, in particular, protect the same types of privacy and reputational interests that Exemption 7(C) is designed to safeguard.

The government nevertheless maintains that corporate privacy rights were unheard of before the decision below. Its principal support for that bold claim comes from cases holding that corporations cannot sue in tort for invasion of privacy. This Court has recognized, however, that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). Further, the

common law in fact does enable corporations to protect interests similar to those at stake in Exemption 7(C). Corporations can sue for defamation to protect their reputations, and they have legal rights to control their confidential information. The government's proposed dichotomy between corporate property interests and corporate privacy interests similarly fails. In a case between two corporations, this Court recognized that "industrial espionage" implicates "[a] most fundamental human right, that of *privacy*." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (emphasis added).

C. Statutory structure confirms the correctness of the Third Circuit's interpretation of Exemption 7(C). For example, where Congress intends to refer only to natural persons—as the government claims it did here—it has used the more narrow word "individual." That Congress chose the broader word "personal," in a statute that defines "person" to include corporations, reinforces the conclusion that it did not intend to exclude corporations.

The government's attempt to seek support from two other FOIA exemptions—Exemptions 6 and 4—is unavailing. It asserts that Exemption 6—which protects "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)—applies only to individuals, and it argues that Exemption 7(C) must be similarly limited. But, as the court below explained, if Exemption 6 does not protect organizations, it is not because it contains the phrase "personal privacy." Indeed, shortly after FOIA's enactment, the Attorney General, following the same statutory analysis as the court below, recognized that the phrase "personal privacy" in Exemp-

tion 6 could be applied to a corporation. To be sure, Exemption 6 contains other language—"personnel and medical files"—that could be read to show an intent to protect only individuals. Thus, interpretations of that provision cannot be reflexively applied to Exemption 7(C).

The government also argues that Exemption 4—which exempts from disclosure "trade secrets" and "commercial or financial information" that is "privileged or confidential," 5 U.S.C. § 552(b)(4)—is all the protection a corporation needs and that Exemption 7(C) ought not, therefore, to be read to extend to corporations. The two exemptions address different interests, however. Exemption 4 prevents public disclosure of corporations' proprietary information, but it does not protect the reputational interests that Exemption 7(C) is designed to safeguard.

D. Exemption 7(C)'s purposes support the Third Circuit's interpretation. Exemption 7(C) protects suspects, witnesses, and cooperating parties in law-enforcement investigations from the reputational harm that can result from public disclosure of records submitted in such investigations. That purpose applies to corporations, which no less than individuals can face damage to their reputations resulting from involvement in a law-enforcement investigation. Reversing the Third Circuit's interpretation of Exemption 7(C) would allow competitors and strike-suit plaintiffs automatic access to private (albeit non-proprietary) information that a corporation furnishes to the government in the course of a law-enforcement investigation.

That corporations can invoke Exemption 7(C) does not mean that information regarding a given corporation's involvement in a law-enforcement investi-

gation can never be disclosed. Exemption 7(C) is implemented through a balancing test that weighs the public interest in disclosure against the privacy interest at stake. That balancing test is flexible enough to accommodate any relevant differences between corporations and individuals with respect to privacy—such as the differences this Court has recognized in the Fourth Amendment context—and renders unnecessary the government's extra-statutory per se rule excluding corporations from Exemption 7(C).

E. Lacking support in the statutory text, the government relies heavily on the "drafting history" of Exemption 7(C). But Exemption 7(C)'s plain meaning is clear from the statutory language, making it unnecessary and inappropriate to rely on legislative history to narrow that meaning. This Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Regardless, the government's legislative history establishes at most that Congress had a concern with protecting individual privacy rights in enacting Exemption 7(C). But that does not show that Exemption 7(C) *excludes* corporate privacy interests. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990).

F. The government's last refuge is a couple of supposed "anomalies" that it says would result from applying the statute as written. It asserts that no precedent exists for measuring institutional privacy claims. But that ignores the numerous contexts—most notably the Fourth Amendment—in which

courts regularly adjudicate corporate privacy claims. Nor is there anything anomalous about applying Exemption 7(C) to foreign, state, and local governments. FOIA contains multiple protections for the federal government's privacy interests. *See*, *e.g.*, 5 U.S.C. § 552(b)(1), (2), (5), (7)(A), (7)(E). The government fails to explain why other sovereign entities lack interests in maintaining the confidentiality of documents they submit to our federal government to assist it in carrying out its law-enforcement function.

ARGUMENT

FOIA EXEMPTION 7(C) PROTECTS THE PRIVACY OF CORPORATE PERSONS

Exemption 7(C) protects from 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." 5 U.S.C. § 552(b)(7)(C). There is no dispute that AT&T's documents that CompTel requested are "records or information" that were "compiled for law enforcement purposes." *Id.* The FCC nevertheless refused to consider AT&T's claim that disclosure here would be an unwarranted invasion of its privacy because, in the agency's view, AT&T, as a corporation, by definition has no "personal privacy" rights within the meaning of Exemption 7(C). The FCC's per se rule cannot be reconciled with the statutory text. Common legal usage, statutory structure, and Exemption 7(C)'s purposes confirm that conclusion. Exaggerated claims regarding legislative history and adverse consequences do not justify deviation from the statute's plain meaning.

A. A Corporation Is a "Person" Under FOIA and Therefore Has "Personal Privacy" Interests Protected by Exemption 7(C)

1. The Third Circuit correctly concluded that the "plain text" of Exemption 7(C) applies to corporations. App. 11a, 13a. Exemption 7(C) provides that FOIA does not apply to law-enforcement records where disclosure "could reasonably be expected to constitute an unwarranted invasion of *personal privacy*." 5 U.S.C. § 552(b)(7)(C) (emphasis added). The meaning of the phrase "personal privacy" in that provision is plain: it refers not only to the privacy of individuals but also to the privacy of corporations.

The word "personal" is an adjective meaning "[o]f or pertaining to a particular person." *Webster's* at 1828; *accord Webster's Third New International Dictionary* 1686 (2002) ("*Webster's Third*") ("of or relating to a particular person"). In this context, Congress has defined "person" to include both "individual[s]" and "corporation[s]." 5 U.S.C. § 551(2). By expressly defining the noun "person" to include corporations, Congress necessarily defined the adjective form of that noun—"personal"—also to include corporations. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring) (referring to the rule that "a statute which defines a noun has thereby defined the adjectival form of that noun" as a "grammatical imperative[]"); App. 11a ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term.").[5] Thus, as used in FOIA, "personal"

---

[5] Courts regularly define the adjective form of a noun by reference to the corresponding noun. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989) (defining term "compiled" in FOIA Exemption 7 with reference to "the word 'compile,'"

means "of or pertaining to a particular" "individual, partnership, corporation, association, or public or private organization." The phrase "personal privacy" therefore includes the privacy "of . . . a particular" corporation—here, AT&T.

The Court need not go beyond the plain language of Exemption 7(C) to affirm the judgment. *See*, *e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.") (citation and internal quotation marks omitted); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last . . . .") (citations omitted). Here, the FCC based its rejection of AT&T's reliance on Exemption 7(C) entirely on the ground that "Exemption 7(C) has no applicability to corporations." App. 32a. Because Exemption 7(C) in fact does protect the privacy of corporations in appropriate cases, the Third Circuit properly vacated

---

because "compiled" is the "adjectival form" of "compile"); *Knight v. Spencer*, 447 F.3d 6, 13 n.2 (1st Cir. 2006) (looking to definition of "prototype" to determine meaning of adjective "prototypical"); *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451, 462 n.16 (D.C. Cir.) (per curiam) (looking to the meaning of "motor vehicle" to define "vehicular"—"the adjectival form of 'motor vehicle'"), *opinion amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996) (per curiam); *Froehly v. T. M. Harton Co.*, 139 A. 727, 729-30 (Pa. 1927) (looking to definition of "season" to define "seasonal"); *see also Littlefield v. Acadia Ins. Co.*, 392 F.3d 1, 8 & n.8 (1st Cir. 2004) (looking to definitions of "crime" in construing adverb "criminally").

the FCC's order and remanded the matter for further proceedings.

