

**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 PETITIONER

Wayne Watts
Paul K. Mancini
AT&T SERVICES INC.
208 S. Akard Street, Suite 3505
Dallas, Texas 75202
(214) 757-3360

Gary L. Phillips
Terri Hoskins
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3055

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
(202) 326-7900

Counsel for AT&T Inc.

December 19, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE.....	2
STATEMENT OF RELATED CASES	3
STATEMENT OF FACTS	3
STANDARD OF REVIEW	12
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. DISCLOSURE OF AT&T’S DOCUMENTS WOULD THREATEN AT&T’S PRIVACY INTERESTS	18
A. Corporations Can Have Privacy Interests Under Exemption 7(C).....	18
1. <i>The Statutory Text Establishes That Corporations Can Invoke the Privacy Interests Protected by Exemption 7(C)</i>	18
2. <i>Reading Exemption 7(C) To Protect Corporations Is Consistent with the Purpose of the Statute To Protect Against Embarrassment, Harassment, and Stigma</i>	24
3. <i>Precedent Supports Reading Exemption 7(C) as Applicable to Corporations</i>	27

4.	<i>That Corporations Have Privacy Interests in Other Contexts Further Confirms Reading Exemption 7(C) To Recognize Such Rights</i>	29
5.	<i>Reading Exemption 7(C) as Applicable to Corporations Would Not Require Identical Treatment with Individuals in All Cases</i>	34
B.	The FCC’s Contrary Arguments Are Unavailing	34
II.	THE INVASION OF AT&T’S PRIVACY CAUSED BY DISCLOSURE OF AT&T’S DOCUMENTS WOULD BE “UNWARRANTED”	41
	CONCLUSION	47
	COMBINED CERTIFICATIONS	
	ADDENDUM	
	APPENDIX (Volume I)	

TABLE OF AUTHORITIES

	Page
Cases	
<i>A.J. Canfield Co. v. Honickman</i> , 808 F.2d 291 (3d Cir. 1986)	41
<i>ACLU v. Department of Defense</i> , 543 F.3d 59 (2d Cir. 2008)	13
<i>American Fed’n of Labor v. FEC</i> , 177 F. Supp. 2d 48 (D.D.C. 2001), <i>aff’d</i> , 333 F.3d 168 (D.C. Cir. 2003)	46
<i>Arizechi v. IRS</i> , Civ. No. 06-CV-5292, 2008 WL 539058 (D.N.J. Feb. 25, 2008)	40
<i>Asahi Metal Indus. Co. v. Superior Court</i> , 480 U.S. 102 (1987)	23
<i>Associated Press v. United States Dep’t of Justice</i> , No. 07-1384-cv, --- F.3d ---, 2008 WL 5047793 (2d Cir. Dec. 1, 2008)	23, 44
<i>Bartholdi Cable Co. v. FCC</i> , 114 F.3d 274 (D.C. Cir. 1997).....	12
<i>Bast v. United States Dep’t of Justice</i> , 665 F.2d 1251 (D.C. Cir. 1981)	24
<i>Brogan v. United States</i> , 522 U.S. 398 (1998)	39
<i>Brown v. Duchesne</i> , 60 U.S. (19 How.) 183 (1856).....	24
<i>CAB v. United Airlines, Inc.</i> , 542 F.2d 394 (7th Cir. 1976)	31
<i>Campaign for Family Farms v. Glickman</i> , 200 F.3d 1180 (8th Cir. 2000).....	12 45, 46
<i>Carpenter v. United States Dep’t of Justice</i> , 470 F.3d 434 (1st Cir. 2006).....	44
<i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	13
<i>Cohen v. EPA</i> , 575 F. Supp. 425 (D.D.C. 1983)	37

Computer Prof’ls for Soc. Responsibility v. United States Secret Serv.,
72 F.3d 897 (D.C. Cir. 1996).....34

Consolidated Edison Co. v. Pataki, 292 F.3d 338 (2d Cir. 2002)..... 30-31, 32

Davin v. United States Dep’t of Justice, 60 F.3d 1043 (3d Cir. 1995).....24

Delaware River Stevedores v. DiFidelto, 440 F.3d 615 (3d Cir. 2006).....20, 22

Dow Chem. Co. v. United States, 476 U.S. 227 (1986).....30

E.I. Du Pont de Nemours & Co. v. MacDermid, Inc., No. 06-3383, 2008
WL 4952450 (D.N.J. Nov. 19, 2008)20

FBI v. Abramson, 456 U.S. 615 (1982)13, 26, 40

Finkel v. United States Dep’t of Labor, No. 05-5525, 2007 WL 1963163
(D.N.J. June 29, 2007)19

First Nat’l Bank v. Bellotti, 435 U.S. 765 (1978).....32

Florida Med. Ass’n v. Department of Health, Educ. & Welfare,
479 F. Supp. 1291 (M.D. Fla. 1979)21

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)29, 30, 40

Gilda Indus., Inc. v. United States Customs & Border Prot. Bureau, 457 F.
Supp. 2d 6 (D.D.C. 2006).....19

Grosjean v. American Press Co., 297 U.S. 233 (1936)..... 22-23

Halperin v. Kissinger, 807 F.2d 180 (D.C. Cir. 1986)36

Henzel v. United States, 296 F.2d 650 (5th Cir. 1961).....31

Hopkins v. United States Dep’t of Hous. & Urban Dev., 929 F.2d 81
(2d Cir. 1991).....28

IUE AFL-CIO Pension Fund v. Baker & Williamson, Inc., 788 F.2d 118
(3d Cir. 1986).....18

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).....13

Judicial Watch, Inc. v. FDA, 449 F.3d 141 (D.C. Cir. 2006).....14, 15, 27, 28, 36

Keene Corp. v. United States, 508 U.S. 200 (1993)22

Manna v. United States Dep’t of Justice, 51 F.3d 1158 (3d Cir. 1995)13, 25

McCreary County v. ACLU, 545 U.S. 844 (2005).....24

Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26 (1889).....32

Moskal v. United States, 498 U.S. 103 (1990).....38

Multi Ag Media LLC v. Department of Agric., 515 F.3d 1224 (D.C. Cir. 2008) 28-29

National Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)23, 33, 34

National Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976)29

OSHA Data/CIH, Inc. v. United States Dep’t of Labor, 220 F.3d 153 (3d Cir. 2000).....12

Park Univ. Enters., Inc. v. American Cas. Co., 442 F.3d 1239 (10th Cir. 2006)32

Pennsylvania Dep’t of Corrections v. Yeskey, 524 U.S. 206, 212 (1998).....38

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)38

Rugiero v. United States Dep’t of Justice, 257 F.3d 534 (6th Cir. 2001).....18

Rural Hous. Alliance v. United States Dep’t of Agric., 498 F.2d 73 (D.C. Cir. 1973).....36, 37

SafeCard Servs., Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991).....44

Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886)32

Sims v. CIA, 642 F.2d 562 (D.C. Cir. 1980), *aff'd in part, rev'd in part*,
471 U.S. 159 (1985).....29, 37

St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369
(9th Cir. 1981)20

Stafford v. Briggs, 444 U.S. 527 (1980)24

Tax Analysts v. IRS, 294 F.3d 71 (D.C. Cir. 2002).....18

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365
(1988).....21

United States v. Acorn Tech. Fund, L.P., 429 F.3d 438 (3d Cir. 2005)41

United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980)31

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)33, 40

United States v. Morton Salt Co., 338 U.S. 632 (1950)30

*United States Dep't of Justice v. Reporters Comm. for Freedom of the
Press*, 489 U.S. 749 (1989).....9, 33, 42, 43

United States Dep't of State v. Washington Post Co., 456 U.S. 595 (1982).....28

Voinche v. FBI, 940 F. Supp. 323 (D.D.C. 1996), *aff'd*, No. 95CV01944,
1997 WL 411685 (D.C. Cir. June 19, 1997).24

Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96
(D.C. Cir. 1988).....10, 35, 37

Wolk v. United States, No. Civ. A. 04-CV-832, 2005 WL 465382
(E.D. Pa. Feb. 28, 2005)44

Administrative Decisions

Memorandum Opinion and Order, *Chadmoore Communications, Inc.*,
 13 FCC Rcd 23943 (1998).....38

Memorandum Opinion and Order, *Patrick A. Linstruth*, 16 FCC Rcd 17409
 (2001).....45

Notice of Proposed Rulemaking and Further Notice of Proposed
 Rulemaking, *Comprehensive Review of the Universal Service Fund
 Management, Administration, and Oversight*, 20 FCC Rcd 11308
 (2005)..... 3-4

Order and Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24014
 (Enf. Bur. 2004).....4

Second Report and Order and Further Notice of Proposed Rulemaking,
Schools and Libraries Universal Service Support Mechanism,
 18 FCC Rcd 9202 (2003).....4

Constitution, Statutes, and Regulations

U.S. Const.:

Art. I, § 9, cl. 3 (Bill of Attainder Clause).....15, 32

Amend. I15, 32

Amend. IV15, 29, 32

Amend. V:

 Double Jeopardy Clause.....15, 22, 32

 Due Process Clause15

Amend. XIV (Equal Protection Clause).....15, 22

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, § 701 *et seq.*12

 5 U.S.C. § 551(2).....19

 5 U.S.C. § 706(2)(A)45

Freedom of Information Act, 5 U.S.C. § 552 1

 5 U.S.C. § 552(b)(4)7, 19

 5 U.S.C. § 552(b)(6)27

 5 U.S.C. § 552(b)(7)(C).....1, 7, 18, 18, 41

 5 U.S.C. § 552(b)(7)(F)22

 5 U.S.C. § 552(e)21

Privacy Act of 1974, 5 U.S.C. § 552a.....20

 5 U.S.C. § 552a(a)(1).....21

 5 U.S.C. § 552a(a)(2).....20, 21

 5 U.S.C. § 552a(b)21

Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.....32

28 U.S.C. § 1391(c)23

28 U.S.C. § 2342(1)1, 12

28 U.S.C. § 2344..... 1

47 U.S.C. § 402(a)1, 12

47 C.F.R. § 0.457(f)..... 11

47 C.F.R. § 0.457(g)45

47 C.F.R. § 0.457(g)(3).....7
47 C.F.R. §§ 54.500-54.523.....4
47 C.F.R. §§ 54.701-54.702.....3

Legislative Materials

H.R. Rep. No. 89-1497 (1966)..... 36-37

Other Materials

Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489 (1999)25
American Heritage Dictionary (2d ed. 1991)19
Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743 (2005).....25
Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996).....25
Note, *Constitutional Rights of the Corporate Person*, 91 Yale L.J. 1641 (1982).....32
Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745 (2001).....33

JURISDICTIONAL STATEMENT

The Federal Communications Commission (“FCC” or “Commission”) issued the order on review on September 12, 2008. AT&T filed a petition for review on September 25, 2008. The Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

STATEMENT OF ISSUES

I. Whether the FCC erred in concluding that corporations are categorically excluded from the protections of Exemption 7(C) of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(7)(C), which 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.”

