

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 08-4024

AT&T, INC.

Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,**

Respondents.

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

BRIEF FOR INTERVENOR COMPTTEL

Mary C. Albert
COMPTTEL
900 17th Street, N.W.
Washington, DC 20006
(202) 296-6650

Counsel for COMPTTEL

January 16, 2009

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JURISDICTIONAL STATEMENT

Petitioner AT&T alleges that this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344 to rule on its Petition for Review of the Federal Communications Commission's ("FCC") Memorandum Opinion and Order¹ granting in part COMPTTEL's Freedom of Information Act ("FOIA") request. Contrary to AT&T's allegation, this Court does not have subject matter jurisdiction over AT&T's "reverse FOIA" appeal under 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) or 2344. A necessary prerequisite to review under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1), 2344 is that the order being challenged be an order under the Communications Act, 47 U.S.C. §§ 151 *et seq.* The FCC Order AT&T is challenging is an order authorizing disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

STATEMENT OF ISSUES

The Court need only address the issues presented by AT&T if it determines that it has subject matter jurisdiction to review the FCC's

¹ Appendix (hereinafter App.) at 7. All appendix references are to AT&T's appendix.

decision that is the subject of this appeal. The first issue the Court must resolve is

Whether 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1), 2344 confer subject matter jurisdiction on the Court of Appeals to review an FCC decision ordering disclosure of documents under FOIA, otherwise known as a reverse FOIA action.

STATUTES AND REGULATIONS

The relevant provisions of the statutes relating to subject matter jurisdiction are reproduced in the addendum to this brief. The relevant provisions of FOIA are reproduced in the addendum to AT&T's brief.

STANDARD OF REVIEW

AT&T did not specify the standard of review the Court should apply in the event the Court determines that it does have jurisdiction to review the FCC's Order authorizing disclosure.² The appropriate standard of review is that set forth in the Administrative Procedure Act, 5 U.S.C. §706(a)(2) ("APA").³ Under this standard, the Court should not substitute its judgment for that of the FCC, but must simply determine whether the FCC's order is arbitrary, capricious, an abuse of discretion or otherwise not in accordance

² AT&T Brief at 12-13.

³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-319 (1979).

with law. *Reliance Electric Co. v. Consumer Product Safety Commission*, 924 F.2d 274, 277 (D.C. Cir. 1991) (judicial review in reverse FOIA cases is “arbitrary and capricious” review); *AT&T Information Systems v. General Services Administration*, 810 F.2d 1233 (D.C. Cir. 1987) (same); *Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (under arbitrary and capricious standard of review, court does not substitute its judgment for that of the agency, but looks only to see whether the agency action reflects a clear error in judgment).

SUMMARY OF ARGUMENT

AT&T has failed to demonstrate that this Court has subject matter jurisdiction to review the FCC’s Order granting in part COMPTTEL’s FOIA request. The Order was issued under FOIA. While the Hobbs Act and Section 402(a) of Title 47 vest exclusive jurisdiction in the Court of Appeals to review FCC orders issued under the Communications Act, the Order AT&T challenges on appeal was not so issued. Subject matter jurisdiction to review the FCC’s reverse FOIA Order properly lies in the federal district courts pursuant to 28 U.S.C. §1331. Because AT&T filed its action in the wrong court, its Petition for Review should be dismissed.

Should the Court review the merits of AT&T’s appeal, it should deny the Petition for Review because AT&T has failed to show that the FCC’s

Order is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. AT&T's argument that the entirety of law enforcement files are exempt from disclosure under FOIA cannot be reconciled with the language of the statute, the intent of Congress or the case law interpreting Exemption 7, 5 U.S.C. §552(b)(7). Moreover, its argument that large, publicly traded corporations have "personal privacy" interests protected by Exemption 7(C) of FOIA, 5 U.S.C. §552(b)(7)(C), finds no support in the case law. Finally, there is no merit to AT&T's contention that even if Exemption 7(C) does not prohibit the FCC from releasing the documents, the FCC's rule implementing Exemption 7(C) provides an independent basis for withholding the documents. An agency cannot narrow the scope of its FOIA disclosure obligations by regulation.