2. In seeking to limit the word "personal" to individuals, the government improperly disregards the APA's definition of "person," relying instead (at 17-18) on the layperson's understanding of that word. Because in ordinary (as opposed to legal) usage, a "person" is a "human being," *Webster's* at 1827, it is unsurprising that the dictionary definitions the government cites define "personal" with reference to an individual. In the context of Exemption 7(C), however, where the term "person" includes both "individual[s]" and "corporation[s]," 5 U.S.C. § 551(2), the adjective "personal" functions to relate the noun it modifies to a particular individual or corporation. The difference here is the statutory definition of "person," which must be given effect. *See*, *e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

The government does not dispute the basic principle of grammar and usage that the adjective form of a noun takes its meaning from the noun. Nor does it identify anything in FOIA, the APA, or any other source indicating that the word "personal" in Exemption 7(C) differs from its usual function and meaning as the adjective form of "person." It observes (at 42-43), however, that Congress has in certain legislation stated that a statutory definition applies to variants of the defined term. But the Court regularly follows "basic rules of grammar," *Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002)—such as the principle that the adjective form of a noun draws its meaning from the noun—in interpret-

ing statutes. It does not ignore those rules simply because they are not set forth in a particular statute. Indeed, the government's argument reduces to the claim that, whenever Congress uses variations of a defined term in a statutory text without expressly defining each specific variation, it is permissible to disregard the defined term when interpreting the variant. The government provides no authority for such a far-reaching and counterintuitive principle of statutory interpretation, and we are aware of none.

The government further argues (at 42 & n.13) that the Third Circuit relied too heavily on the linguistic relationship between "person" and "personal" because the word "personnel" also "shares the same 'root'" and "refer[s]" to "federal officials, not corporate entities." But, unlike "personal," "personnel" is not simply the adjective form of "person." Instead, as the government elsewhere has acknowledged, "the term 'personnel' normally refers to either 'a body of persons employed in some service' or 'persons of a particular (as professional or occupational) group.'" Br. for Resp. at 20, *Milner v. Department of the Navy*, No. 09-1163 (U.S. filed Oct. 15, 2010) ("Gov't *Milner* Br.") (quoting *Webster's Third* at 1687). Although AT&T made that point before, *see* Br. in Opp. 27 n.13, the government has neither acknowledged nor disputed it.

The government also suggests (at 18-19) that the term "privacy" cannot be applied to corporations. As shown below, that is incorrect; corporate privacy rights have been recognized in a number of contexts, such as the Fourth Amendment, for more than a hundred years. *See infra* Part B. More fundamentally, the government elsewhere appears to concede that, if the statutory phrase read "the privacy of any

person," the APA's definition of "person" would apply, meaning the statute would protect "the privacy of any corporation." *See* Gov't Br. 15, 41-42. Such an admission fatally undermines any claim that the word "privacy" cannot be used in connection with a corporation.

Unable to show that either "personal" or "privacy" cannot refer to corporations, the government asserts (at 43-44) that "[t]he phrase 'personal privacy' must be understood as a textual unit." But the government identifies no authority supporting the notion that the phrase "personal privacy" is a term of art that necessarily applies only to individuals. The bare assertion that the words are a "textual unit" therefore adds nothing to the government's argument.

B. Recognizing the Privacy Interests of Corporate Persons Accords with Common Legal Usage

The status of corporations as "persons" with cognizable legal interests such as privacy has long been recognized in a number of contexts. The government's efforts to distinguish those contexts from this case are unpersuasive.

1. As this Court has explained, at least "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687; *see*, *e.g.*, *Louisville, C. & C.R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created by and doing business in a particular state[] is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as

a natural person.").[6] In that year, Congress enacted the Dictionary Act, which specified that "the word 'person'" in federal statutes presumptively includes "bodies politic and corporate." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431. At the time of the 1974 amendments to FOIA, the Dictionary Act provided (as it does today) that, "[i]n determining the meaning of any Act of Congress," the word "person" presumptively includes "corporations." 1 U.S.C. § 1; *cf. Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (following the Dictionary Act in construing the statutory term "white person" to include corporations).

The word "personal," no less than "person," can quite comfortably be used to refer to corporations. *See*, *e.g.*, *Mercantile Bank v. Tennessee*, 161 U.S. 161, 171 (1896) (an "exemption from taxation contained in [a revenue act] was a *personal privilege* in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter") (emphasis added). Corporations have long been understood to be "persons" for the purposes of the Fifth and Fourteenth Amendments to the United States Constitution, *see*, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"), and therefore protected by the doctrine of "personal" jurisdiction that inheres in the concept of due process, *see*, *e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109-10 (1987) (plurality); 28 U.S.C. § 1391(c) ("a defendant that is a *corporation* shall be deemed to reside in

---

[6] The government's authority (at 18) is to the same effect. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 654 (1819) ("the body corporate . . . has rights which are protected by the constitution").

any judicial district in which it is subject to *personal* jurisdiction") (emphases added). The government's unsupported assertion (at 46) that "personal jurisdiction" is not "'personal' *to a corporation* in the same sense that an individual may possess 'personal privacy'" makes no sense. The "person" in "personal jurisdiction" is the defendant, not the court. *See also Black's Law Dictionary* 930 (9th ed. 2009) (explaining that "personal jurisdiction" refers to "jurisdiction over a defendant's personal rights, rather than merely over property interests").

Consistent with those authorities, this Court has recognized that corporations are rights-bearing persons under multiple constitutional provisions. For instance, it has held that corporations can invoke rights under the First Amendment, *see Citizens United v. FEC*, 130 S. Ct. 876, 899-900 (2010) (collecting cases), the Due Process Clause, *see Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889), and the Equal Protection Clause, *see id.*; *County of Santa Clara v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of Waite, C.J.).

Of particular relevance here, the Court has applied to corporations two constitutional provisions, the Fourth Amendment and the Double Jeopardy Clause, whose purposes are to protect privacy and to prevent embarrassment and harm to reputation—and thus are closely analogous to Exemption 7(C).

Fourth Amendment. This Court has held that corporations have privacy interests under the Fourth Amendment. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Thus, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Court explained that a corporation such as Dow "plainly has a reasonable, legitimate, and objective expectation of *privacy* within

the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236 (emphasis added); *see also id.* at 245 (Powell, J., concurring in part and dissenting in part) ("Our precedents . . . leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusions."), 247 ("Dow has an expectation of privacy in [its] buildings . . . and . . . society is prepared to recognize that expectation as reasonable."); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) ("Nor can it be claimed that corporations are without some Fourth Amendment rights.") (collecting cases); *Hale*, 201 U.S. at 76 ("A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."); *United States v. Hubbard*, 650 F.2d 293, 304 (D.C. Cir. 1980) ("That the fourth amendment—which is now recognized to protect legitimate expectations of privacy—can be invoked by corporations to suppress the fruits of a search of corporate premises demonstrates an understanding that a compulsory search of even corporate premises may constitute an intrusion upon privacy.") (footnotes omitted).

The government dismisses (at 47-48) the existence of corporate privacy interests under the Fourth Amendment as irrelevant because (it asserts) those interests derive solely from the interests of the corporation's constituents. Although *Hale* originally articulated the corporation's right to privacy in those terms, the Court in *Dow Chemical* explained that "Dow"—*the corporation*, not its shareholders, direc-

tors, or officers—"has a reasonable, legitimate, and objective expectation of privacy" in its corporate property that "society is prepared to observe." 476 U.S. at 236; *see also J.J. McCaskill Co. v. United States*, 216 U.S. 504, 514 (1910) ("Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers."). Further, in *G.M. Leasing*, the Court identified the proposition that "business premises are . . . protected by the Fourth Amendment" separately from the proposition that "*corporations*" have "Fourth Amendment rights." 429 U.S. at 353 (emphasis added). The Court thus made clear that the Fourth Amendment protects not only "business premises" (Gov't Br. 47), but also the corporate "petitioner's privacy" (*G.M. Leasing*, 429 U.S. at 354).