II. Whether disclosure of AT&T documents to a trade group representing the interests of AT&T’s competitors would be “unwarranted” within the meaning of Exemption 7(C), where the documents shed no light on the workings of the Government; where they are in the possession of the Government (and therefore subject to a FOIA request) only through the happenstance of a law-enforcement investigation; and where the requesting party has identified no public interest that would be served by disclosure.

STATUTES AND REGULATIONS

The relevant provisions of the FOIA and related statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case arises out of a one-sentence FOIA request submitted to the FCC by CompTel, a trade association representing communications service providers with a long history of antagonism towards AT&T. In its request, CompTel sought the contents of an FCC investigative file relating to an investigation that began when AT&T voluntarily — and confidentially — disclosed to the FCC concerns regarding certain invoices that an AT&T subsidiary had submitted to the FCC's universal service fund administrator.

Upon receiving notice of CompTel's request, AT&T submitted a letter resisting disclosure, *inter alia*, on the ground that the FCC's file included internal AT&T documents that were protected from disclosure by the FOIA's law-enforcement exemption, Exemption 7(C). On August 5, 2005, the FCC's Enforcement Bureau ruled that AT&T, as a corporation, is not entitled to invoke Exemption 7(C). *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel, FOIA Control No. 2005-333 (Aug. 5, 2005) (A 41-46). AT&T filed a timely application for review with the FCC. On September 12, 2008, the FCC released the order at

issue here denying AT&T's application for review. *See* Memorandum Opinion and Order, *SBC Communications Inc. On Request For Confidential Treatment*, FCC 08-207 (rel. Sept. 12, 2008) (“*Order*”) (A 7-13).¹

STATEMENT OF RELATED CASES

In October 2006, while AT&T's application for review was under consideration by the Commission, CompTel filed a FOIA action in the United States District Court for the District of Columbia seeking to compel disclosure. As discussed further below, *see infra* note 5, that action, which does not involve the order underlying this case, is stayed pending the resolution of this case and any necessary remand.

STATEMENT OF FACTS

1. In August 2004 — in connection with an investigation that commenced when AT&T voluntarily and confidentially reported to the FCC concerns about invoices submitted to the federal universal service fund administrator² — AT&T informed the FCC of concerns regarding certain invoices

¹ The *Order* refers to petitioner as SBC Communications Inc. (“SBC”), as do certain filings contained in the record below. In November 2005, SBC acquired AT&T Corp. and changed its name to AT&T Inc. Petitioner is referred to herein as “AT&T.”

² The universal service fund administrator is an independent, not-for-profit corporation that administers the federal universal service fund on behalf of the FCC. *See* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Comprehensive Review of the Universal Service Fund Management*,

related to the FCC's "Education Rate," or "E-Rate," program. The E-Rate program is the universal service mechanism designed to assist schools and libraries in gaining access to telecommunications and advanced communications. *See* 47 C.F.R. §§ 54.500-54.523; Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202, ¶¶ 1-90 (2003) (describing E-Rate).

In its August 2004 disclosure, AT&T explained that its Connecticut subsidiary, Southern New England Telephone Company, had submitted arguably improper invoices to the universal service fund administrator relating to certain services provided to the New London, Connecticut school district. At the same time that it made this disclosure, AT&T refunded all amounts collected pursuant to the questionable invoices, and it cancelled outstanding invoices that raised similar concerns.

In response to AT&T's voluntary disclosure, the FCC's Enforcement Bureau conducted an investigation into AT&T's compliance with the FCC's E-Rate regulations in connection with the New London Public Schools. That investigation was subsequently resolved in a consent decree that involved no admission of wrongdoing on behalf of AT&T. *See* Order and Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004).

Administration, and Oversight, 20 FCC Rcd 11308, ¶ 4 (2005); 47 C.F.R. §§ 54.701-54.702.

In the course of the Enforcement Bureau's investigation, the Bureau ordered AT&T to produce, and AT&T did produce, a wide range of documents. *See* FCC Certified List of Items in the Record at 6 (A 20) (referring to "[AT&T]'s response to the FCC's Letter of Inquiry, with attachments"). These documents include detailed written responses to the Enforcement Bureau's interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed universal service fund invoice forms; internal AT&T emails (including documents attached to those emails) that provide cost, pricing, and billing information in connection with the services provided to New London Public Schools and that indicate how AT&T came to invoice the universal service fund for certain aspects of those services; AT&T billing invoices and maintenance orders; invoices provided from AT&T's vendors for work performed for AT&T; descriptions and pricing information of telecommunications products and services that AT&T's subsidiaries provide to schools and libraries in Connecticut and elsewhere; AT&T's Code of Business Conduct; and AT&T's written views regarding whether and the extent to which its employees had violated that code of conduct. *See generally* Decl. of Leslie Bowman ¶¶ 5-6 ("Bowman Decl.") (describing AT&T documents submitted to the FCC) (A 62-64) (Attach. B to Motion of AT&T Inc. for Stay Pending Judicial Review (3d Cir. filed Sept. 26, 2008) ("AT&T Stay Motion")).

2. On April 4, 2005, CompTel — a trade association representing AT&T’s competitors with a history of attempting to tarnish AT&T’s goodwill and reputation in regulatory proceedings — submitted a one-sentence FOIA request demanding the contents of the Enforcement Bureau’s investigative file. *See* Email from Mary C. Albert, CompTel, to FOIA FCC (Apr. 4, 2005) (A 27). CompTel sought “[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342.” *Id.* Although CompTel did not reveal — either in its FOIA request or thereafter — why it sought the contents of the Bureau’s file, it has long sought to use FCC investigations to portray AT&T as lawless or worse.³

³ *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, 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.

On May 27, 2005, three days after receiving notice of CompTel's request, AT&T submitted a letter opposing disclosure. *See* Letter from Jim Lamoureux, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (May 27, 2005) (A 28-36). AT&T explained that the internal documents that AT&T had produced to the Bureau had been "compiled for law enforcement purposes" and were protected from disclosure under the FOIA's law-enforcement exemption (Exemption 7(C)) and FCC rules implementing that exemption. *See* 5 U.S.C. § 552(b)(7)(C); 47 C.F.R. § 0.457(g)(3). (AT&T also explained that the documents included competitively sensitive information that was protected from disclosure under the FOIA's exemption for confidential commercial information (Exemption 4), *see* 5 U.S.C. § 552(b)(4).) CompTel responded approximately one month later with a letter filing in which it disputed AT&T's claims. *See* Letter from Mary C. Albert, CompTel, to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (June 28, 2005) (A 37-40).

On August 5, 2005, the Enforcement Bureau issued a letter ruling rejecting AT&T's reliance on Exemption 7(C). *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel, FOIA Control No. 2005-333 (Aug. 5, 2005) ("Aug. 5, 2005 FCC Letter") (A 41-46). The Bureau did so solely on the ground that, in its view,

“businesses do not possess ‘personal privacy’ interests as required for application” of Exemption 7(C). *Id.* at 6 (A 46).⁴

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. *See* Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Aug. 19, 2005) (“Aug. 19, 2005 FCC Letter”) (A 47-54). AT&T argued that the “broad” protection afforded by Exemption 7(C) was designed to “protect parties who had been the subject of law enforcement proceedings from embarrassment, reprisal or harassment.” *Id.* at 2 (internal quotation marks and alterations omitted) (A 48). AT&T explained that there was no reason to exclude corporations as a rule from that “broad” protection, thereby potentially subjecting them to “the embarrassment, reprisal or harassment” associated with law-enforcement investigations. *Id.* at 6 (A 52). AT&T further argued that it had concrete privacy

⁴ At the same time, the Bureau found that portions of AT&T’s documents — such as documents revealing AT&T’s “pricing information” — were exempt from disclosure under FOIA Exemption 4. Aug. 5, 2005 FCC Letter at 5 (A 45). In addition, although it ruled that AT&T itself had no protectable interests under Exemption 7(C), the Bureau invoked that exemption (as well as Exemption 6) to redact the names of certain individuals appearing in AT&T’s documents. The Bureau further concluded that CompTel’s request encompassed documents of the FCC that were protected from disclosure under the FOIA’s deliberative-privilege exemption (Exemption 5). *See id.* at 6 (A 46). In light of these holdings, the Bureau stated that it would withhold FCC documents encompassed within CompTel’s FOIA request, and it redacted certain information from AT&T’s documents.

interests in its documents — which were AT&T’s “private possessions,” were not “generally publicly available,” and were in the hands of the FCC only through the happenstance of a law-enforcement investigation that AT&T itself had initiated through its voluntary disclosure. *Id.* at 5 (A 51). Finally, AT&T noted that, under settled precedent, including the Supreme Court’s decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), there was no public interest in the disclosure of AT&T’s documents because they included no information about the Government that would shed any light on governmental activities. *See* Aug. 19, 2005 FCC Letter at 3-4 (A 49-50).⁵

3. On September 12, 2008, the FCC denied AT&T’s application for review and ordered disclosure of AT&T’s records. The Commission explained that it “disagree[d] with [AT&T’s] contention that [it] should withhold all of the

⁵ For its part, CompTel filed an application for review challenging the Enforcement Bureau’s application of Exemption 4 and Exemption 5. *See* Letter from Mary Albert, CompTel, to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Sept. 6, 2005) (A 55-60). Approximately a year later — when the FCC had not yet ruled on its application for review — CompTel initiated a civil action in the United States District Court for the District of Columbia seeking disclosure. *See* Compl., *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. filed Oct. 5, 2006) [Dkt. 1-1]. AT&T intervened and resisted disclosure, in part on the basis of its claim that the AT&T documents at issue were protected by the FOIA’s law-enforcement exemption (Exemption 7(C)). On March 5, 2008, the district court stayed further action pending the FCC’s resolution of “AT&T’s intra-agency appeal” on the issue of Exemption 7(C). Memorandum Opinion and Order, *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008) [Dkt. 32]. That stay remains in place pending the resolution of this case and any remand. *See Order* ¶ 4 (A 9).