FOIA requires every federal agency, upon request, to make promptly available to any person any records not subject to an exemption from disclosure.⁴ The FCC's Order correctly concludes that Exemption 7(C) does not exempt from disclosure the documents requested by COMPTel. Because the documents are not exempt, the FCC must disclose them. In ruling that the documents should be released to COMPTel, the FCC fulfilled its obligations under FOIA and acted in accordance with the law

⁴ 5 U.S.C. §552(a)(3).

and AT&T has not shown otherwise. Accordingly, the Court should deny AT&T's Petition for Review.

ARGUMENT

I. This Court Does Not Have Subject Matter Jurisdiction

AT&T brought its reverse FOIA action in the wrong court and for this reason, its Petition for Review should be dismissed. AT&T mistakenly asserts that the Hobbs Act, 28 U.S. C. §§ 2341 *et. seq.*, vests jurisdiction in the court of appeals to review *all* FCC final orders, including those in reverse FOIA actions.⁵ The Hobbs Act vests exclusive jurisdiction in the court of appeals to review FCC orders "made reviewable by section 402(a) of Title 47."⁶ In turn, Section 402(a) of Title 47 provides that any proceeding to enjoin, set aside, annul or suspend any order of the FCC *under the Communications Act* shall be brought as provided in the Hobbs Act. Because Section 402(a) does not make the FCC's reverse FOIA Order reviewable as provided in the Hobbs Act, this Court does not have subject matter jurisdiction.

As the FCC's Order, AT&T's brief and the controlling statutory provisions AT&T submits with its brief make clear, the FCC's Order that is

⁵ AT&T Brief at 12.

⁶ 28 U.S.C. § 2342(1).

the subject of AT&T's Petition for Review is not an order under the Communications Act. Instead, it is an order under the Freedom of Information Act and the Hobbs Act does not vest jurisdiction in this Court. *See Jefferson Standard Broadcasting Co. v. FCC*, 297 F. Supp. 784 (W.D.N.C. 1969) (FCC order denying broadcaster tax certificate was not an order under the Communications Act within the meaning of Section 402(a), but an order under the Internal Revenue Code, and the district court, not the court of appeals, had jurisdiction to review). AT&T itself concedes that the FCC's order was not issued under the Communications Act. Indeed, AT&T asserts that the FCC is entitled to no deference in interpreting FOIA because "the FOIA applies government-wide and no one agency administers it."⁷

The Supreme Court has held that review of FOIA disclosure decisions, such as the FCC's order in this matter, is available under the APA and that jurisdiction to review agency action under the APA is found in 28 U.S.C. § 1331, a provision that vests original jurisdiction in the federal district courts,⁸ not the court of appeals. *Chrysler Corp. v. Brown*, 441 U.S.

⁷ AT&T Brief at 13.

⁸ As AT&T detailed in footnote 5 of its Brief, COMPTTEL initiated an action in the District of Columbia district court to compel the FCC to comply with its disclosure obligations under FOIA. Compl., *COMPTTEL v. FCC*, No. 1:06-cv-017180-HHK (D.D.C. filed Oct. 5, 2006) [DKT. 1-1]. AT&T intervened and raised its reverse FOIA Exemption 7(C) claims in a

281, 316 and n. 47 (1979); *see also*, *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, 598 F.2d 790, 795 (3rd Cir. 1979) (subject matter jurisdiction to review reverse FOIA appeals lies in the district court pursuant to 28 U.S.C. § 1331).