More fundamentally, the government never explains why, if the privacy "rights of those who collectively own and operate corporations" (Gov't Br. 47) are entitled to protection under the Fourth Amendment, such a collective right to privacy is irrelevant to the interpretation of FOIA. Congress enacted Exemption 7(C) against the background principle that a corporation retains a reasonable expectation of privacy under the Fourth Amendment "[i]n organizing itself as a collective body." *Hale*, 201 U.S. at 76. The government therefore bears a heavy burden to demonstrate that the decision to organize in the corporate form waives all privacy interests under FOIA.

That individuals may be entitled to greater protection under the Fourth Amendment than corporations, as the government asserts (at 48), likewise does not distinguish corporate privacy under the Fourth Amendment from corporate privacy under FOIA. AT&T has acknowledged that, in the balancing that

takes place under FOIA, corporate privacy interests may not be entitled to the same treatment as individual privacy interests in all cases. *See* Br. in Op. 19; AT&T C.A. Br. 34. But that does not mean that corporate privacy rights are nonexistent.

Double Jeopardy Clause. The Court has applied the Fifth Amendment's Double Jeopardy Clause in cases involving the prosecution of a corporation. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565 & n.1, 574-75 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam). That provision's principal rationale is to protect "the deeply ingrained principle" that a defendant should not be subjected "to embarrassment, expense and ordeal" and "a continuing state of anxiety and insecurity" resulting from multiple prosecutions. *Yeager v. United States*, 129 S. Ct. 2360, 2365-66 (2009) (internal quotation marks omitted); *accord Martin Linen*, 430 U.S. at 569.

The government does not address *Fong Foo*, but argues (at 49) that the question whether the corporate defendants in *Martin Linen* could assert the Double Jeopardy Clause was not "squarely addressed" in that case. But, as the government admits, it argued there that the Double Jeopardy Clause does not protect corporations, *see* Br. for U.S. at 13 n.6, *Martin Linen*, *supra* (No. 76-120), 1976 WL 181441, yet the Court held that the government's appeal was barred, nowhere suggesting that it had left open the predicate question whether the corporate defendant could invoke the protections of the Double Jeopardy Clause. *Cf. Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 575 (1949) (opinion of Jackson, J.) (observing that it would be "quite improper" to "discuss and dispose of [a] corporation's contentions on their

merits . . . if the corporation had no standing to raise the constitutional questions"). The courts of appeals that have addressed the issue have read this Court's cases as establishing that the Double Jeopardy Clause protects corporations, and commentators have agreed. *See United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 333-34 (1st Cir. 1978); *United States v. Security Nat'l Bank*, 546 F.2d 492, 493 (2d Cir. 1976); *United States v. Southern Ry. Co.*, 485 F.2d 309, 312 (4th Cir. 1973); 4 Wayne R. LaFave et al., *Criminal Procedure* § 15.1(b), at 383-84 & n.21 (3d ed. 2007) ("*Criminal Procedure*") ("the Court has . . . applied the double jeopardy prohibition to an entity") (citing *Martin Linen*); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1754 (2001) (*Martin Linen* "included corporations within the Fifth Amendment's protection against double jeopardy").

The government is incorrect in suggesting (at 49) that the Double Jeopardy Clause primarily protects the integrity of judgments, rather than the interests of defendants. The Double Jeopardy Clause is not "simply res judicata dressed in prison grey." 6 *Criminal Procedure* § 25.1(b), at 574 (internal quotation marks omitted). Rather, "[f]inality" for purposes of the Clause "looks . . . more to protecting the defendant against prosecution oppression." *Id.* Thus, the "general design of the Double Jeopardy Clause" is that the defendant should not be subjected "to embarrassment, expense and ordeal" through multiple prosecutions. *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980) (internal quotation marks omitted).

Nor is the government right when it claims (at 49-50) that the Double Jeopardy Clause's purpose of

protecting defendants from "embarrassment" (*Martin Linen*, 430 U.S. at 569) cannot apply to a corporation. Although corporations qua corporations "do not have human emotions," they still can suffer "harm to . . . legitimate, protectible interest[s]," *Hospital Monteflores*, 575 F.2d at 335, such as harm to reputation. Public criminal prosecutions can damage a corporation's "good will," and "bad publicity" can "affect the corporation's ability to do business with the public or to raise capital on public markets." *Id.*; *see Security Nat'l Bank*, 546 F.2d at 494 ("No corporation, large or small, can escape the 'incalculable effect' which a conviction may have on the public attitude toward the company."); 4 *Criminal Procedure* § 15.1(b), at 384 ("the entity surely is capable of suffering . . . burdens associated with being the subject of a prosecution—e.g., financial costs, *injury to reputation*, and disruption of the ordinary pattern of activities") (emphasis added).

2. Against the weight of that authority, the government offers two unfounded and inapt analogies of its own.

Tort law. The government relies heavily (at 19) on the notion that a corporation cannot sue in tort for invasion of privacy. *But cf. Socialist Workers Party v. Attorney General*, 463 F. Supp. 515, 525 (S.D.N.Y. 1978) (recognizing association's claim for invasion of privacy). This Court, however, has specifically distinguished "the question whether a tort action might lie for invasion of privacy" from "[t]he question of the statutory meaning of privacy under the FOIA." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n.13 (1989). "[T]he statutory privacy right protected by Exemption 7(C) *goes beyond* the common law and the

Constitution." *Favish*, 541 U.S. at 170 (emphasis added).

Further, the proposition that corporations have no privacy interests recognized under the common law is demonstrably incorrect. Corporations have protectable interests in, for example, their names, reputations, and confidential information. *See* Restatement (Second) of Torts § 561 (1977) (corporation may sue for defamation); *id.* § 652I cmt. c (corporation has "a limited right to the exclusive use of its own name or identity"); William L. Prosser, *Handbook of the Law of Torts* § 117, at 815 (4th ed. 1971) (same); *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.") (internal quotation marks omitted); *see also H & M Assocs. v. City of El Centro*, 167 Cal. Rptr. 392, 399-400 (Cal. Ct. App. 1980) ("In the commercial world, businesses, regardless of their legal form, have zones of privacy which may not be legitimately invaded."); *Dayton Newspapers, Inc. v. City of Dayton*, 259 N.E.2d 522, 534 (Ohio Ct. Com. Pl. 1970) ("The right of privacy applies to individuals, corporations, associations, institutions and to public officials."), *aff'd*, 274 N.E.2d 766 (Ohio Ct. App. 1971); Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*, 20 J. Marshall L. Rev. 607, 626-27 (1987) ("[U]nder many areas of state and federal law, corporations and other business entities are afforded privacy protection against unwanted access to information, property and person-

nel. Outside of privacy tort law, it is not widely thought that there is a purely conceptual bar either to ascribing privacy protection rights to corporations or to calling them 'privacy' rights.") (footnote omitted).

The government also fails in its effort (at 19-20) to distinguish, as a categorical matter, "privacy" interests—which the government claims corporations lack—from the "property" interests that it acknowledges corporations possess. Courts have referred to corporations' interests in their confidential information as privacy interests. This Court, for one, explained in a case between two corporations that "there is [an] inevitable cost to the basic decency of society when one firm steals from another. A most fundamental human right, that of *privacy*, is threatened when industrial espionage is condoned or is made profitable." *Kewanee Oil*, 416 U.S. at 487 (emphasis added); *see E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) ("Commercial privacy must be protected from espionage which could not have been reasonably anticipated or prevented.").[7]

Self-Incrimination Clause. The government incorrectly suggests (at 49-50) that a corporation's documents receive less protection than an individual's documents under the Fifth Amendment's privilege against self-incrimination. In fact, the privilege simply does not apply to documents, regardless of who possesses them.