documents that [AT&T] submitted in response to [the Enforcement Bureau's] letter of inquiry under Exemption 7(C).” *Order* ¶ 7 (A 10). That was so, the FCC said, because, as a *per se* matter, a corporation cannot hold “‘personal privacy’ interests within the meaning of Exemption 7(C).” *Id.* The Commission based this conclusion largely on case law, primarily *Washington Post Co. v. United States Department of Justice*, 863 F.2d 96 (D.C. Cir. 1988), that, according to the FCC, established that Exemption 7(C) is aimed exclusively at interests of an “‘intimate personal nature.’” *Order* ¶ 7 (quoting *Washington Post*, 863 F.2d at 100) (A 11). Such interests do not apply to corporations, the Commission reasoned, “since,” in the Commission’s view, “a corporation’s interests are of necessity business interests.” *Id.*

The Commission rejected AT&T’s argument that such an interpretation was inconsistent with the purpose of Exemption 7(C) in protecting against the “embarrassment” and “the possibility of harassment” that can come from participation in a law-enforcement investigation. *Id.* ¶ 8 (A 11-12). In the FCC’s view, the aim of Exemption 7(C) is to protect against “the literal embarrassment” an individual might suffer, “not . . . the more abstract impact that disclosure might have on a legal entity like a corporation.” *Id.* (A 12). The FCC also refused to apply precedent from other contexts establishing that corporations have privacy interests because, the Commission asserted, the fact that corporations have

“privacy” interests in “other contexts” is “not controlling for purposes of Exemption 7(C).” *Id.* ¶ 10 (A 12). Based on this analysis, the FCC categorically concluded that “Exemption 7(C) has no applicability to corporations such as [AT&T].” *Id.* ¶ 11 (A 13).⁶

4. The *Order* mandated disclosure of AT&T’s records to CompTel unless AT&T “s[ought] a judicial stay” by September 26, 2008. *Id.* ¶ 12 (A 13). Accordingly, AT&T requested a stay from the FCC on September 23 and, when the Commission did not act on that request, filed a petition for review and a motion for stay with this Court on September 26, 2008.

In seeking a stay, AT&T explained that its petition for review was likely to succeed on the merits because, properly construed, Exemption 7(C) protects corporate, as well as individual, privacy interests. *See* AT&T Stay Motion at 8-18. AT&T further contended that a stay was necessary to prevent the release of AT&T’s documents, thereby preserving AT&T’s right to obtain judicial review and protecting AT&T from irreparable harm. In support of these contentions, AT&T submitted a sworn declaration describing the documents at issue and

⁶ Although the *Order* faults AT&T for failing to request confidential treatment of its records at the time they were submitted, the FCC did not deny AT&T’s application for review or otherwise order disclosure on that basis. *See Order* ¶ 6 (“[W]e have considered the information and arguments subsequently submitted by [AT&T] on our own motion.”) (A 10); *id.* ¶ 11 (“deny[ing] [AT&T’s] application for review” as a result of “find[ing] that Exemption 7(C) has no applicability to corporations”) (A 13); 47 C.F.R. § 0.457(f) (allowing FCC to consider grounds for withholding documents from disclosure on its own motion).

explaining the harm to its goodwill and reputation that would result from disclosure. *See id.* at 6-7; 18-20; Bowman Decl. ¶¶ 7-12 (A 64-66).

Rather than contesting AT&T's right to interim relief, the FCC acquiesced in AT&T's request for stay. *See* Respondent Federal Communications Commission's Response to AT&T's Motion for Stay (3d Cir. filed Oct. 6, 2008) (noting Commission's agreement that it would not release AT&T's documents pending resolution of this appeal).

STANDARD OF REVIEW

As this Court has observed, "an agency can . . . be sued through the vehicle of the Administrative Procedure Act [(“APA”)] for allowing disclosure of information that was in fact covered by one of the nine exemptions to FOIA. This . . . type of suit is commonly referred to as a ‘reverse FOIA’ suit.” *OSHA Data/CIH, Inc. v. United States Dep’t of Labor*, 220 F.3d 153, 160 (3d Cir. 2000) (citations omitted); *see Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1184 (8th Cir. 2000). Because review of all FCC final orders is governed by the Hobbs Act, such a reverse FOIA action, when brought against the FCC, is brought in the court of appeals. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997) (reviewing claim that FCC misconstrued FOIA in ordering production of documents).

In adjudicating a reverse FOIA claim such as the one at hand, this Court owes no deference to the FCC. Because the “FOIA applies government-wide and no one agency administers it,” the FCC is not “entitled to deference” under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), “in interpreting its provisions.” *ACLU v. Department of Defense*, 543 F.3d 59, 66 (2d Cir. 2008). In construing the FOIA and its exemptions, moreover, this Court must keep in mind that the FOIA’s exemptions serve “important interests,” *FBI v. Abramson*, 456 U.S. 615, 630-31 (1982), and that the exemptions “are intended to have meaningful reach and application,” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989); *see also Manna v. United States Dep’t of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995) (“despite these pronouncements of liberal congressional purpose, the Supreme Court teaches us that the statutory exemptions are intended to have meaningful reach and application and should not be construed in a nonfunctional way”) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The text of the FOIA establishes that corporations can claim “personal privacy” interests under Exemption 7(C). The statute defines “person” to include corporations, and Congress’s choice of the adjectival form of that word — “personal” — should be understood to refer to that definition. That reading is confirmed by the fact that, where Congress intends to refer to natural persons and to exclude corporations — both in the FOIA itself and in the closely related Privacy Act of 1974 — it uses the term “individual.” That Exemption 7(C) uses the term “personal privacy” — rather than, say, “individual privacy” — is dispositive here.

The purpose of Exemption 7(C) supports this reading. Exemption 7(C) protects suspects, witnesses, and cooperating parties in law-enforcement investigations from the embarrassment, harassment, and stigma that can result from participating in such investigations. That purpose applies to corporations, which, like individuals, are routinely caught up in law-enforcement investigations and which, like individuals, can face public embarrassment, harassment, and stigma as a result.

Precedent further supports reading Exemption 7(C) as applicable to corporations. In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which the FCC did not address in the *Order*, the D.C. Circuit held that the

“personal privacy” protections in Exemption 6 apply to “private individuals *and companies* who worked on the approval” of a controversial drug. *Id.* at 152 (emphasis added). If, as the D.C. Circuit held, the term “personal privacy” in Exemption 6 encompasses the privacy rights of corporations, that same phrase in Exemption 7(C) must likewise encompass those same rights.

Moreover, 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, the Bill of Attainder Clause, and the Double Jeopardy Clause. Indeed, with respect to the Double Jeopardy Clause, the Supreme Court held that its protections apply to corporations even as it explained that one of the clause’s central purposes is the avoidance of “embarrassment,” which is precisely the interest the FCC has acknowledged is protected by Exemption 7(C).

Finally, that corporations can claim protection under Exemption 7(C) does not mean the privacy interests of corporations must be given the same weight as privacy interests of individuals in every case. Exemption 7(C) is implemented through a balancing test that weighs the public interest in disclosure against the privacy interest at stake. That test is flexible enough to accommodate any relevant

differences between corporations and individuals with respect to privacy and renders unnecessary the FCC's extra-statutory *per se* rule.

The Commission's contrary reading of the statute is unpersuasive. The FCC relied primarily on a line of decisions from the D.C. Circuit suggesting that the privacy protections of Exemptions 6 and 7(C) extend only to the "intimate" details of an individual's private life. But, unlike the FCC in this case, the D.C. Circuit has announced no *per se* rule against recognizing the privacy rights of corporations under Exemption 7(C), and indeed the D.C. Circuit's more recent decision in *Judicial Watch* strongly suggests that the FCC's rule is in fact contrary to D.C. Circuit precedent.

Moreover, even apart from the D.C. Circuit's more recent precedent, to the extent the decisions relied upon by the FCC suggest that Exemption 7(C) covers only "intimate" details of individuals' private lives, those decisions are unpersuasive. The "intimate" details language on which the Commission relies originated in a 1966 House Report involving Exemption 6. Although Exemption 6 (like 7(C)) protects "personal privacy," the legislative history from the 1966 House Report (like the decisions parroting it) has nothing to do with the interpretation of the phrase "personal privacy." Rather, that legislative history goes to the phrase "similar files," which does not appear in Exemption 7(C). It would be an enormous leap to limit the reach of Exemption 7(C) on the basis of legislative

history relating to Exemption 6. It would be an unfathomable one where the legislative history in question addresses statutory language that is not even present in Exemption 7(C).

II. Because the FCC held as a matter of law that corporations are foreclosed from invoking the protections of Exemption 7(C), the agency did not decide whether disclosure of AT&T's documents in this case would be "unwarranted." The Court need not decide that issue here — rather, it can vacate and remand solely on the ground that the FCC's *per se* rule is wrong. But, because the question whether disclosure would be "unwarranted" in this case is a straightforward legal question, the Court is free to address it now and should do so for purposes of efficiency. Although, as noted, courts assessing whether disclosure under Exemption 7(C) is "unwarranted" ordinarily apply a balancing test that weighs the public interest in disclosure against the privacy interest at stake, the Supreme Court has made clear that no such balancing is necessary when the documents sought are private documents that shed no light on governmental activities and when the FOIA requester has failed to identify any public interest in disclosure. Because both conditions are present here, disclosure of AT&T's documents would be "unwarranted" under Exemption 7(C).

ARGUMENT

I. DISCLOSURE OF AT&T’S DOCUMENTS WOULD THREATEN AT&T’S PRIVACY INTERESTS

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). The law is clear that Exemption 7(C) applies to “records” — such as the records in this case — that are “compiled for civil enforcement purposes.” *Rugiero v. United States Dep’t of Justice*, 257 F.3d 534, 550 (6th Cir. 2001); see *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002); *Order* ¶ 7 (A 10). 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). For the reasons explained below, the FCC’s *per se* rule is incorrect.

A. Corporations Can Have Privacy Interests Under Exemption 7(C)

1. The Statutory Text Establishes That Corporations Can Invoke the Privacy Interests Protected by Exemption 7(C)

“Statutory interpretation begins with the language of the statute itself.” *IUE AFL-CIO Pension Fund v. Baker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986) (internal quotation marks omitted). The broadly worded text of Exemption

7(C) — including in particular its express protection against unwarranted invasions of “personal privacy,” 5 U.S.C. § 552(b)(7)(C) — applies to corporations.