AT&T's reliance on *Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997) to establish jurisdiction⁹ is unavailing. No party in that case made a FOIA request to the FCC for the materials at issue nor did the FCC propose to release them under FOIA. Instead, what the D.C. Circuit reviewed was a cable licensing applicant's appeal of an FCC order (1) rejecting a request for confidential treatment of a report of an internal investigation of unlicensed operations and (2) directing the *applicant* to serve the material on other parties to the licensing proceeding. In its request for confidential treatment, the applicant alleged that its documents were

motion for summary judgment. While the District Court determined that it could rule on the motions for summary judgment filed by COMPTel and the FCC, it found that AT&T was unable to seek judicial review of its claims because the FCC had not issued a final order on its Exemption 7(C) claims. In issuing a stay pending final FCC action on AT&T's intra-agency appeal, the court stated that "a stay promotes judicial efficiency and economy by permitting the court to simultaneously address the issues raised by COMPTel, AT&T and the FCC at a future time." Memorandum Opinion and Order, *COMPTel v. FCC*, No. 1:06-cv-017180 HHK (D.D.C. Mar. 5, 2008) [DKT. 32]. Rather than file its reverse FOIA action with the district court as that court anticipated, AT&T seeks review in this Court of the FCC's final Order denying its Exemption 7(C) claims.

⁹ AT&T Brief at 12.

protected from disclosure under the attorney-client and attorney work product privileges as well as Exemptions 4 and 6 of FOIA. *In the Matter of Liberty Cable Company, Inc. On Request for Confidentiality*, 11 FCC Rcd 2475 (1996), *aff'd. sub nom. Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

Although the D.C. Circuit reviewed and rejected the applicant's FOIA arguments, *Bartholdi* was not a FOIA action, reverse or otherwise. FOIA governs the public disclosure of documents by a *government agency* to which the documents were supplied and not, as in *Bartholdi*, disclosure by the *party supplying the requested documents to the government*. See *Jaroslavicz v. Englehard Corp.*, 115 F.R.D. 515 (D.C. N.J. 1987). (FOIA does not apply where demand for disclosure is made to private party and not government). Contrary to AT&T's allegation, *Bartholdi* provides no support for its claim that this Court has jurisdiction to review the FCC's Order authorizing the release of documents to COMPTEL.

Subject matter jurisdiction to review the FCC's Order rejecting AT&T's Exemption 7(C) claims and authorizing disclosure lies in the district court pursuant to 28 U.S.C. § 1331. AT&T's failure to demonstrate that this Court has jurisdiction compels the dismissal of its Petition for Review.

II. The FCC's Order Should Be Affirmed Because It It Directs Disclosure As FOIA Requires

If the Court determines that it does have jurisdiction over AT&T's appeal of the FCC's Order, it should deny AT&T's Petition For Review on the merits. The Order is consistent with the statute and the case law interpreting the statute.

Exemption 7(C) authorizes, but does not require,¹⁰ the FCC to withhold records or information compiled for law enforcement purposes "but only to the extent" production of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). The FCC's Order correctly concluded that AT&T, as a large publicly traded corporation, has no "personal privacy" interest in any of the documents at issue within the meaning of FOIA Exemption 7(C). AT&T offers no statutory or other legal support either for its contention that all law enforcement files are exempt from disclosure under Exemption 7 or that the "personal privacy" interests protected by Exemption 7(C) encompass corporate interests.

¹⁰ *Chrysler Corp. v. Brown*, 441 U.S. at 293 ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure.")

The FOIA embodies a policy compelling the liberal disclosure of government records.¹¹ Such records must be produced upon request unless they are exempt from disclosure pursuant to one of the statute's nine exemptions. The Supreme Court has consistently held that FOIA's disclosure requirements are to be construed broadly and the exemptions narrowly. *See, e.g., National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976).

A. AT&T's Argument Ignores The Plain Language of Exemption 7(C)

Before the FCC, AT&T argued that law enforcement files relating to corporations are entitled to a blanket exemption from disclosure under Exemption 7(C) because involvement in such a matter may cause a corporation public embarrassment, harassment and stigma.¹² AT&T reiterates that argument here¹³ and attempts to reinforce it with a Declaration from one of its employees dated September 20, 2008, almost three weeks

¹¹ 5 U.S.C. §552(a).

¹² App. at 28-32; 47-54.