Originally, the privilege was held to protect the content of an individual's, but not a corporation's,

---

[7] Even the government's authority (at 18) described "the law of trade secrets" as an aspect of "the right to privacy." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 212-13 (1890).

documents. *See United States v. White*, 322 U.S. 694 (1944); *Boyd v. United States*, 116 U.S. 616 (1886). That differential treatment was based on pragmatic considerations: "effective enforcement of many federal and state laws would be impossible" if corporations could refuse any government subpoena for the production of documents. *White*, 322 U.S. at 700. The Court also indicated that a corporation could not effectively assert the privilege, because it can act only through its agents, and an agent cannot assert the privilege to avoid incriminating a principal. *See id.* at 699-700 (because "the papers and effects which the privilege protects must be the private property of the person claiming the privilege," and "the official records and documents of the organization . . . are not the private records of the individual" representative, those papers "embody no element of personal privacy" with respect to the representative).[8]

After *Fisher v. United States*, 425 U.S. 391 (1976), the privilege does not entitle any person to refuse to produce documents on the ground that they contain incriminating information. That is because the privilege does not protect "privacy"; it protects "against compelled self-incrimination." *Id.* at 401 (internal quotation marks omitted). Thus, today, it is a "settled proposition" that an individual "may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." *United States*

---

[8] *White* therefore did not hold, as the government suggests (at 50), that a corporation has no personal privacy interests in its own documents; instead, it held that production of corporate documents by a corporate representative does not invade *the representative's own* personal privacy. *See* 322 U.S. at 699-700.

v. Hubbell, 530 U.S. 27, 35-36 (2000). *Fisher* replaced the prior rule with the "act of production" doctrine, which holds that the act of producing documents and testifying regarding that production "may have a compelled testimonial aspect" that implicates the privilege against self-incrimination. *Id.* at 36. Although the Court has held that corporations, unlike individuals, cannot rely on the act of production doctrine, it has based that result largely on the pre-*Fisher* precedent and reasoning. *See Braswell v. United States*, 487 U.S. 99, 105-13, 115-16 (1988).

Because the privilege against self-incrimination is not a privacy right, the inability of a corporation to assert that privilege does not remotely suggest that a corporation lacks privacy interests in its documents. On the contrary, corporations do in fact possess a reasonable expectation of privacy regarding their documents, and government subpoenas for corporate documents therefore must be "reasonable" under the Fourth Amendment. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *Hale*, 201 U.S. at 76; *see also Fisher*, 425 U.S. at 400-01; *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976) ("while the expectation of privacy of a regulated carrier is limited, . . . there are internal corporate papers that stand at the heart of management effort, and . . . there is a strong element of privacy in such items") (internal quotation marks omitted).

Here, of course, AT&T complied with the FCC's letter of inquiry compelling the production of documents. It did not attempt to resist the FCC's demand through assertion of the privilege against self-incrimination. Thus, the question in this case is whether FOIA *automatically* entitles AT&T's

competitors (and other requestors who might benefit from damaging AT&T's reputation) to obtain the documents AT&T provided to the FCC. On that question, this Court's decisions recognizing corporate privacy interests under the Fourth Amendment and the Double Jeopardy Clause refute the government's position that a corporation can never have personal privacy interests protected under Exemption 7(C).

C. The Structure of FOIA and Related Statutes Confirms That Exemption 7(C) Applies to Corporations

Consideration of the structure of FOIA and the closely related Privacy Act of 1974 confirms that Congress's reference to "personal" in Exemption 7(C) extends to corporations and cannot be limited to natural persons.

1. Had Congress intended to preclude corporations from invoking Exemption 7(C), it could have used the term "individual." Thus, unlike Exemption 7(C), FOIA Exemption 7(F) specifies that it protects only an "individual." 5 U.S.C. § 552(b)(7)(F). Similarly, in the Privacy Act, Congress chose to protect only "individual[s]," 5 U.S.C. § 552a(a)(2), thereby excluding "corporations or sole proprietorships," *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981). That Congress expressly incorporated some FOIA definitions into the Privacy Act, *see* 5 U.S.C. § 552a(a)(1) (defining "agency" as that term is defined in FOIA, *id.* § 552(e)), reinforces the significance of Congress's decision to define "individual" separately under § 552a(a)(2). Indeed, Congress used both "person" and "individual" in the Privacy Act, further demonstrating that Congress understood the distinction between the two. *See*, *e.g.*, *id.* § 552a(b) ("[n]o agency shall disclose any record

. . . to any *person*, or to another agency, except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains") (emphases added). What is more, the phrase "individual privacy" appears in multiple provisions throughout the United States Code. *See* 6 U.S.C. § 485(b)(1)(H); 16 U.S.C. § 410jj-1(2); 20 U.S.C. § 9871(e)(2)(C)(ii)(II); 42 U.S.C. § 2473c(f)(1); 49 U.S.C. §§ 5331(d)(1), 20140(c)(1), 31306(c)(1), 45104(1). Thus, in 6 U.S.C. § 485, Congress directed the President to "incorporate[] protections" only for "individuals' privacy" in facilitating the sharing of terrorism information. *Id.* § 485(b)(1)(H).

Unlike those provisions, Exemption 7(C) does not use the term "individual" or include any other textual indication of an intent to exclude corporations. The decision not to use language that would refer exclusively to natural persons must be presumed to be intentional. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted, alterations in original); App. 12a (Exemption 7(F)'s language shows that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to").

The government's reliance (at 33) on the appearance of the phrase "personal privacy" in the Privacy Act's uncodified statement of purpose, *see* Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (reprinted at 5 U.S.C. § 552a note), misses a fundamental point: there is no dispute that the phrase "personal privacy"

includes the privacy of individuals. The only question is whether it necessarily excludes the privacy of corporations. Notably, the same section of the Privacy Act uses the phrases "the privacy of an individual," "individual privacy," and "the privacy of individuals," *id.* § 2(a)(1), (2), (5), further demonstrating that Congress knows how to restrict the application of personal privacy protections to individuals when that is its intention. Considered in context, the language the government cites reinforces the point. It states that the Privacy Act's purpose "is to provide certain safeguards *for an individual* against an invasion of personal privacy." *Id.* § 2(b) (emphasis added). The emphasized language shows that Congress there intended to address only the personal privacy of individuals; it does not suggest that corporations cannot also have personal privacy protected in other statutory contexts.

2. In seeking to limit Exemption 7(C) to individuals, the government relies to no avail on two other FOIA exemptions—Exemptions 6 and 4.

Exemption 6. The government incorrectly argues (at 20-24) that the phrase "personal privacy" in Exemption 7(C) must refer only to natural persons because the same phrase appears in Exemption 6 and (according to the government) Exemption 6 protects only individuals. Nothing about the phrase "personal privacy" in Exemption 6 excludes corporations.

In fact, shortly after FOIA's enactment in 1966, the Attorney General, following the same textual analysis as the Third Circuit here, interpreted the phrase "personal privacy" in Exemption 6 to *include* corporations. U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (June 1967)

("*1967 AG Memorandum*"). The *1967 AG Memorandum* first addressed the phrase "personal privacy" in connection with FOIA's clause permitting agencies to redact identifying details from published documents "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy." Pub. L. No. 89-487, § 1, 80 Stat. 250, 250 (codified as amended at 5 U.S.C. § 552(a)(2)). Interpreting that provision, the Attorney General noted that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, includes corporations and other organizations as well as individuals." *1967 AG Memorandum* at 19. Observing that the legislative history of the clause "shows that [it] is intended to protect privacy in a person's business affairs as well as in medical or family matters," the Attorney General concluded that, "[i]n the context of this section, the reasons for deleting identifying details would seem as applicable to corporations as to individuals." *Id.*

Turning to Exemption 6, the Attorney General explained that it likewise applies to both individuals and corporations:

> It is apparent that [Exemption 6] is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. As was explained . . . above, 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.