Congress broadly defined “person” for purposes of the FOIA to include “an individual, partnership, corporation, association, or public or private organization other than an agency.” *Id.* § 551(2). Thus, for example, courts have long held that FOIA Exemption 4 — which applies to “trade secrets and commercial or financial information obtained from *a person*,” *id.* § 552(b)(4) (emphasis added) — applies to corporations. *See, e.g., Finkel v. United States Dep’t of Labor*, No. 05-5525, 2007 WL 1963163, at *6 (D.N.J. June 29, 2007) (rejecting as “without merit” argument that information from non-natural person was not “obtained from a person” under Exemption 4); *Gilda Indus., Inc. v. United States Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 9 (D.D.C. 2006) (“records are considered to be obtained from a person [under Exemption 4] as long as they were submitted by a partnership, corporation, association, or public or private organization”) (citation and internal quotation marks omitted). Indeed, in the *Order*, the FCC itself specifically acknowledged that corporations such as AT&T can invoke Exemption 4, confirming its understanding that AT&T is a “person” for purposes of the FOIA. *See Order* ¶ 10 n.53 (A 13).

“Personal,” in turn, is defined simply as “[o]f or pertaining to a particular person.” *E.g., American Heritage Dictionary* 925 (2d ed. 1991). Indeed, it is a

“grammatical imperative[.]” that “a statute which defines a noun has thereby defined the adjectival form of that noun.” *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring); *see also E.I. Du Pont de Nemours & Co. v. MacDermid, Inc.*, No. 06-3383, 2008 WL 4952450, at *11 (D.N.J. Nov. 19, 2008) (relying on the dictionary definition of the “noun ‘elastomer’” to interpret the phrase “elastomeric binder” in a patent because “‘elastomeric’” is “the adjective form of the noun”). By expressly defining the noun “person” to include corporations, Congress necessarily defined “the adjectival form of that noun” — *i.e.*, “personal” — to likewise include corporations.

A comparison with related statutes confirms that Congress’s reference to “personal” in the FOIA extends to corporations and cannot be limited to natural persons. The text and scope of the Privacy Act of 1974, 5 U.S.C. § 552a, for example, demonstrate that Congress knows how to extend protections exclusively to natural persons when it intends that result. The protections of the Privacy Act extend only to “individual[s],” *id.* § 552a(a)(2), which *excludes* “corporations or sole proprietorships,” *St. Michael’s Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981). “In choosing the word ‘individual’ as the object of the Privacy Act’s protections, Congress demonstrated its awareness and preference for the narrower scope of that term, rather than the broader scope of the term ‘person’

to which the FOIA applies.” *Florida Med. Ass’n v. Department of Health, Educ. & Welfare*, 479 F. Supp. 1291, 1307 (M.D. Fla. 1979). The significance of this structural evidence of congressional intent is heightened by the fact 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 the FOIA, *id.* § 552(e)), while separately defining “individual” under Section 552a(a)(2).

Indeed, Congress used “person” and “individual” in the Privacy Act simultaneously, further confirming 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). Yet, unlike the Privacy Act, FOIA Exemption 7(C) does *not* use the term “individual” (*e.g.*, “individual privacy”) or include any other textual indication of an intent to exclude corporations. The absence of such a limitation is compelling evidence that the scope of Exemption 7(C) is not so limited. *See, e.g., United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear”).

Even within the FOIA exemptions themselves, Congress differentiated between the term “personal” (as, for example, in Exemption 7(C)) and the term “individual” (for example, in Exemption 7(F), *see* 5 U.S.C. § 552(b)(7)(F)). That choice 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), and further confirms that Congress knew how to refer to non-natural persons when it intended.

That Exemption 7(C) uses the adjectival form of the word “person” — that is, “personal” — to describe the privacy interests at stake does not suggest a different result. Again, it is a “grammatical imperative[.]” that “a statute which defines a noun has thereby defined the adjectival form of that noun.” *Delaware River*, 440 F.3d at 623 (Fisher, J., concurring). Because Congress defined “person” to include a corporation, it follows that “the adjectival form of that noun” — *i.e.*, “personal” — likewise includes a corporation. *Id.* Moreover, the word “personal,” no less than “person,” can quite comfortably be used to refer to corporations. For example, 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”); *see also infra* p. 32, 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, 110 (1987); 28 U.S.C. § 1391(c) (“a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to *personal* jurisdiction”) (emphasis added).

“The privacy interests protected by the exemptions to FOIA are broadly construed.” *Associated Press v. United States Dep’t of Justice*, No. 07-1384-cv, 2008 WL 5047793, at *2 (2d Cir. Dec. 1, 2008) (to be reported at --- F.3d ---); *see National Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004) (“the concept of personal privacy under Exemption 7(C) is not some limited or ‘cramped notion’ of that idea”) (citation omitted). Congress’s express definition of “person,” coupled with the fact that in the privacy context in particular Congress uses “individual” when it intends to restrict a term to natural persons, establishes at a minimum that the term “personal privacy” in Exemption 7(C) can be read to encompass the privacy rights of corporations. It follows that, when “broadly construed” consistent with Supreme Court precedent, *Associated Press*, 2008 WL 5047793, at *2, Exemption 7(C) must be read in that way.

2. *Reading Exemption 7(C) To Protect Corporations Is Consistent with the Purpose of the Statute To Protect Against Embarrassment, Harassment, and Stigma*

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 purpose. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of “the objects and policy of the law”) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)); *McCreary County. v. ACLU*, 545 U.S. 844, 861 (2005) (“[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country”).

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 “[s]uspects, interviewees and witnesses have a privacy interest because disclosure [of requested information] may result in embarrassment or harassment.” *Davin v. United States Dep’t of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995); *see Voinche v. FBI*, 940 F. Supp. 323, 331 (D.D.C. 1996) (Exemption 7(C) provides protection against “the stigma frequently attached to law enforcement proceedings and investigations”), *aff’d*, No. 95CV01944, 1997 WL 411685 (D.C. Cir. June 19, 1997). In other words, Exemption 7(C) protects the personal privacy of those parties participating in law-enforcement investigations — whether as

suspects, witnesses, or cooperating parties, *see Manna*, 51 F.3d at 1166 — because the disclosure of information pertaining to those investigations may be used to embarrass, harass, or stigmatize those parties.

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 public embarrassment, harassment, and stigma based upon their involvement in such investigations.⁷ The FCC’s construction of Exemption 7(C) thus categorically excludes an important category of actors that can be swept into law-enforcement investigations, and then later made to suffer serious consequences. That outcome cannot be squared with the exemption’s purpose.

⁷ 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.”).

Beyond that, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other non-natural persons in law-enforcement investigations. 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 Commission held here, be made public based on nothing more than a one-sentence FOIA request. *See Abramson*, 456 U.S. at 630 (observing that Exemption 7(C) guards against “potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure”).⁸

⁸ FOIA Exemption 4, which protects “trade secrets” as well as “commercial or financial information . . . [that is] privileged or confidential,” 5 U.S.C. § 552(b)(4), is not sufficient to protect against this result, as this case illustrates. The FCC below proposed to redact information that it believed met the dictates of Exemption 4. *See Order* ¶ 3 (A 8); *supra* p. 19. Yet the documents that remain unredacted — and that the Commission ordered disclosed to CompTel in the *Order* — nevertheless contain confidential internal information about AT&T’s alleged wrongdoing that, even if not competitively sensitive within the meaning of Exemption 4, could nevertheless be used to embarrass or stigmatize the corporation. *See supra* p. 5 (observing that the documents at issue contain, for example, information about how AT&T’s subsidiary came to bill the invoices in question, as well as AT&T’s own views on whether its actions were in compliance with its own Code of Conduct).

3. *Precedent Supports Reading Exemption 7(C) as Applicable to Corporations*

Precedent, including in particular the D.C. Circuit's recent decision in *Judicial Watch*, further supports reading Exemption 7(C) to recognize that corporations may have privacy rights implicated by a FOIA request.

In *Judicial Watch*, the D.C. Circuit construed 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) (emphasis added) — to protect the privacy interests of a corporation. There, the Food and Drug Administration (“FDA”), citing FOIA Exemption 6, had withheld information relating to “private individuals *and companies* who worked on the approval” of a controversial drug. 449 F.3d at 152 (emphasis added). The petitioner argued that such information could not be withheld because it was not “about an individual.” *Id.* The D.C. Circuit rejected that “crabbed reading of the statute,” noting that the Supreme Court has instructed that the privacy interests protected by the FOIA should be construed “broadly.” *Id.* The court further explained that the privacy interests at stake under the FOIA “vary depending on . . . context” and that, in that case, disclosure of information about “persons *and businesses* associated with [the drug]” risked retaliation against those persons and businesses and therefore implicated the privacy interests of Exemption 6. *Id.* at 153 (internal quotation marks omitted, emphasis added). The court thus held that

the FDA's withholding of documents under the "personal privacy" protections of Exemption 6 was proper to protect private parties — including "companies" and "businesses" — "from the injury and embarrassment that can result from the unnecessary disclosure" of protected information. *Id.* at 152-53 (quoting *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982)).

Judicial Watch establishes that, contrary to the FCC's conclusion here, corporations can have "personal privacy" interests protectable under the FOIA. Although *Judicial Watch* involved "personal privacy" under Exemption 6, as the FCC has acknowledged, "the relevant privacy interest covered by" Exemptions 6 and 7(C) are at least coextensive. *Order* ¶ 7 n.33 (A 10) (internal quotation marks omitted). Indeed, Congress provided a "broader degree of protection to privacy interests" under Exemption 7(C) than under Exemption 6. *Hopkins v. United States Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 86 (2d Cir. 1991) (emphasis added). If, as the D.C. Circuit held, the "personal privacy" interests protected by Exemption 6 can extend to corporations, it follows that those same interests may likewise extend to corporations under the "broader" protection afforded by Exemption 7(C).⁹

⁹ The D.C. Circuit's recent statement that "businesses . . . do not have protected privacy interests under Exemption 6," *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224, 1228 (D.C. Cir. 2008), was *dicta* that does not overrule the holding of *Judicial Watch*. The *Multi Ag Media* panel made that statement while addressing an issue the parties had not "contest[ed]" and in the

4. *That Corporations Have Privacy Interests in Other Contexts Further Confirms Reading Exemption 7(C) To Recognize Such Rights*

An interpretation of Exemption 7(C) that recognizes the privacy interests of corporations draws still more support from other areas of the law that likewise recognize such privacy interests.