¹³ AT&T Brief at 24-25.

after the FCC issued the Order that is the subject of this appeal.¹⁴ Because AT&T did not submit the Declaration to the FCC in support of its Exemption 7(C) claims, it is not part of the administrative record that the Court may review to determine whether the FCC's Order is arbitrary and capricious or otherwise not in accordance with law. *AT&T Information Services v. General Services Administration*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (in reverse FOIA appeals, parties are barred from introducing litigation affidavits to supplement the administrative record); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (in review of agency order in reverse FOIA action, court is limited to examination of record compiled before agency); *McDonnell Douglas Corp. v. U.S. Dep't of Air Force*, 375 F.2d 1182, 1187-88 (D.C. Cir. 2004) (in reverse FOIA action, court may not review more or less information than did the agency when it made its decision).

¹⁴ Declaration of Leslie A. Bowman, App. at 61-67. Among other things, Ms. Bowman's Declaration claims at ¶8 that the documents at issue "contain the names, and other identifying information, of individuals involved in the arguable violations of FCC rules" and that release of the documents "could be used to attempt to embarrass, harass or stigmatize those employees as individuals. As AT&T is well aware, the FCC does not propose to release the names of any individuals revealed in the documents. FCC Order at ¶3, App. at 8.

Ironically, AT&T accuses the FCC of ignoring the text of Exemption 7(C),¹⁵ when in fact it is AT&T that totally disregards the text of the statute. Not surprisingly, AT&T is unable to cite any support for its assertion that all law enforcement files are exempt from disclosure because of the “embarrassment” and “stigma” attached to being associated with an investigation.¹⁶ If AT&T’s interpretation were correct, the entirety of all law enforcement files would be exempt from disclosure, and there would be no need for the language in subparts 7(A) through 7(F) defining the harms that must be shown to justify withholding material. The Supreme Court has emphatically rejected AT&T’s interpretation as inconsistent with the plain language of the statute. *FBI v. Abrahmson*, 456 U.S. 615, 627-28 (1982) (all law enforcement files are not entitled to a blanket exemption from disclosure; government must demonstrate one of six types of harm to prevent production of records compiled for law enforcement purposes); *see also, The Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995) (agencies not permitted to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record

¹⁵ AT&T Brief at 34-36.

¹⁶ *Id.* at 24-26.

includes some information that identifies a private citizen or provides that person's name and address).

Congress has also rejected AT&T's interpretation that Exemption 7 protects all law enforcement files from disclosure. Indeed, Congress narrowed the language of Exemption 7 in 1974 because of its disapproval of court decisions reading the Exemption as authorizing the withholding of all law enforcement files. *National Labor Relations Board v. Robbins, Tire & Rubber Co.*, 437 U.S. at 227-228 (Exemption 7 amended in 1974 to clarify Congressional intent and override judicial decisions finding that all investigatory files compiled for law enforcement purposes are exempt from disclosure). The FCC properly rejected AT&T's argument that all law enforcement files are exempt from disclosure and this Court should affirm the FCC's reading of the statute.

The FCC also properly rejected AT&T's argument that the text of Exemption 7(C) endows it with "personal privacy" interests. There is no question that FOIA defines "person" to include an individual, partnership, corporation, association or public or private organization other than an agency. 5 U.S.C. §551(2).¹⁷ The fact that FOIA's definition of person includes both natural (*i.e.*, individuals) and artificial (*i.e.*, corporations)

¹⁷ *Id.* at 19.

persons does not mean, as AT&T maintains, that large publicly traded corporations have “personal privacy” interests as that term is used in FOIA Exemptions 6 and 7. AT&T’s reliance on the *American Heritage Dictionary* definition of “personal” to bolster its argument¹⁸ that corporations have “personal privacy interests” in reality undermines its argument. While the dictionary defines “personal” as “of or pertaining to a particular person,” it also defines “person” as “a living human being, especially as distinguished from an animal or thing.”¹⁹

Although not in the FOIA context, the Supreme Court has affirmatively ruled that corporations do not enjoy the same right to privacy as individuals. In *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Court stated that

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

The FCC’s determination that corporations do not have “personal privacy” interests within the meaning of Exemption 7(C) is also consistent with the legislative history of FOIA as well as judicial and FCC precedent interpreting Exemption 7(C).