Id. at 36-37. Although the Attorney General cautioned that "[t]he kinds of files referred to in" Exemption 6 "would *normally* involve the privacy of individuals rather than of business organizations," *id.* at 37 (emphasis added), that did not change his conclusion that the phrase "personal privacy" could apply to corporations.

Consistent with the *1967 AG Memorandum*, the D.C. Circuit has applied the "personal privacy" protections in Exemption 6 to corporate information. In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), the Food and Drug Administration ("FDA"), citing Exemption 6, had withheld information relating to "private individuals and companies who worked on the approval" of a controversial drug. *Id.* at 153. The court further explained that the privacy interests at stake under FOIA "vary depending on . . . context" and that, in that case, disclosure of information about "persons and businesses associated with [the drug]" risked "harassment" of those individuals and entities and therefore implicated the privacy interests of Exemption 6. *Id.* (internal quotation marks omitted). The government speculates (at 39-40) that the only reason the *Judicial Watch* court applied Exemption 6 was to protect the safety of employees that worked at those companies. But the decision itself does not support that reading. The companies themselves had intervened in the case, *see id.* at 145, and the court clearly held that FOIA protected not only the "private individuals" but also the "companies" that worked on approval of the drug, as well as "all business partners associated with the manufacturing of the drug," *id.* at 152.

The government argues (at 22-24) that the 1974 Congress that enacted Exemption 7(C) would have believed that Exemption 6 protected only individuals. But that ignores the prevailing interpretation of Exemption 6 by the Attorney General, which provided that the exemption's plain text applies to corporations. Indeed, in *Favish*, on which the government relies (at 24), the Court specifically identified the *1967 AG Memorandum* as part of the background against which Congress legislated in amending FOIA in 1974. *See* 541 U.S. at 169. The government collects (at 20-24) snippets from cases and congressional committee reports establishing that the phrase "personal privacy" in Exemption 6 encompasses an individual's privacy rights.[9] But no one disputes that conclusion. The question is whether that language also encompasses corporations, particularly when the statute expressly defines "person" to do so. Unlike the *1967 AG Memorandum*, the cases and legislative history on which the government relies do not address that question.

The government cites (at 23) a hornbook that disagreed with the Attorney General's interpretation of Exemption 6, as well as a student note citing the

---

[9] None of the cases the government cites (at 23-24) implicated corporate privacy. *See Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974) (names and addresses of individuals registered to produce wine for family use); *Rural Hous. Alliance v. USDA*, 498 F.2d 73 (D.C. Cir.) (information about individuals subject to housing discrimination), *opinion supplemented on other grounds*, 511 F.2d 1347 (D.C. Cir. 1974); *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974) (summaries of investigations of honor-code violations by Air Force Academy cadets), *aff'd*, 425 U.S. 352 (1976); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) (names and home addresses of employees eligible to vote in union elections).

hornbook with approval. *See* Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 164 (1970 Supp.) ("Davis") ("I think 'personal privacy' always relates to individuals."); Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 954 n.323 (1974). Professor Davis provides no reasoning or authority to support his bare assertion, and there is no reason to conclude that legislators would have ignored the Attorney General's straightforward reading of the statute's plain language in favor of one law professor's *ipse dixit*. Moreover, even Professor Davis recognized the propriety of protecting corporate privacy. Writing about FOIA's clause (now codified at § 552(a)(2)) that empowers agencies to delete identifying details from published documents to protect "personal privacy," Professor Davis opined that an agency "[c]learly" should be able to delete such details to protect corporate privacy—even though he thought that "one *probably* cannot say that a corporation has a 'personal privacy'"—because "[t]he ineptitude of the draftsmen should not prevent a sensible result." Davis § 3A.13, at 139 (emphasis added); *see also id.* at 139 n.51 (dismissing the congressional committees' "failure to think of corporations" in drafting their reports as "probably an inadvertence").

Because the phrase "personal privacy" can refer to both individual and corporate privacy, if Exemption 6 does not protect corporations, it is because the exemption applies only to "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). Whereas the disclosure of information in such files is highly likely to implicate the privacy of individuals, the same cannot be said for the privacy of corporations. *See* App. 13a; *1967 AG Memorandum* at 36-37. But

that does not mean that the phrase "personal privacy" has different meanings in the two exemptions. Instead, it reflects that Exemption 6 contains *other* language ("personnel and medical files") limiting its application to individuals.

In criticizing the Third Circuit's reasoning on that point, the government asserts (at 45-46) that the disclosure of information in a corporation's personnel or medical files could invade the corporation's privacy by revealing information about its "internal affairs." But the "files" referred to in Exemption 6 are "Government files," *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 n.4 (1982), not a corporation's files. *See* Gov't Br. 42 n.13 ("Congress clearly used the term 'personnel' in Exemption 6 to refer to *files for federal officials*") (emphasis added); *see also Department of the Air Force v. Rose*, 425 U.S. 352, 375 n.14 (1976) ("the primary concern of Congress in drafting Exemption 6" was to protect information "in such files as those maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans' Administration"). Although it is somewhat difficult to imagine a case in which information in an agency's own personnel files would implicate a corporation's privacy interests, the key point is that the words "personnel" and "medical" in Exemption 6 cannot be disregarded. If Exemption 6 applies only to individuals (an issue not presented here), it is because those terms show that Congress intended the exemption to protect information "about a particular individual." *Washington Post*, 456 U.S. at 600; *see id.* (referring to "'personnel and medical files'" as "the two benchmarks for measuring the term 'similar files'").

The government's effort to equate Exemptions 6 and 7(C), despite their distinct language, is not advanced by its assertion (at 22) that "Congress incorporated the phrase 'personal privacy' into Exemption 7(C) directly from Exemption 6 in 1974." The government bases that claim entirely on a single legislator's floor statement. Assuming for the sake of argument that resort to legislative history were appropriate to interpret the plain language of Exemption 7(C), the Court has declined to rely on floor statements to determine congressional intent. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 & n.15 (2002); *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

Moreover, Senator Hart's statement does not establish the proposition for which the government cites it. He said only that "the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974). That Exemption 7(C)'s protection for personal privacy includes the privacy interests that Exemption 6 protects does not prove that Exemption 7 does not also protect other interests. In fact, Senator Hart stated that he "wish[ed] also to make clear, in case there is any doubt, that [Exemption 7(C)'s protection for personal privacy] is intended to protect *the privacy of any person* mentioned in the requested files." *Id.* at 17,033-34 (emphasis added). Thus, contrary to the government's position here, Senator Hart equated the phrases "personal privacy" and "the privacy of any person," *see id.*, and he must be presumed to have understood that the term "person" in FOIA includes corporations.

Exemption 4. The government also argues (at 24-27) that Exemption 4 protects any "legitimate interest" corporations have "in preserving the confidentiality" of their information. But Exemption 4's limited protection for trade secrets and confidential commercial information does not address the reputational interests that Exemption 7(C) protects.

Exemption 4 applies to "trade secrets" as well as "commercial or financial information . . . [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The exemption's protection for "confidential" commercial information does not protect against "reputational injury" or "embarrassment in the marketplace"—such as a "competitor['s]" use of documents "to discredit [the disclosing corporation] in the eyes of current and potential customers." *United Techs. Corp. v. United States Dep't of Defense*, 601 F.3d 557, 563-64 (D.C. Cir. 2010) (collecting cases).[10] Although Exemption 4 is said to apply where release of the information is "likely to cause . . . substantial competitive harm," that standard is met only when disclosure would enable "the affirmative use of proprietary information by competitors." *Id.* at 563 (internal quotation marks omitted); *see also Utah v. United States Dep't of the Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (following D.C. Circuit's interpretation of Exemption 4); *Frazee v. United States Forest Serv.*,

---

[10] In addition, Exemption 4 has been construed to provide significantly less protection for "trade secrets" than the common law. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-89 (D.C. Cir. 1983) (rejecting "'widely relied-upon definition'" of trade secret from the Restatement of Torts (1939)) (quoting *Kewanee Oil*, 416 U.S. at 474).