The Supreme Court has held that corporations have privacy interests under the Fourth Amendment. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the Court noted that “business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context.” *Id.* at 353. But, the Court emphasized, “the intrusion into [G.M. Leasing’s] *privacy*” at issue in the case “was not based on the nature of its business, its license, or any regulation of its activities.” *Id.* at 354 (emphasis added). Because the intrusion at issue in that case was in connection with the ordinary enforcement of the laws, the Court “[found] no justification for treating petitioner differently in these circumstances simply because it is a corporation.”

course of concluding that information in business records was “traceable to an *individual*” and therefore within the scope of Exemption 6. *Id.* The court thus had no occasion to revisit the holding in *Judicial Watch* that corporations as such can invoke the “personal privacy” protections of Exemption 6. Although prior to *Judicial Watch* the D.C. Circuit had twice stated in dicta that Exemption 6 does not apply to corporations, *see National Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 685 & n.44 (D.C. Cir. 1976); *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980), *aff’d in part, rev’d in part*, 471 U.S. 159 (1985), such dicta can no longer be considered correct after *Judicial Watch*.

Id.; see also *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (“Dow [Chemical Co.] 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.”).

G.M. Leasing establishes two principles relevant here. *First*, there is nothing unusual about speaking of corporations as possessing “privacy” interests. See, e.g., 429 U.S. at 354. For that reason, a construction of Exemption 7(C) that recognizes corporations’ privacy interests would break no new ground.

Second, *G.M. Leasing* establishes that a departure from the presumption that a corporation has an expectation of privacy should be tied to some corporate attribute that warrants differential treatment. See *id.* at 353-54. Here, however, the FCC made no effort to tie its *per se* rule foreclosing corporations in all cases from claiming the protections of Exemption 7(C) to any corporate attribute. Thus, as in *G.M. Leasing*, there is on this record “no justification for treating [AT&T] differently” for the purpose of invoking Exemption 7(C) “simply because it is a corporation.” *Id.* at 354.¹⁰

¹⁰ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), is not to the contrary. There, the Court held that corporations cannot “plead an *unqualified* right to conduct their affairs in secret” under the Constitution in the face of an agency’s “legitimate right to satisfy [itself] that corporate behavior is consistent with the law.” *Id.* at 652 (emphasis added). At most, *Morton* holds that “corporations enjoy narrower rights to privacy” because of “the state’s interest in investigating corporate wrongdoing.” *Consolidated Edison Co. v. Pataki*, 292 F.3d

Apart from *G.M. Leasing*, numerous decisions of federal courts establish that corporations have cognizable privacy interests in a range of circumstances. In *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), for example, the Seventh Circuit found that, “while the expectation of privacy of a regulated carrier is limited, it nevertheless exists,” reasoning that there “are internal corporate papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items (which is) a reason for limiting the occasion of (their) production.” *Id.* at 399 (citation and internal quotation marks omitted).

Similarly, in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the D.C. Circuit held that “legitimate expectations of privacy can be invoked by corporations to suppress the fruits of a search of corporate premises,” which, the court reasoned, “demonstrates an understanding that a compulsory search of even corporate premises may constitute an intrusion upon privacy.” *Id.* at 304 (footnotes omitted); *see also Henzel v. United States*, 296 F.2d 650, 652 (5th Cir. 1961) (“a corporation has the same rights as a natural person to be free from illegal searches and seizures”). In addition, federal courts have held that “corporate [and]

338, 348 (2d Cir. 2002). *Morton* does not suggest (as the FCC held here) that corporations have no privacy interests whatsoever, nor is there any suggestion that disclosure of AT&T documents (relating to an already-completed law-enforcement investigation) to a private association representing the interests of AT&T’s competitors is in any way justified by the public interest in policing corporate behavior.

business entities,” in addition to “natural persons,” are entitled to bring “invasion of privacy claims” under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. *See Park Univ. Enters., Inc. v. American Cas. Co.*, 442 F.3d 1239, 1247 n.4 (10th Cir. 2006) (collecting cases).

Nor is it uncommon for constitutional protections that are designed to safeguard the interests of individuals also to apply to corporations. In addition to the Fourth Amendment context noted above, corporations can invoke rights under the First Amendment, *see First Nat’l Bank v. Bellotti*, 435 U.S. 765, 784 (1978), the Due Process Clause, *see Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28-29 (1889), the Equal Protection Clause, *see Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); *see also* Note, *Constitutional Rights of the Corporate Person*, 91 Yale L.J. 1641, 1642 n.6 (1982) (“Since the turn of the century, business corporations have consistently been deemed persons for the purposes of the due process and equal protection guarantees of the Fourteenth Amendment.”), and the Bill of Attainder Clause, *see Consolidated Edison*, 292 F.3d at 349.

Indeed, of particular significance here, the Supreme Court has expressly recognized that corporations can invoke constitutional protections — akin to the protections of Exemption 7(C) — that are rooted in the desire to prevent embarrassment and anxiety. The Fifth Amendment’s guarantee against double

jeopardy, the Court has explained, is intended to ensure that a defendant is not “subject[ed] . . . to embarrassment, expense and ordeal” and to protect against the “continuing state of anxiety and insecurity” resulting from a second trial. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (internal quotation marks omitted). The Court then held that the Double Jeopardy Clause applied in a case involving a “criminal contempt proceeding” involving two defendant “linen supply companies.” *Id.* at 565 n.1. *Martin Linen*, in other words, “included corporations within the Fifth Amendment’s protection against double jeopardy, arguing that such protection was necessary to protect corporations from such . . . human experiences as ‘embarrassment,’ ‘anxiety,’ and ‘insecurity.’” Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1754 (2001).

In short, in many areas of law, corporations are entitled to invoke the same protections as individuals, including protections rooted in fundamental privacy concerns. For that reason, and because the privacy interest protected under Exemption 7(C) is broader than and “goes beyond” that protected by the Constitution, *Favish*, 541 U.S. at 170; *Reporters Comm.*, 489 U.S. at 762 n.13, these precedents further support a reading of Exemption 7(C) that recognizes that corporations may have protectable privacy interests.

5. *Reading Exemption 7(C) as Applicable to Corporations Would Not Require Identical Treatment with Individuals in All Cases*

Finally, it is not the case that construing Exemption 7(C) to protect corporations means the privacy interests of corporations must in all cases be given the same weight as the privacy interests of individuals. In the ordinary case arising under Exemption 7(C), when the party requesting the documents establishes a threshold legitimate public interest in disclosure, *see Favish*, 541 U.S. at 172, courts are required to “balance” that public interest against the “privacy interests that are at stake.” *E.g., Computer Prof’ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (internal quotation marks omitted). Such a balancing approach can readily take into account any relevant differences between corporations and individuals with respect to the privacy interests implicated by disclosure. Indeed, the flexibility of such a balancing test underscores why the Commission’s *per se* exclusion of corporations from the protections of Exemption 7(C) in all cases is unnecessary and inappropriate.

B. The FCC’s Contrary Arguments Are Unavailing

1. The FCC’s categorical exclusion of corporations from the protections of Exemption 7(C) is in no way rooted in the text or structure of the statute. Indeed, the *Order* barely acknowledges the statutory text, and it makes no effort to explain how the statutory term “personal privacy” can be read categorically to

exclude corporations, when the very same statute defines “person” to include corporations.

Rather than grappling with the text and structure of the statute, the Commission grounded its categorical exclusion of corporations primarily on a 1988 decision from the D.C. Circuit (*Washington Post*). In the Commission’s view, that decision establishes that “personal privacy” as that term appears in Exemption 7(C) is concerned (apparently exclusively) with “intimate personal” matters such as “marital status” and “family fights.” *Order* ¶ 7 (A 11) (internal quotation marks omitted). Because such “intimate” matters are not relevant to corporations, the Commission reasoned, corporations cannot as a rule avail themselves of Exemption 7(C). *See id.*

As a threshold matter, however, *Washington Post* does not establish a *per se* rule foreclosing corporations from invoking the protection of Exemption 7(C).¹¹ Thus, even if it were binding here, that decision could not be said to compel the rule adopted by the FCC. Equally important, the more recent D.C. Circuit decision in *Judicial Watch* establishes both that the “personal privacy” protections of

¹¹ Compare *Washington Post*, 863 F.2d at 100 (“[f]inding that none of the privacy interests encompassed by Exemption 7(C) would be implicated by disclosure” of the special committee report at issue in that case because the report involved “business decisions” relating to “development and marketing of a commercial product” and not allegations that employees had “committed a crime”) with *Order* ¶ 11 (concluding that “Exemption 7(C) has no applicability to corporations such as [AT&T]”) (A 13).

Exemption 6 can extend to “businesses” and “companies” and that such entities can claim protection under the statute’s purpose of protecting against the “embarrassment that can result from the unnecessary disclosure” of protected information. 449 F.3d at 152-53 (internal quotation marks omitted). As the D.C. Circuit’s “more recent” pronouncement regarding the interests protected by the term “personal privacy” in the FOIA, *Judicial Watch* is the “law of [that] circuit.” *Halperin v. Kissinger*, 807 F.2d 180, 193 n.11 (D.C. Cir. 1986). Thus, far from being compelled by D.C. Circuit precedent, the FCC’s *per se* rule in fact conflicts with it.

Furthermore, to the extent *Washington Post* is properly read to hold that the “personal privacy” protection in Exemption 7(C) extends only to the “intimate” details of an individual’s private life, it not only is superseded by *Judicial Watch*, but also is wrong. The origin of the D.C. Circuit’s emphasis on the “intimate” details of an individual’s private life — in connection with the “personal privacy” protections of the FOIA — is *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1973), a decision interpreting Exemption 6. *Rural Housing*, in turn, relied on a 1966 House Report that, as the *Rural Housing* court observed, stated that Exemption 6 was “designed to protect individuals from public disclosure of intimate details” and cited such examples as “marital status” and “legitimacy of children.” 498 F.2d at 76-77 & n.13 (citing H.R. Rep. No. 89-

1497 (1966)). Notably, however, the court in *Rural Housing* did not purport to hold that protecting against disclosure of such details *exhausted* the purposes of Exemption 6 (nor did it purport to construe Exemption 7(C) at all). Nonetheless, this analysis has been repeated reflexively and without analysis in cases such as *Washington Post*,¹² and it is the apparent basis for the Commission’s interpretation of Exemption 7(C) here.