¹⁸ *Id.* at 19-22, citing *American Heritage Dictionary* 925 (2d ed. 1991).

¹⁹ *Id.*

B. The Legislative History Confirms That The “Personal Privacy” Language Is Intended to Protect Individuals, Not Businesses

FOIA Exemption 6 authorizes agencies to withhold personnel and medical files and similar files the disclosure of which would “constitute a clearly unwarranted invasion of personal privacy.”²⁰ Similarly, Exemption 7(C), which was added to FOIA in 1974, authorizes an agency to withhold law enforcement files only to the extent disclosure could reasonably be expected to “constitute an unwarranted invasion of personal privacy.”²¹ Although there is no legislative history explaining the meaning of the “personal privacy” language added to Exemption 7 in 1974, Congress did explain in both the House and Senate Reports when it enacted Exemption 6 in 1966 that the “personal privacy” Exemption was meant to protect individuals. The Senate Report states that

“clearly unwarranted invasion of personal privacy” enunciates a policy that will involve a balancing of interests between the protection of an *individual’s* private affairs from unnecessary public scrutiny and the preservation of the public’s right to governmental information.²²

And the House Report states that

²⁰ 5 U.S.C. § 552(b)(6).

²¹ 5 U.S.C. § 552(b)(7)(C).

²² Clarifying and Protecting the Right of the Public to Information, and For Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965) (emphasis added).

The limitation of a “clearly unwarranted invasion of personal privacy” provides a proper balance between the protection of an *individual’s* right of privacy and the preservation of the public’s right to Government information by excluding those kinds of files the disclosure of which might harm the *individual*. The exemption is also intended to cover detailed Government records on an *individual* which can be identified as applying to that *individual* and not the facts concerning the award of a pension or benefit²³

Because Congress used the identical “unwarranted invasion of personal privacy” language when it added Exemption 7(C) in 1974, there is no reasonable basis for concluding that Congress intended for the personal privacy language in Exemption 6 to protect only the privacy interests of individuals, but the same language in Exemption 7(C) to protect the “privacy interests” of large publicly traded corporations. While conceding that the relevant privacy interests covered by Exemptions 6 and 7 are coextensive, AT&T alleges that the legislative history of Exemption 6 “sheds no light on the phrase ‘personal privacy’” either in Exemption 6 or in the later enacted Exemption 7(C).²⁴ As the above quoted excerpts from the House and Senate reports demonstrate, AT&T is clearly mistaken.

²³ Clarifying and Protecting the Right of the Public to Information, H. Rept. No. 1497, 89th Cong. 2d Sess. at 11 (1966) (emphasis added).

²⁴ Compare AT&T Brief at 28 with 37-38.

C. The FCC's Order is Consistent With Precedent

AT&T has not shown, nor could it, that the FCC's Order is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. On the contrary, consistent with its own and judicial precedent, the FCC correctly rejected AT&T's contention that the "personal privacy" language of Exemption 7(C) protects from disclosure business records contained in law enforcement files.²⁵ See e.g., *Chadmoore Communications, Inc.*, 13 FCC Rcd 23943 (1998) (FCC licensees have no "personal" privacy interest protected by Exemption 7(C) in their capacity as holders of commercial radio licenses); *The Washington Post Co. v. U. S. Dep't of Agriculture*, 943 F. Supp. 31, 35 n. 4 (D.D.C. 1996) (a business entity has no "personal privacy" interest); *Ivanhoe Citrus Association v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985) (neither corporations nor business associations possess protectible privacy interests under FOIA); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (Exemption 6 does not protect privacy interests of businesses or corporations); *Washington Research Project, Inc. v. Dep't of Health, Education and Welfare*, 366 F. Supp. 929, 938 (D.D.C. 1973) (the right of privacy envisioned in FOIA is personal and cannot be claimed by a

²⁵ FCC Order at ¶¶ 7-10, App. at 10-13.

corporation or association). *See also, The Washington Post Company v. U.S. Dep't of Justice*, 863 F. 2d 96, 100 (D.C. Cir. 1988) (investigation and assessment of business decisions of corporate employees during the development and marketing of a commercial product do not qualify for exemption from disclosure under Exemption 7(C)); *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (the Exemption 7(C) privacy exemption does not apply to information regarding business and professional activities).