97 F.3d 367, 370-71 (9th Cir. 1996) (same); *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (same).[11]

This case illustrates the point. The FCC below proposed to redact information that it believed met the dictates of Exemption 4. App. 40a-42a. Yet the documents that remain unredacted—and that the FCC ordered disclosed to CompTel—nevertheless contain confidential internal information about AT&T's alleged wrongdoing that, even if not proprietary within the meaning of Exemption 4, could nevertheless be used in an effort to damage AT&T's reputation. *See supra* p. 2 (observing that the documents at issue contain, for example, information about how AT&T's subsidiary came to bill the invoices in question, descriptions of discussions between AT&T and its customers, and AT&T's own views on whether its actions were in compliance with its own Code of Conduct).

The government asserts (at 26) that, "[h]ad Congress intended its enactment of Exemption 7(C) in 1974 to enhance FOIA's protections for the confidentiality interests of corporations and other entities, it presumably would have employed language similar to that used in Exemption 4—such as 'trade secrets' or 'confidential' 'commercial or financial informa-

---

[11] Although the term "confidential" in Exemption 4 has been construed in at least one circuit to apply where a corporation voluntarily provides to the government documents containing commercial or financial information "of a kind that the provider would not customarily release to the public," *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc), that more lenient standard has been held not to apply in cases such as this one, where the agency requires the corporation to provide the documents in question, App. 40a-41a. That is so even though the investigation in this case arose from AT&T's own voluntary disclosure.

tion.'" But the government's proposed rewriting of Exemption 7(C) would simply have rendered it duplicative of Exemption 4. Congress instead achieved a different purpose in Exemption 7(C), enacting a limited safeguard for personal privacy that protects the reputations of persons involved in law-enforcement investigations. Nothing in Exemption 4 serves that purpose, as the authorities quoted above demonstrate.

3. For its part, CompTel seeks to create ambiguity in Exemption 7(C) by pointing out (at 18-19) that defining "personal" to include corporations would appear unusual in other statutory provisions that refer to "personal property" or "personal injury." But those are terms of art in the law, *see Black's Law Dictionary* at 1337 (defining "personal property"); *id.* at 857 (defining "personal injury"), in which the word "personal" does not carry its ordinary meaning as the adjective form of "person." Thus, "personal property" does not mean "property of a person"; it means property "not classified as real property." *Id.* at 1337. Similarly, "personal injury" generally refers to "bodily injury" or "mental suffering." *Id.* at 857. Neither CompTel nor the government provides any textual evidence that the words "personal privacy" likewise are a term of art and that the word "personal" in Exemption 7(C) therefore should not be given its ordinary meaning as the adjective form of the defined noun "person."

D. Recognizing Corporate Privacy Interests Comports with Exemption 7(C)'s Purposes

1. An interpretation of Exemption 7(C) that allows for the possibility of corporate privacy rights accords not only with the text of the exemption, but also with its purposes. Exemption 7(C) "affords

broad[] privacy rights to suspects, witnesses, and investigators" in law-enforcement investigations. *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The exemption reflects Congress's judgment that disclosure of information about those parties "may result in embarrassment or harassment," *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995), and "potentially more serious reputational harm," *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.).

That purpose plainly applies to corporations. Corporations, like individuals, are routinely suspects or cooperating parties (or both) in law-enforcement investigations. And corporations, like individuals, face the prospect of significant reputational harm based upon their involvement in such investigations.[12] No less than individuals, an organization

---

[12] *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 492 (1999) (citing study showing that "publicly traded corporations sustained substantial losses in goodwill when named as targets of [Federal Trade Commission] investigations for having possibly violated its regulations against false and misleading advertising"); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 332 (1996) ("[c]orporations convicted of crimes may well suffer significant reputational losses"); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1771-72 (2005) ("Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale, damage to reputation and corporate image, damage to relationships with customers, suppliers, and the government, bars to future business, and (as a consequence of all of this) significant drops in share price and market share. The size of these extralegal penalties often dwarfs that of the formal legal penalties.") (footnotes omitted).

that serves as a "witness[]" or "informant[]" in a law-enforcement investigation also has a substantial interest in preventing the disclosure of records that could risk retaliation by, for example, customers and suppliers. *Cf. Senate of Puerto Rico*, 823 F.2d at 588.

The government's construction of Exemption 7(C) thus categorically excludes an important set of actors that can be swept into law-enforcement investigations and then later made to suffer serious consequences. Adopting its interpretation would mean that, anytime a corporation voluntarily discloses possible unlawful conduct, any information provided to regulators as part of a resulting investigation *must be disclosed* not only to the media and public-interest organizations, but also to the corporation's competitors and legal adversaries. Such a result cannot be squared with the exemption's purpose.

Beyond that, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other organizations in law-enforcement investigations. Exemption 7 as a whole guards against the "potential disruption in the flow of information to law enforcement agencies" caused by a fear "of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). As the facts of this case bear out, corporations routinely cooperate in law-enforcement investigations, often initiating such investigations themselves upon discovery of potential wrongdoing. A rule foreclosing the possibility of invoking Exemption 7(C) could make corporations less willing to do so, out of concern that potentially damaging confidential information could, as the FCC held here, be made public based on nothing more than a one-sentence FOIA request from a group

of competitors. *See* App. 14a n.5 ("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.").

2. CompTel—but not the government—argues (at 33-34) that the Third Circuit's decision is inconsistent with FOIA's policy of disclosure. But that argument rests on an incomplete account of Congress's purposes in enacting FOIA. In the Act, Congress struck a "balance" by including statutory exemptions from disclosure that "this Court has recognized . . . are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152-53 (internal quotation marks omitted). "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information, and therefore provided the specific exemptions under which disclosure could be refused." *Id.* at 152 (internal quotation marks omitted); *see Abramson*, 456 U.S. at 630-31 ("While Congress established that the basic policy of the Act is in favor of disclosure, it recognized the important interests served by the exemptions."); *cf. Favish*, 541 U.S. at 165 ("[T]he concept of personal privacy under Exemption 7(C) is not some limited or cramped notion of that idea.") (internal quotation marks omitted). Thus, any discussion of congressional purpose cannot ignore the objectives of FOIA's exemptions, which plainly support the result here. The government has made the same point in a brief filed this Term. *See* U.S. *Milner* Br. 49.

CompTel also suggests (at 34-35) that allowing corporations to "claim" privacy interests under Exemption 7(C) would result in the "public" being "denied" important information about how the gov-

ernment fulfills its law-enforcement responsibilities. CompTel is mistaken. As an initial matter, the consequence of applying Exemption 7(C)—or any other FOIA exemption—is that the government is not required to disclose the requested information. That is so whether the party asserting the exemption is an entity or an individual. More fundamentally, identifying the privacy interest at stake is only the first step in applying Exemption 7(C). The next step, which the Third Circuit here left to the FCC to perform, is to "balance" that "privacy interest" against "the public interest in disclosure," *Favish*, 541 U.S. at 171, to determine whether the invasion of privacy would be "unwarranted," 5 U.S.C. § 552(b)(7)(C); 47 C.F.R. § 0.457(g)(3).

In a case where there is a legitimate public interest in the requested information, and a corporation's privacy interests are insubstantial, then that balance would be struck in favor of disclosure. If the government and CompTel had their way, however, potentially damaging corporate documents collected for law-enforcement purposes would be subject to automatic disclosure without any need even to articulate why the requested information is likely to advance the public interest. *See Favish*, 541 U.S. at 172. Moreover, that corporations are not categorically excluded from claiming the protections of Exemption 7(C) does not mean that they must be treated the same as individuals. AT&T has acknowledged that point in both this Court and the court of appeals, *see supra* p. 23, and nothing in the Third Circuit's decision mandates that the privacy interests of corporations be given the same weight as the privacy interests of individuals in applying Exemption 7(C).