The legislative history of Exemption 6 relied on by the D.C. Circuit in *Rural Housing* and successive cases — and, by extension, by the Commission below — provides no basis for excluding corporations from Exemption 7(C).

First, the legislative history of Exemption 6 sheds no light on the phrase “personal privacy.” In *Rural Housing*, the issue before the court was whether an “investigatory report” was a “similar file[]” within the meaning of Exemption 6. 498 F.2d at 76. The court held that the report was a “similar file” — and that the phrase was not limited to “Veterans’ Administration or Social Security files” — because a contrary holding would conflict with the stated purpose of Exemption 6 in the legislative history of “protect[ing] individuals from public disclosure of intimate details of their lives.” *Id.* at 77. The court thus relied on the legislative

¹² See *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (citing and quoting *Rural Housing* for the view that the privacy interests under Exemption 6 includes intimate details); *Sims*, 642 F.2d at 574 (citing *Rural Housing* as to the scope of Exemption 6); *Washington Post*, 863 F.2d at 100 (citing *Sims* and *Cohen* for the proposition that “personal privacy” in Exemption 7(C) refers to “intimate” details of an individual’s private life).

history of Exemption 6 to interpret the phrase “similar file[s]” in Exemption 6 (a phrase that does not appear in Exemption 7(C)); it was not even purporting to interpret the phrase “personal privacy” in Exemption 6. It is, of course, a significant leap to ascribe the legislative history of Exemption 6 to the later-enacted Exemption 7(C) under any theory; it is beyond the pale to make that leap here, where the legislative history at issue did not even address the relevant statutory term. *Cf. Moskal v. United States*, 498 U.S. 103, 111 (1990) (there is no “require[ment] that every permissible application of a statute be expressly referred to in its legislative history”).¹³

Second, and in all events, reliance on the legislative history of Exemption 6 to exclude corporations from Exemption 7(C) cannot be squared with the rule 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 Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)). As the Supreme Court has said, “it is not, and cannot be, our practice to restrict the unqualified language of a

¹³ The Commission’s reliance on *Chadmoore Communications, Inc.*, 13 FCC Rcd 23943 (1998), is of no help to the FCC here. That decision simply applied decisions such as the ones discussed in the text with little analysis. *See Order* ¶ 7 (A 10-11). Moreover, this Court owes no deference to the FCC’s interpretation of the FOIA, *see supra* p. 13, whether that interpretation is set forth in the order on review or a previous order.

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). That principle has even more force in this case where the only legislative history that discusses “intimate” details involves a different FOIA exemption.

2. The *Order* also states that “Exemption 7(C) focus[es] on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of harassment.” *Order* ¶ 8 (A 11-12). The FCC then asserted that, to fall within the scope of Exemption 7(C), the disclosure must cause “literal embarrassment.” *Id.* This line of argument is equally unpersuasive.

First, this limitation — like a limitation to “intimate” details — has no basis in the text, which refers generically to “unwarranted” invasions of “personal privacy,” not to invasions of privacy that cause “literal embarrassment” (whatever that means). Relatedly, to the extent the FCC’s conclusion that the statute is limited to “literal embarrassment” of an individual rests on *Washington Post* and *Cohen*, the Commission’s analysis is mistaken, as explained above. *See supra* pp. 36-38.

Second, the Commission’s narrow interpretation conflicts with the purpose of Exemption 7(C). Again, the purpose of Exemption 7(C) is to protect the privacy interests of entities involved in law-enforcement investigations for the practical reason of preserving the proper incentives of third parties to cooperate fully in such investigations. *See Abramson*, 456 U.S. at 630; *Arizechi v. IRS*, Civ. No. 06-CV-5292, 2008 WL 539058, at *6 (D.N.J. Feb. 25, 2008). Corporations, just like individuals, can be swept into law-enforcement investigations as cooperating parties or suspects. Corporations, just like individuals, can be made to suffer harassment, embarrassment, and stigma from participation in such investigations, with deleterious consequences. *See supra* pp. 24-26. Again, there is no “justification” — either in the text of the statute or on this record — “for treating [AT&T] differently in [this particular] circumstance[] simply because it is a corporation.” *G.M. Leasing*, 429 U.S. at 354.

Finally, even accepting the premise that “literal embarrassment” is the touchstone of Exemption 7(C), that does not support the conclusion that corporations are beyond its scope. As explained above, the Supreme Court, having explained that the Double Jeopardy Clause protects against “embarrassment” and “anxiety,” expressly applied that protection to corporations. *Martin Linen*, 430 U.S. at 569 (internal quotation marks omitted). There is no basis for concluding that Congress intended a different result under the FOIA.

II. THE INVASION OF AT&T'S PRIVACY CAUSED BY DISCLOSURE OF AT&T'S DOCUMENTS WOULD BE "UNWARRANTED"

As explained at the outset, because the Commission concluded that corporations are categorically excluded from the scope of Exemption 7(C), the Commission did not reach the question whether the invasion of privacy occasioned by disclosure of AT&T's documents in this case would be "unwarranted."

5 U.S.C. § 552(b)(7)(C). For the reasons explained in Part I of this brief, the Commission's categorical rule foreclosing corporations from invoking the protections of Exemption 7(C) is incorrect. The *Order* must be reversed and remanded on that basis alone, and the Court need go no further to resolve this case.

Petitioners respectfully suggest, however, that the Court should address the question whether disclosure is warranted here. In the circumstances of this case, that question can be resolved purely as a question of law (on which the Commission is owed no deference, *see supra* p. 13). For reasons of efficiency, this Court should address that question now, rather than remanding for the agency to do so in the first instance. *See United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 445 (3d Cir. 2005) (declining to remand for application of proper legal standard where this Court could decide the issue "as a matter of law"); *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 307 (3d Cir. 1986) (this Court need not remand after holding that lower court failed "to apply the correct legal standard" when the "the

record permits only one resolution of the factual issue”) (internal quotation marks omitted).

A. As explained above, it is typically the case that the determination of whether invasion of a privacy interest is “unwarranted” is decided by application of a balancing test that gauges the public interest in disclosure and weighs that public interest against the invasion of privacy that would result. *See supra* p. 34. In this case, however, there is no need for such balancing because CompTel, as a matter of law, has not established *any* public interest in the disclosure of AT&T’s documents. This case therefore falls under the “categorical” rule, articulated by the Supreme Court in its seminal decision involving Exemption 7(C), establishing that the FOIA does not require disclosure of documents under Exemption 7(C) where the requester fails to identify any public interest in disclosure. *See Reporters Comm., supra.*

In *Reporters Committee*, the Supreme Court addressed whether the contents of a “rap sheet” could be disclosed consistent with FOIA Exemption 7(C), notwithstanding that “much rap-sheet information is a matter of public record.” 489 U.S. at 753. In assessing whether disclosure was warranted in those circumstances, the Court explained that “categorical decisions [under the FOIA] may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction.” *Id.* at 776.

The Court then held that, “as a categorical matter[,] . . . a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, *and that when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing*, the invasion of privacy is unwarranted.” *Id.* at 780 (emphasis added). The foundation for that rule is the recognition that the purpose of the FOIA is to ensure “the citizens’ right to be informed about what their government is up to” and that such a purpose is not furthered by “disclosure” of private documents “accumulated in various governmental files.” *Id.* at 773 (internal quotation marks omitted).

Application of that principle here compels the conclusion that AT&T’s documents are protected under Exemption 7(C). None of the AT&T records that CompTel seeks contains “official information” about the FCC or otherwise pertains to the conduct of the FCC. *Id.* at 780. The request is instead aimed at obtaining information *about AT&T*, contained in *AT&T’s* own documents, that “the Government happens to be storing” only because *AT&T* voluntarily brought an issue to the FCC’s attention in the first place. *Id.* Under *Reporters Committee*, that interest in disclosure lacks any weight. *See id.* at 774 (“the FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the

warehouse of the Government be so disclosed”) (emphases omitted). It follows that disclosure of AT&T’s documents is “unwarranted” under Exemption 7(C). *See Carpenter v. United States Dep’t of Justice*, 470 F.3d 434, 441 (1st Cir. 2006) (disclosure of documents that a competitor provided to the government would not further the public interest “because reviewing such documents tells the public nothing about the actions of the government”); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (“We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.”); *Associated Press*, 2008 WL 5047793, at *3 (“requested document must produce information revealing what government is up to”) (internal quotation marks and alterations omitted); *Wolk v. United States*, No. Civ. A. 04-cv-832, 2005 WL 465382, at *6 (E.D. Pa. Feb. 28, 2005) (“Under Exemption 7(C), the only relevant public interest focuses on the citizens’ right to be informed about what their government is up to.”) (internal quotation marks omitted).¹⁴

¹⁴ Because CompTel’s failure to establish a public interest in disclosure alone warrants non-disclosure under *Reporters Committee*, the Court need not inquire into the precise nature of AT&T’s privacy interests at stake. In the event the Court were to undertake such an inquiry, it should conclude that AT&T’s privacy interests are substantial. All of AT&T’s documents requested by CompTel pertain in some way to conduct by AT&T related to potential violations of FCC rules. The requested documents contain facts and descriptions that reveal the what,

B. Because AT&T's documents are protected under Exemption 7(C), the Commission may not disclose them.

Although the FOIA itself does not prohibit an agency from disclosing documents that fall within a statutory exemption, disclosure of protected documents is unlawful when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Campaign for Family Farms*, 200 F.3d at 1184. Under that standard, when documents and information are protected under the FOIA, and "something independent of FOIA prohibits disclosure," disclosure is prohibited. *Campaign for Family Farms*, 200 F.3d at 1185.