In contrast to this long line of precedent declining to find that corporations have “personal privacy” interests protected by Exemption 7(C), AT&T was unable to unearth one case interpreting the “personal privacy” language of Exemption 7(C) to apply to large publicly traded corporations. Instead, it argues that cases interpreting Exemption 7(C) to protect only the privacy interests of individuals are simply wrong.²⁶ Not only is AT&T unable to cite any judicial support for its position, even the cases upon which AT&T does rely address solely the personal privacy interests of individuals. *See e.g., National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004)²⁷ (holding that family members of a deceased person had a personal privacy interest recognized by Exemption 7(C) in death scene

²⁶ AT&T Brief at 36.

²⁷ *Id.* at 23, 33, 34.

photographs and that disclosure would constitute an unwarranted invasion of that privacy); *Carpenter v. U.S. Dep't of Justice*, 470 F. 3d 434 (2006)²⁸ (Exemption 7(C) protects an *individual's* interest in avoiding disclosure of personal matters); *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251 (D.C. Cir. 1981)²⁹ (Exemption 7(C) protects from disclosure identities of individuals involved in investigation); *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043 (3d Cir. 1995)³⁰ (Exemption 7(C) protects from disclosure identities of individuals involved in law enforcement investigation); *Voinche v. FBI*, 940 F.Supp. 323 (D.D.C. 1996)³¹ (Exemption 7(C) protects from disclosure names of individuals associated with law enforcement proceeding); *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)³² (disclosure of individual's rap sheet or criminal identification record constitutes unwarranted invasion of personal privacy prohibited by Exemption 7(C)); *SafeCard Services, Inc. v. SEC*, 926 F. 2d 1197 (D.C. Cir.

²⁸ *Id.* at 44.

²⁹ *Id.* at 24.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 9, 33, 42, 43.

1991)³³ (names and other identifying information on individuals appearing in agency's law enforcement files exempt from disclosure under Exemption 7(C)); *Campaign for Family Farms v. Glickman*, 200 F. 3d 1180 (8th Cir. 2000)³⁴ (the purpose of FOIA's personal privacy exemption is to protect the privacy of individuals); *Associated Press v. U.S. Dep't of Justice*, 549 F.3d 62 (2d Cir. 2008)³⁵ (privacy interests protected by Exemptions 6 and 7(C) embody the right of individuals "to determine for themselves when, how and to what extent information about them is communicated to others"); *Hopkins v. U.S. Dep't of Housing and Urban Dev.*, 929 F. 2d 1 (2d Cir. 1991)³⁶ (Exemption 6 protects from disclosure names, addresses and personal financial information of individual employees).

AT&T's argument that the D.C. Circuit's decision in *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006) construed Exemption 6 to protect the personal privacy interests of a corporation is a gross overstatement.³⁷ In that case, the Court affirmed the propriety of the FDA's

³³ *Id.* at 44.

³⁴ *Id.* at 12, 45, 46.

³⁵ *Id.* at 23, 44.

³⁶ *Id.* at 27-28.