Thus, CompTel is wrong to suggest (at 26-27) that the Third Circuit's decision resurrects the law that existed before the 1974 amendments, under which the public was denied access to "meat inspection reports" and the like compiled for law-enforcement purposes. Under the prior law, such documents were automatically withheld. *See Abramson*, 456 U.S. at 627 n.11 (describing congressional concern with "stone wall" erected by decisions interpreting pre-1974 Exemption 7 to "prevent[] public access to any material in an investigatory file") (internal quotation marks omitted). But the Third Circuit's decision does not prevent disclosure of all corporate documents collected for law-enforcement purposes. Instead, as with individuals, when a corporate participant in a law-enforcement investigation asserts a privacy interest in requested information, a balancing analysis is performed to determine whether disclosure is warranted.

E. The Government's Reliance on Legislative History and Statements from Lower Courts Is Misplaced

1. The Third Circuit correctly determined that, because Exemption 7(C)'s plain language shows that it applies to corporations, resort to legislative history is inappropriate in this case. App. 13a-14a; *see*, *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Lamie v. United States Trustee*, 540 U.S. 526, 534, 536 (2004) (fact that statute "is awkward, and even ungrammatical," does not make reliance on legislative history appropriate where "plain meaning" can be determined); *Rucker*, 535 U.S. at 132-33; *Hughes*

Aircraft, 525 U.S. at 438; *Ratzlaf*, 510 U.S. at 147-48 & n.18; *Connecticut Nat'l Bank*, 503 U.S. at 253-54; *see also Exxon Mobil*, 545 U.S. at 568 (describing problems with reliance on legislative history).

Moreover, the legislative history on which the government relies does not even address the question presented. The government's seven-page discussion of Exemption 7(C)'s "drafting history" contains only one snippet (at 29) that purports to relate to whether Exemption 7(C) encompasses corporations as well as individuals—a floor statement in which Senator Dole introduced into the record a district court case that, according to the government, said that Exemption 6 cannot be claimed by a corporation. Even assuming that a floor statement, rather than the statutory text, is the appropriate source for ascertaining congressional intent, *but see Barnhart*, 534 U.S. at 457 ("Floor statements . . . cannot amend the clear and unambiguous language of a statute."), Senator Dole's statement had nothing to do with Exemption 7(C). He referenced the case to support a proposed amendment to *Exemption 4*, which would have specified that Exemption 4 protects applications for research grants. *See* 120 Cong. Rec. at 17,045 (stating that the case "clearly demonstrates the need for congressional action to insure that research ideas are indeed accorded the confidential status which they deserve"). So, the opinion's statement regarding "personal privacy" had nothing to do with the purpose for which Senator Dole introduced it into the congressional record. Moreover, Senator Dole was not even proposing to offer his amendment to Exemption 4 as part of the 1974 amendments to FOIA; instead, it was expected that he would "have the opportunity to offer [that] amendment at a later time, perhaps

to a health bill that will be pending." *Id.* at 17,042. It is therefore an extraordinary leap to suggest that Senator Dole's statement would have caused any legislator to think that Exemption 7(C) would apply only to individuals.

The government's legislative history establishes at most that Congress had a particular concern with protecting individual privacy rights in enacting Exemption 7(C). That says nothing about whether Exemption 7(C) also applies to corporations. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal*, 498 U.S. at 111. On the contrary, it is well-settled that a statute may have applications beyond those Congress expressly contemplates: "'[T]he 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 *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)); *see Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) ("The operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification."); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

That principle controls here. As AT&T has explained, the text of Exemption 7(C)—especially read in light of common legal usage, the statutory structure, and Exemption 7(C)'s purposes—encompasses corporations. *See supra* Parts A-D. That Congress's primary focus in enacting that language may have been the protection of individual privacy

rights provides no basis for refusing to apply the terms of Exemption 7(C) as written. As the Court has said, "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself. . . . [T]he reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

2. Wandering even further from the statutory text, the government also relies on (at 34-41) various authorities published after the enactment of the 1974 amendments. Such sources of course can shed no light on the intent of the Congress that passed that legislation. *Cf. California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 331 n.8 (1997) (rejecting the argument that "Congress' unwillingness to amend [a statute] in response to [lower court] decisions is evidence that Congress believed that those opinions accurately interpreted" the statute). Regardless, none of those authorities persuasively supports the government's per se rule that Exemption 7(C) excludes corporations.

The statement in the Attorney General's 1975 memorandum that Exemption 7(C) does not "seem" to apply to corporations provides no help to the government. U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (Feb. 1975); *cf. Abramson*, 456 U.S. at 622 n.5 (criticizing a party for placing "undue emphasis" on the Attorney General's 1975 memorandum). Such memoranda are "entitled to be taken seriously only to the extent that [they] make[]

persuasive arguments." *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir.), *opinion modified on reh'g on other grounds*, 976 F.2d 751 (D.C. Cir. 1992). The 1975 memorandum makes no arguments at all, much less persuasive ones, in support of its tentatively asserted view regarding the scope of Exemption 7(C). It therefore provides no basis to depart from the statutory text.

The government also relies on decisions that observe (in varying degrees of detail) that the personal privacy protections of Exemption 7(C) apply to "individuals." Such observations are uniformly beside the point. No one disputes that Exemption 7(C)'s protection of "personal privacy" encompasses the privacy rights of individuals. It is therefore unremarkable—and irrelevant to the question presented—that courts have discussed individuals when, on the facts before them, an individual's privacy interest was the only thing at stake. *Cf. Favish*, 541 U.S. at 165 ("To say that the concept of personal privacy must 'encompass' the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well.").

Only one of the cases that the government cites, *Washington Post Co. v. United States Department of Justice*, 863 F.2d 96 (D.C. Cir. 1988), involved Exemption 7(C). But the opinion in *Washington Post* does not indicate that either of the parties resisting the FOIA request in that case argued that disclosure would invade the privacy interests of the corporation (Eli Lilly) that had submitted the document in question. *See id.* at 100-01. Instead, the Department of Justice and Eli Lilly appear to have contended only that disclosure would invade the privacy of particular Eli Lilly employees. *See id.*

The remaining statements the government quotes come from cases interpreting Exemption 6. Even setting aside the textual distinctions between Exemptions 6 and 7(C) (*see supra* pp. 36-37), the statements are unreasoned dicta. In *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the court rejected the applicability of Exemption 6 because it held that any invasion of privacy would not be "clearly unwarranted" in light of the strong interest in enabling the public to monitor the Department of Agriculture's implementation of the benefit program at issue. *See id.* at 1232 (internal quotation marks omitted). Although the court opined that "businesses . . . do not have protected privacy interests under Exemption 6," it offered that view in discussing an issue that the parties had not "contest[ed]" and in concluding that information in the business records was "traceable to an *individual*" and therefore within the scope of Exemption 6 in any event. *Id.* at 1228. In *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), the Central Intelligence Agency made "no claim that the names of the institutions participating in" the program at issue could be withheld under Exemption 6. *Id.* at 572 n.47. And, in *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), the court raised the possible applicability of Exemption 6 on its own and said only that Exemption 6 had "not been extended to protect the privacy interests of businesses or corporations," *id.* at 685 n.44; it did not say that such an extension would be unwarranted in an appropriate case.

The cases the government cites (at 37) for the proposition that Exemptions 6 and 7(C) protect the same privacy interests are even further afield. None

considered the question whether either exemption protects any interest in corporate privacy. *See United States Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) (home addresses of federal civil service employees); *Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008) (names of individual employees in government report); *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (name of individual who had accused government employee of misconduct); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992) (names and addresses of employees in bargaining unit).