Here, the FCC's regulations prohibit the disclosure of documents that fall within Exemption 7(C). See 47 C.F.R. § 0.457(g); Memorandum Opinion and Order, *Patrick A. Linstruth*, 16 FCC Rcd 17409, ¶ 2 (2001) (affirming Bureau decision to withhold documents because they fall within applicable FOIA

when, where, why, and how of the allegations in a law-enforcement investigation. These private, internal documents relate to the decision-making processes that led to the alleged violations of the FCC rules, the period of time over which those alleged violations occurred, and AT&T's internal responses to the arguable misconduct. With those details of supposed wrongdoing in hand, CompTel could piece together basic time lines and theories of how and why the arguable violations of FCC rules came about. Such information could then be used to embarrass, harass, and stigmatize AT&T by, for example, citing such information in press releases, public comments to the FCC, advertisements, or news reports. See Bowman Decl. ¶¶ 7-10 (A 64-65). CompTel has engaged in just such conduct in the past. See *supra* p. 6 & note 3.

exemption and Commission's implementing rule). Because, for the reasons explained above, disclosure of AT&T's documents would invade AT&T's "privacy" and because such disclosure would be "unwarranted," the Commission may not lawfully disclose AT&T's documents. *See Campaign for Family Farms*, 200 F.3d at 1185 (because agency regulations imposed essentially the same test as under Exemption 6, a determination that Exemption 6 was met prevented disclosure under APA); *American Fed'n of Labor v. FEC*, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (holding, under *Campaign for Family Farms*, that agency's "refusal to apply Exemption 7(C) to bar release of the names and other identifying information of third-party individuals referred to in its investigative files is arbitrary, capricious and contrary to law"), *aff'd*, 333 F.3d 168 (D.C. Cir. 2003).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review, vacate the *Order*, and direct the Commission not to disclose AT&T's documents. Alternatively, the Court should grant the petition for review, vacate the *Order*, and remand to the FCC to decide whether disclosure of AT&T's documents would be "unwarranted" in the circumstances of this case.

Respectfully submitted,

/s/ Colin S. Stretch

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
(202) 326-7900

Wayne Watts
Paul K. Mancini
AT&T SERVICES INC.
208 S. Akard Street, Suite 3505
Dallas, Texas 75202
(214) 757-3360

Gary L. Phillips
Terri Hoskins
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3055

Counsel for AT&T Inc.

December 19, 2008

COMBINED CERTIFICATIONS

Bar Membership: Pursuant to Third Circuit LAR 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, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font, and accordingly 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 LAR 31.1(c), that the text of the electronic (PDF) version of this brief (filed with the Court on the Court's electronic filing system) is identical to the text in the paper copies of the brief sent to the Court by overnight mail.

Virus Check: I hereby certify, pursuant to Third Circuit LAR 31.1(c), that a virus detection program (Symantec AntiVirus, version 10.1.4.4000) has been run on the electronic version of the brief and that no viruses have been detected.

/s/ Colin S. Stretch
Colin S. Stretch
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for AT&T Inc.

December 19, 2008

ADDENDUM

TABLE OF CONTENTS

	Page
United States Code:	
Freedom of Information Act, 5 U.S.C. § 552(b)	Add. 1
Privacy Act of 1974, 5 U.S.C. § 552a (excerpts)	Add. 3
5 U.S.C. § 552a(a)	Add. 3
5 U.S.C. § 552a(b)	Add. 4
47 C.F.R. § 0.457(g)	Add. 6

5 U.S.C. § 552

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

* * *

(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), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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 technically 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.

* * *

5 U.S.C. § 552a

§ 552a. Records maintained on individuals

(a) Definitions. --For purposes of this section--

(1) the term “agency” means agency as defined in section 552(e) of this title;

(2) the term “individual” means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term “maintain” includes maintain, collect, use, or disseminate;

(4) the term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term “system of records” means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term “statistical record” means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term “routine use” means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term “matching program”--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by,

applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

* * *

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication 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, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the

agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * *

47 C.F.R. § 0.457

§ 0.457 Records not routinely available for public inspection.

* * *

(g) Investigatory records compiled for law enforcement purposes, to the extent that production of such records would:

- (1) Interfere with enforcement proceedings;
- (2) Deprive a person of a right to fair trial or an impartial adjudication;
- (3) Constitute an unwarranted invasion of personal privacy;
- (4) Disclose the identity of a confidential source;
- (5) Disclose investigative techniques or procedures; or
- (6) Endanger the life or physical safety of law enforcement personnel, 5 U.S.C. 552(b)(7).

APPENDIX
Volume I (A 1-14)

TABLE OF CONTENTS
Volume I

	Page
Petition for Review (filed Sept. 26, 2008) (without attachments).....	A 1
Memorandum Opinion and Order, <i>SBC Communications Inc.</i> <i>On Request For Confidential Treatment</i> , FCC 08-207 (rel. Sept. 12, 2008)	A 7
Order Granting Motion to Expedite Appeal (Nov. 19, 2008).....	A 14

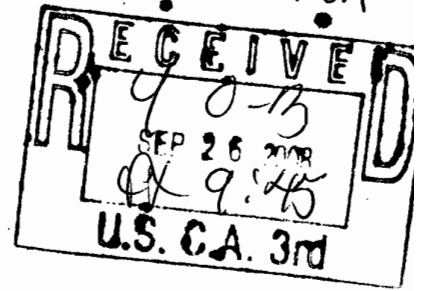
Volume II

Certified List of Items in the Record (File No. EB-04-IH-0342).....	A 15
Email from Mary C. Albert, CompTel, to FOIA FCC (Apr. 4, 2005)	A 27
Letter from Jim Lamoureux, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (May 27, 2005).....	A 28
Letter from Mary C. Albert, CompTel, to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (June 28, 2005)	A 37
Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel, FOIA Control No. 2005-333 (Aug. 5, 2005).....	A 41
Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Aug. 19, 2005)	A 47
Letter from Mary Albert, CompTel, to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Sept. 6, 2005).....	A 55

Declaration of Leslie Bowman, Attachment B to Motion of
AT&T Inc. for Stay Pending Judicial Review (3d Cir.
filed Sept. 26, 2008).....A 61

No check

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



AT&T INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 08-4024

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, AT&T Inc. ("AT&T") hereby petitions this Court for review of an order of the Federal Communications Commission. See Memorandum Opinion and Order, *SBC Communications Inc. On Request for Confidential Treatment*, FCC 08-207 ("Order"). The Order, a copy of which is attached to this petition, was released on September 12, 2008. Venue is proper under 28 U.S.C. § 2343.

AT&T seeks review on the grounds that the Order is arbitrary and capricious and contrary to law. AT&T asks this Court to hold the Order unlawful and to enter an order vacating, enjoining, and setting aside the Order.

Respectfully submitted,



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
(202) 326-7900
(202) 326-7999 (facsimile)

WAYNE WATTS
PAUL K. MANCINI
AT&T INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

GARY L. PHILLIPS
TERRI HOSKINS
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2055

Counsel for AT&T Inc.

September 25, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT


_____)	
AT&T INC.,)	
)	
	Petitioner,)	
)	
	v.)	No. _____
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
	Respondents.)	
_____)	

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, AT&T Inc. submits the following corporate disclosure statement:

AT&T Inc. has no parent company. No publicly held company owns 10 percent or more of AT&T Inc.'s stock.

Respectfully submitted,



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
(202) 326-7900
(202) 326-7999 (facsimile)

WAYNE WATTS
PAUL K. MANCINI
AT&T INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

GARY L. PHILLIPS
TERRI HOSKINS
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2055

Counsel for AT&T Inc.

September 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of September 2008, I caused copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served upon each of the following on the attached service list by hand delivery.



Robyn L.M. Sommerfield

SERVICE LIST

**FEDERAL COMMUNICATIONS
COMMISSION**

Matthew Berry
General Counsel
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

COMPTÉL

Mary C. Albert
CompTel
900 17 Street, N.W., Suite 400
Washington, D.C. 20006
(202) 926-6650

UNITED STATES OF AMERICA

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

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
SBC COMMUNICATIONS INC.)
)
On Request for Confidential Treatment)
)
)
)
)
)
)
)
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 2008

Released: September 12, 2008

By the Commission:

1. The Commission has before it an application for review filed by SBC Communications, Inc. (SBC),¹ seeking review of a decision of the Enforcement Bureau (EB or Bureau), which rules on a Freedom of Information Act (FOIA) request by CompTel. SBC appeals that portion of EB’s decision that denied in part SBC’s request for confidential treatment of records responsive to CompTel’s FOIA request. For the reasons set forth below, we deny SBC’s application for review.²

I. BACKGROUND

2. On December 16, 2004, EB issued a consent decree³ terminating its investigation into SBC’s compliance with section 254 of the Communications Act, as amended, and Part 54 of the FCC’s regulations.⁴ CompTel, on April 4, 2005, filed a FOIA request seeking “[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [*i.e.*, the investigation of SBC].”⁵ In opposing

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

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

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

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

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

release of the requested documents, SBC, on May 27, 2005, for the first time requested confidential treatment of its submissions in that investigation.⁶

3. The Bureau granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's FOIA request.⁷ The Bureau found that SBC had not complied with the procedures for seeking confidential treatment specified by section 0.459 of the Commission's rules.⁸ EB held that SBC "failed to provide a statement of specific reasons for withholding its responses in their entirety," especially because it failed to meet the requirements of section 0.459 that it explain "how disclosure of the information could result in substantial competitive harm" and "whether any of the information for which it seeks protection is already available to the public."⁹ The Bureau, however, examined SBC's submissions and determined that certain information in SBC's submissions should be treated as confidential, including "costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.¹⁰ EB also determined that this information was not in the public domain.¹¹ In addition, the Bureau determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).¹² EB ruled, however, that SBC itself, as opposed to the individuals mentioned in SBC's submissions, did not possess personal privacy interests protected by Exemptions 6 and 7(C).¹³ Finally, the Bureau withheld from release pursuant to FOIA Exemption 5¹⁴ drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation,¹⁵ which EB determined would disclose the Commission's deliberative process.

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

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

⁸ 47 C.F.R. § 0.459.

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

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

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

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

¹³ *FOIA Decision* at 6.

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

¹⁵ *FOIA Decision* at 6.

4. Both CompTel and SBC filed applications for review of EB's decision.¹⁶ While these pleadings were pending before the Commission, CompTel filed a civil action, pursuant to 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking a judicial order compelling disclosure of the records withheld by EB.¹⁷ AT&T¹⁸ (as successor to SBC) intervened in CompTel's action as a defendant, and, on March 5, 2008, the court stayed the case.¹⁹ The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.²⁰ The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal. Accordingly, SBC's application for review is now before us.