³⁷ *Id.*

“assertion of abortion-related violence as a privacy interest” sufficient to invoke Exemption 6 to redact the *names and addresses* of agency personnel, private individuals and companies who worked on the approval of a medical abortion drug and the *names and street addresses* of companies involved with manufacturing the drug. The Court did not hold, as AT&T implies, that corporations have personal privacy interests of the type protected by Exemption 6 or 7(C) or that such interests would protect anything other than names and addresses and then only in very limited circumstances. In this case, COMPTTEL has not objected to the FCC’s redaction of the names of individuals identified in the material responsive to its request.³⁸

If there was any doubt that the *Judicial Watch* opinion cannot be read to mean that corporations have “personal privacy interests” under Exemption 6, that doubt is dispelled by the D.C. Circuit’s more recent decision in *MultiAg Media LLC v. Dep’t of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008). In that case, the court reaffirmed that Congress’ primary purpose in enacting Exemption 6 was to protect individuals, not businesses, from the injury and embarrassment that can result from the disclosure of personal information:

It is clear that businesses themselves do not have protected privacy interests under Exemption 6, but where their records reveal financial

³⁸ FCC Order at ¶ 3, App. At 8.

information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects. We thus hold that Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and “the records would necessarily reveal at least a portion of the owner’s personal finances.”

515 F.3d at 1228-29.

The FCC also properly determined that AT&T’s allegations that release of the details surrounding its receipt and use of federal E-rate funds could be used to “embarrass,” “harass” or “stigmatize” it³⁹ provided no basis for withholding the information under any FOIA Exemption.⁴⁰

Information regarding business and professional activities is not exempt from disclosure under 7(C), even if its release might embarrass or stigmatize a professional reputation. *See, e.g., The Washington Post Co. v. U.S. Dep’t of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (report detailing investigation and assessment of business decisions of corporation and its employees does not qualify for exemption under 7(C) even if disclosure might tarnish someone’s professional reputation); *Cohen v. Environmental Protection Agency*, 575 F. Supp. 425 (D.D.C. 1983) (privacy exemption of 7(C) does not protect information regarding professional or business

³⁹ AT&T Brief at 25.

⁴⁰ FCC Order at ¶ 8, App. 11.

activities even if disclosure would stigmatize or tarnish a professional reputation).

D. The Constitution Does Not Give AT&T Privacy Rights Under Exemption 7(C) of FOIA

The FCC was correct in rejecting AT&T's argument that Exemption 7(C) must be read to afford "personal privacy" rights to corporations because corporations have privacy interests protected by the Constitution.⁴¹ Although AT&T's brief cites repeatedly to the Supreme Court's decision in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), it does not acknowledge that in that case,⁴² the Supreme Court rejected the very argument that AT&T makes here:

[T]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution.

Id. at 789, n. 13. Thus, there is no merit to AT&T's argument that it has "personal privacy" rights under FOIA simply because corporations may have privacy rights under the Constitution.

⁴¹ FCC Order at ¶10, App. at 13.

⁴² AT&T Brief at 29-33.

E. The Commission Was Not Required To Engage In A Balancing Test

AT&T's contention that the FCC's failure to determine whether the invasion of its "personal privacy" would be unwarranted if the documents were released provides an independent basis for reversal of the decision⁴³ is wholly lacking in merit. Because the FCC correctly concluded that AT&T does not have a protectible privacy interest within the meaning of Exemption 7(C), there was no need for the FCC to balance AT&T's non-existent "personal privacy" interest against the public interest in disclosure.

III. The FCC's Rules Do Not Prohibit Disclosure

The Court should reject out of hand AT&T's contention that even though FOIA itself does not prohibit the FCC from ordering the release of the documents to COMPTTEL, the FCC's regulations do.⁴⁴ AT&T cites 47 C.F.R. § 0.457(g), the FCC's rule that implements FOIA Exemption 7,⁴⁵ in support of its argument. As AT&T itself concedes, the rule at most

⁴³ *Id.* at 41.

⁴⁴ *Id.* at 45.

⁴⁵ The FCC case cited by AT&T, *Patrick A. Linstruth*, 16 FCC Rcd 17409 (2001), specifically states that Section 0.457(g) is the Commission's rule implementing Exemption 7.