Citing then-Professor Scalia's 1981 congressional testimony, the government suggests (at 39) that Justice Scalia has already decided this case. Not so. The most pertinent aspect of that testimony in fact supports AT&T's position. There, Professor Scalia recognized this Nation's "tradition of respect for the autonomy and, except in specified fields, the *privacy* of nongovernmental associations" and spoke of the "*privacy* which has been the right of our private institutions and which many of them require in order to function effectively." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 958 (1981) ("*1981 FOIA Hearings*") (emphases added); *see also id.* at 957 ("Observers of American democracy since de Tocqueville have noted the vital importance of private associations, *corporations*, unions, churches, universities, political and social clubs, in preserving freedom by providing diverse centers of power apart from what would otherwise be the all-powerful democratic state.") (emphasis added). That testimony further undermines the government's claim that corpo-

rate privacy interests are entirely foreign to American law. True, Professor Scalia criticized FOIA as insufficiently protective of "institutional privacy" interests, *id.*, noting specifically the lack of a corporate parallel to FOIA Exemption 5, which exempts from disclosure government agency memoranda and letters, 5 U.S.C. § 552(b)(5). *See 1981 FOIA Hearings* at 957-58. But the testimony nowhere mentions Exemption 7(C), let alone addresses the merits of the Third Circuit's (and Attorney General Clark's) interpretation of the phrase "personal privacy."

In sum, the government's authorities provide no justification for departing from the plain language of Exemption 7(C). Moreover, the government's claim (at 41) that there is not "a scintilla" of evidence that anyone ever before thought that a corporation could have personal privacy under FOIA is demonstrably wrong. As noted above (*see supra* pp. 32-34), and, as even the government admits (at 35 n.10), in 1967, *the Attorney General himself* advanced the same textual interpretation of the phrase "personal privacy" that the Third Circuit adopted here. The Third Circuit's interpretation is hardly "novel[]" (Gov't Br. 40 (internal quotation marks omitted)). *Cf. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (rejecting dissent's reliance on "long-prevailing Circuit precedent") (internal quotation marks omitted).

F. There Is Nothing Absurd About Recognizing Institutional Privacy Interests Under Exemption 7(C)

The government's claim (at 51-54) that no workable standard exists for agencies and courts to use in measuring institutional privacy interests ignores the long "tradition of respect" for "institutional privacy,"

1981 FOIA Hearings at 957-58, which has been recognized in a number of contexts, including the Fourth Amendment. *See supra* Part B. In *Hale*, for instance, the Court balanced the corporation's interests against the needs of law enforcement to determine whether the challenged governmental action was reasonable under the Fourth Amendment. *See* 201 U.S. at 76-77; *see also Dow Chem.*, 476 U.S. at 234-39 (applying traditional Fourth Amendment principles to determine whether taking aerial photographs of Dow's facility constituted a search); 2 *Criminal Procedure* § 3.9(c), at 358 (discussing cases involving regulatory inspections of businesses). The government is thus wrong to assert (at 53) that no "predicates" exist for corporate privacy interests under Exemption 7(C). Indeed, the claim that the concept of corporate privacy is entirely foreign and unprecedented simply cannot be squared with the Nation's 140-year history of treating corporations "as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687.[13]

The government also asserts (at 53) that "[a] corporation itself can no more be embarrassed, harassed, or stigmatized than a stone." On the contrary, the Second Circuit has expressly recognized in the Double Jeopardy Clause context that corporations can suffer "embarrassment" and "harassment" as a consequence of multiple prosecutions. *Security Nat'l*

---

[13] Nothing in *Reporters Committee* or *Favish*, from which the government quotes (at 52-53), is to the contrary. Those cases explicated the privacy interests involved in the possible disclosure of an individual's rap sheet (*Reporters Committee*) and photographs of a deceased relative (*Favish*). Neither case purported to provide a comprehensive account of the privacy interests that Exemption 7(C) protects.

Bank, 546 F.2d at 494-95. And this Court has acknowledged in other contexts that litigation can be used "to harass large companies through a multiplicity of small claims," *NAACP v. Button*, 371 U.S. 415, 441 (1963), and that disclosure of campaign finance information can result in "harassment directed against [an] organization itself," *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam). In fact, it is quite common to speak of corporations and other organizations as being "embarrassed," "harassed," and "stigmatized."[14] More fundamentally, the government's claim simply cannot be squared with the longstanding recognition of corporations as having similar reputational interests as individuals for purposes of, for example, the law of defamation. *See* Restatement (Second) of Torts § 561 cmt. b ("A corporation for profit has a business reputation and may therefore be defamed in this respect."). To say that a corporation has been "embarrassed" is just another way of saying that its reputation has been damaged.

---

[14] *See*, *e.g.*, Verne G. Kopytoff, *Rival Ordered To Pay Oracle Over $1 Billion*, N.Y. Times, Nov. 24, 2010, at A1 (referring to Oracle's efforts "to embarrass another rival, Hewlett-Packard"); Charlie Savage & Andrew W. Lehren, *State's Secrets Day 2: Cables Depict Coaxing By U.S. in Bid to Clear Guantanamo's Prison*, N.Y. Times, Nov. 30, 2010, at A1 ("The suicide bomber proved deeply embarrassing for the Kuwaiti government."); Salman Masood, *Anticorruption Group Claims Harassment in Pakistan*, N.Y. Times, Nov. 30, 2010, at A14 ("The head of the Pakistani branch of Transparency International, the global advocacy group that monitors corruption, has alleged intimidation and harassment by government officials for its monitoring of American aid in Pakistan."); Alan Feuer, *Battle Over the Bailout*, N.Y. Times, Feb. 14, 2010, at MB1 (reporting the Federal Reserve's concern that disclosing the identities of financial institutions that borrowed money from it in the fall of 2008 could "stigmatize" those institutions).

The government provides no support for its suggestion (at 50-51) that treating foreign, state, and local governments as persons with privacy interests under Exemption 7(C) would be absurd, aside from its unpersuasive claim (at 51), addressed above, that institutional privacy interests are "wholly novel and non-intuitive." FOIA contains multiple protections for the federal government's own privacy interests, *see*, *e.g.*, 5 U.S.C. § 552(b)(1), (2), (5), (7)(A), (7)(E), which seriously weakens the government's claim that foreign, state, and local governments cannot have similar interests. Indeed, Exemption 7(D) expressly recognizes one such interest in nondisclosure, exempting information that could disclose the identity "of a confidential source, including a State, local, or foreign agency or authority." 5 U.S.C. § 552(b)(7)(D).[15]

The Executive Branch is free to address to Congress its disagreement with the congressional decision to include corporations within the protections of Exemption 7(C). But this Court "will not alter the text [of the statute] in order to satisfy the policy preferences of the [Acting Solicitor General]." *Barnhart*, 534 U.S. at 462.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[15] As AT&T has acknowledged, corporate privacy claims may not be entitled to the same weight as individuals' claims, and it may be that any claim raised by a governmental entity would be entitled to even less weight.

Respectfully submitted,

D. WAYNE WATTS
AT&T INC.
208 S. Akard Street
Suite 3702
Dallas, Texas 75202
(214) 757-3300

PAUL K. MANCINI
GARY L. PHILLIPS
TERRI HOSKINS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3055

GEOFFREY M. KLINEBERG
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(gklineberg@khhte.com)

December 9, 2010

Counsel for AT&T Inc.

STATUTORY AND REGULATORY ADDENDUM

1. 1 U.S.C. § 1 provides:

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

2. 5 U.S.C. § 551(2) provides:

§ 551. Definitions

For the purpose of this subchapter—

* * * * *

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

* * * * *

3. 5 U.S.C. § 552 provides in relevant part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

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

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person

under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish,

quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(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.

* * * * *

(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.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If techni-

cally feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * * * *

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

* * * * *

(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.

* * * * *

4. 47 C.F.R. § 0.457 provides in relevant part:

§ 0.457 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 advance 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 codified 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.