5. SBC seeks review of the Bureau's denial in part of its request for confidential treatment. SBC challenges the Bureau's conclusion that FOIA Exemption 7(C) does not apply to corporations, contending that corporations are persons that have a privacy interest within the meaning of Exemption 7(C), and that this proposition is consistent with precedent.²¹ Accordingly, SBC argues that its internal documents should be withheld pursuant to Exemption 7(C), because disclosure would embarrass SBC without serving any public policy interest.²² CompTel responds that there is no precedent supporting the proposition that corporations have a personal privacy interest for purposes of Exemption 7(C).²³

II. DISCUSSION

A. Procedural Matter

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

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

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

¹⁸ See note 1, *supra*.

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

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

²¹ SBC Application for Review at 2-8.

²² *Id.* at 4-5.

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

²⁴ 47 C.F.R. § 0.461(j).

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

notice from EB of its right to do so,²⁶ SBC did not seek confidential treatment of its submissions in accordance with section 0.459(a) by filing a timely request for confidentiality when it submitted the material, and thus does not qualify to file an application for review pursuant to the terms of section 0.461(i).²⁷ This failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment. Although we admonish SBC that it should have complied with section 0.459, we are mindful of the provisions of FOIA Exemption 4 and the Trade Secrets Act²⁸ to prevent disclosure of confidential information and to consider the views of the submitter when making disclosure determinations. Therefore, we have considered the information and arguments subsequently submitted by SBC on our own motion.

B. Exemption 7(C)

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

²⁶ EB's letter of inquiry specifically advised SBC: "If the Company [SBC] requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall submit, along with responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearing Division, EB to Michelle A. Thomas and Christopher Heimann [SBC] (Aug. 24, 2004) at 1-2.

²⁷ SBC's response to CompTel's FOIA request states: "All of the records responsive to the CompTel/ALTS [FOIA] request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 0.457, are not routinely available for public inspection." Letter from Jim Lamoureux to Judy Lancaster (May 27, 2005). SBC thus implies that it was not required to comply with section 0.459. We disagree. Because the material submitted by SBC was not specifically listed as confidential commercial and financial information under section 0.457(d)(1), section 0.457(d)(2) required SBC to submit a request for confidentiality under section 0.459. Section 0.461(i) does not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as SBC did, until a FOIA request is filed.

²⁸ 18 U.S.C. § 1905.

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

³⁰ See 5 U.S.C. § 552(b)(7)(C).

³¹ *SBC Application for Review* at 4.

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

³³ *Chadmoore* references a line of cases holding that corporations do not have a "personal privacy" interest for purposes of Exemption 6. See 13 FCC Rcd at 23946-47 ¶ 7 and *Electronic Privacy Information Center v. Dep't of Homeland Security*, 384 F.Supp.2d 100, 118 n.29 (D.D.C. 2005); *Hill v. Dep't of Agriculture*, 77 F.Supp.2d 6, 7 (D.D.C. 1999); *Ivanhoe Citrus Ass'n v. Handley*, 612 F.Supp. 1560, 1567 (D.D.C. 1985). "While it has been established that Exemption 7(C) and Exemption 6 are not completely congruent, the difference lies in the standard of review and not the relevant privacy interest covered by the exemption." *Cohen v. EPA*, 575 F.Supp. 425, 429 n. 6 (D.D.C. 1983), citing *FBI v. Abramson*, 456 U.S. 615, 630 n. 13 (1982) (Exemption 6 protects against the disclosure

(continued...)

*Washington Post Co. v. U.S. Dep't of Justice*³⁴ and *Cohen v. EPA*.³⁵ In *Washington Post*, the United States Court of Appeals for the District of Columbia Circuit stated that the disclosures with which Exemption 7(C) is concerned are those of “an intimate personal nature” such as “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation.”³⁶ In *Cohen*, the United States District Court for the District of Columbia cited the same examples.³⁷ These cases hold that Exemption 7(C) does not cover information relating to business judgments and relationships, even if disclosure might tarnish someone’s professional reputation.³⁸ Thus, in *Washington Post*, the D.C. Circuit held that Exemption 7(C) did not cover the report of an internal corporate investigation that mentioned individual employees by name but did not identify them as being personally the target of the investigation.³⁹ In *Cohen*, the district court held that Exemption 7(C) did not cover the names of individuals, such as corporate officials, mentioned in EPA hazardous waste notices, since they were identified only in their “public role” of being the users of hazardous waste disposal sites and would no more be subject to harassment than if the name of the corporation were disclosed.⁴⁰ Like *Chadmoore*, these cases imply that Exemption 7(C) does not cover a corporation’s “privacy interest,” since a corporation’s interests are of necessity business interests. SBC points to no Exemption 7(C) cases that are to the contrary.

8. SBC urges us to depart from this precedent on several grounds, none of which are persuasive. Unlike SBC, we do not believe that protecting a corporation from “embarrassment” falls within the purposes of Exemption 7(C), as interpreted by the courts.⁴¹ Judicial discussion of the purposes of Exemption 7(C) focus on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of

(...continued from previous page)

of information that would constitute a “clearly unwarranted” invasion of personal privacy, whereas Exemption 7 (C) does not require the harm to privacy to be “clearly unwarranted”); see also *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989) (noting the same distinction and that Exemption 6 uses the word “would” while Exemption 7(C) uses “could reasonably”).

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

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

³⁶ 863 F.2d at 100.

³⁷ 575 F. Supp. at 429.

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

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

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

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

harassment.⁴² We read the courts' discussion in these cases to refer to the literal embarrassment and danger that an individual might suffer from disclosure of information of a personal nature and not to the more abstract impact that disclosure might have on a legal entity like a corporation.

9. SBC also argues that in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*,⁴³ the United States Supreme Court did not limit the applicability of Exemption 7(C) to individuals.⁴⁴ This argument is inapposite because *Reporters Committee* involved a rap sheet unique to a particular individual and the Court had no reason to address the applicability of its holding to corporations. Nonetheless, to the extent that *Reporters Committee* is at all relevant, it is fully consistent with EB's determination that Exemption 7(C) applies only to individuals' privacy interests. In analyzing the intent of Congress with respect to Exemption 7(C), *Reporters Committee* relies on both the Privacy Act⁴⁵ and FOIA Exemption 6, both of which apply only to individuals,⁴⁶ suggesting that the privacy interest involved in all three provisions is similar and applicable only to individuals.

10. SBC's remaining arguments amount to the assertion that because a corporation may be treated as a "person"⁴⁷ and have "privacy interests" for some purposes, it has personal privacy interests for purposes of Exemption 7(C). Such reasoning cuts too broadly. The privacy interests relevant to Exemption 7(C) are those discussed in paragraphs 8 and 9, *supra*. The interests underlying other forms of "privacy" that might be relevant in other contexts are not controlling for purposes of Exemption 7(C).⁴⁸

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

⁴³ 489 U.S. 749 (1989).

⁴⁴ *SBC Application for Review* at 4.

⁴⁵ 5 U.S.C. § 552a.

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

⁴⁷ A corporation is defined as a "person" under the Administrative Procedure Act (APA), of which the FOIA is a part. See 5 U.S.C. § 551(2). Thus, a corporation falls within the scope of FOIA Exemption 4, which speaks of commercial and financial records obtained from a person. See *Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729 n.24 (2004), citing *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The APA does not, however, define "personal" or "personal privacy." It is therefore irrelevant, for example, whether FOIA Exemption 7(B), which applies to records or information that "would deprive a person of a right to a fair trial or an impartial adjudication," applies to corporations, as SBC contends. *SBC Application for Review* at 6. A corporation's right to a fair trial is not based on any personal privacy interest.

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

Thus, for example, it is not relevant that a corporation may have a constitutionally protected privacy interest against unreasonable search and seizure of its property under the Fourth Amendment, as found in *U.S. v. Hubbard*,⁴⁹ cited by SBC. SBC has not demonstrated that the holding in *Hubbard* compels or even supports a finding that a corporation has any personal privacy interest that justifies withholding of documents under the FOIA.⁵⁰ Likewise, the privacy interests found in *Tavoulaareas v. Washington Post Co.*,⁵¹ and cited by SBC, involved the “constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information [obtained in civil discovery and not used at a trial between private parties].”⁵² It had nothing to do with FOIA Exemption 7.⁵³ The constitutional privacy analysis applied by the panel in *Tavoulaareas* was, in any case, vacated on rehearing by the court *en banc*.⁵⁴

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

III. ORDERING CLAUSE

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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

⁵⁰ In *Hubbard*, the government seized documents from non-public areas of the premises of the Church of Scientology. Subsequently, the Church proffered the documents in support of a motion asserting that the seizure was unconstitutional. The appellate court reversed the trial judge’s order unsealing the documents. It held that the “single most important element” in its decision to protect the documents was that they had been put in the record solely to support a motion to demonstrate the unlawfulness of the seizure and that it would undermine the Fourth Amendment for the documents to be disclosed under those circumstances. The fact that a corporation may have an interest in protecting itself from the unlawful seizure of its property does not imply that it has the distinctly different “personal privacy” interest relevant to Exemption 7(C).

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

⁵² 724 F.2d at 1023.

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

⁵⁴ *See supra* note 51.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 10, 2008

No. 08-4024

BCO-6

AT&T INC,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

COMPTEL,
Intervenor
(FCC 08-207)

Present: MCKEE, FISHER and CHAGARES, Circuit Judges

Motion by Respondent FCC to Expedite Appeal.

/s/ Tina Koperna

Case Manager (267)299-4930

ORDER

The foregoing Motion by Respondent FCC to Expedite Appeal is hereby GRANTED.

By the Court,

/s/ Theodore A. McKee

Circuit Judge

Dated: November 19, 2008

tmk/cc: Kelly P. Dunbar, Esq.

Colin S. Stretch, Esq.

Michael A. Krasnow, Esq.

Catherina G. O'Sullivan, Esq.

Robert J. Wiggers, Esq.

Mary C. Albert, Esq.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Petitioner (including Volume I of the Appendix) was filed electronically in compliance with Third Circuit LAR 31.1(b) on this 19th day of December 2008. In addition, 10 paper copies of the brief were sent via overnight mail to the Office of the Clerk.

I further certify that, on this date, one copy of the foregoing brief was served on each of the parties listed below by first-class mail, postage prepaid.

/s/ Colin S. Stretch

Colin S. Stretch

**FEDERAL COMMUNICATIONS
COMMISSION**

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

COMPTel

Mary C. Albert
CompTel
900 17th Street, N.W., Suite 400
Washington, D.C. 20006

UNITED STATES OF AMERICA

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