“prohibit[s] the disclosure of documents that fall within Exemption 7(C).”⁴⁶ Because the Commission correctly found that Exemption 7 does not protect AT&T’s documents from disclosure, there is no basis whatsoever for AT&T’s assertion that the FCC’s rule *implementing* that Exemption, which contains language virtually identical to that in the Exemption, does prohibit disclosure. If the “personal privacy” language in Exemption 7(C) cannot be read to protect AT&T’s corporate privacy, the identical language in the FCC’s implementing rule cannot be so read. In any event, an agency cannot override FOIA by regulation. *Consumers Union v. Consumer Product Safety Commission*, 590 F. 2d 1209, 1215-16 (D.C. Cir. 1978) (if FOIA calls for disclosure, agency has no authority to withhold materials requested); *ACLU v. Dep’t of Defense*, 543 F.3d 59, 66 (D.C. Cir. 2008) (FOIA is broadly conceived to reflect philosophy of full agency disclosure and exemptions are exclusive).

CONCLUSION

COMPTEL urges the Court to dismiss AT&T’s Petition for Review on jurisdictional grounds. If the Court determines that it does have subject matter jurisdiction, it should deny the Petition for Review on the merits. Under the APA, the Court may vacate the FCC’s Order only if it is arbitrary,

⁴⁶ AT&T Brief at 45.

capricious, an abuse of discretion or otherwise not in accordance with law. The FCC's Order finding that AT&T does not have a personal privacy interest that protects the documents requested by COMPTel from disclosure is fully consistent with the legislative history of FOIA and FCC and judicial precedent interpreting Exemption 7(C). AT&T has offered no colorable argument that the Order does not comply with the law. FOIA obligates the FCC to disclose the documents and the FCC's Order appropriately so ordered.

January 16, 2009

Respectfully submitted,



Mary C. Albert
Assistant General Counsel
COMPTel
900 17th Street N.W., Suite 400
Washington, D.C. 20006
malbert@comptel.org
(202) 296-6650 (telephone)
(202) 296-7585 (facsimile)

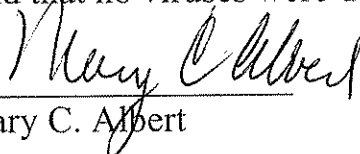
COMBINED CERTIFICATIONS

Bar Membership: Pursuant to Third Circuit L.A.R. 28.3(d) and 46.1(e), I hereby certify that I am a member of the bar of this Court.

Compliance with Fed. R. App. P. 32(a): I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. Pro. 32(a)(7)(B) because the brief contains 4,680 words excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This calculation was made using the word count function of Microsoft Word 2003, the word processing program used to prepare the brief. The brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman font and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

Identical Compliance of Briefs: I hereby certify, pursuant to Third Circuit L.A.R. 31(C), that the text of the electronic (PDF) version of this brief filed on the Court's electronic filing system is identical to the text in the paper copies of the brief filed with the Court by overnight mail.

Virus Check: I hereby certify, pursuant to Third Circuit L.A.R. 31.1(c), that a virus detection program has been run on this brief (OfficeScan Antivirus Eng/PTN 8.911.1001) and that no viruses were detected.



Mary C. Albert

ADDENDUM

47 U.S.C. § 402

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

* * *

28 U.S.C. § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47.

* * *

28 U.S.C. § 1331

§ 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2009, I caused copies of the foregoing Brief For Intervenor COMPTel to be served upon the following by first-class, United States mail, postage prepaid:

Federal Communications Commission

Matthew Berry
Michael Krasnow
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

United States of America

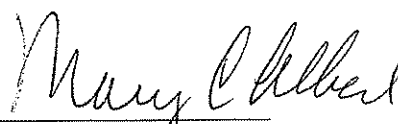
Catherine G. O'Sullivan
Robert Wiggers
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue N.W., Room 3224
Washington, D.C. 20530-0001

AT&T

Colin S. Stretch
Kelly P. Dunbar
Kellogg, Huber, Hansen, Todd
Evans & Figel, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036

Wayne Watts
Paul Mancini
AT&T Inc.
175 East Houston
San Antonio, Texas 78205

Gary Phillips
Terri Hoskins
AT&T Inc.
1120 20th Street N.W.
Washington, DC 20036



Mary C. Albert