BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

08-4024

AT&T, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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JURISDICTION

This Court has jurisdiction to review a final order of the Federal Communications Commission under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES

1. Whether AT&T's failure to challenge an independent and alternative basis for the Commission's Order – AT&T's failure to file a timely request for confidential treatment as required by the Commission's rules – should by itself lead to denial of its petition.

If AT&T's claim is not so barred,

2. Whether the Commission reasonably concluded that AT&T as a corporate entity does not possess a cognizable privacy interest under Freedom of Information Act Exemption 7(C), which exempts from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 47 C.F.R. § 0.457(g)(3).

3. Whether, if the Commission's Order was legally flawed, the appropriate remedy is confined to remand to the Commission.

STATEMENT OF RELATED CASES

In October 2006, CompTel filed a civil action in the U.S. District Court for the District of Columbia under the Freedom of Information Act seeking to compel disclosure of additional records, which, unlike those at issue here, Commission staff found to be covered by FOIA exemptions. CompTel's action does not challenge the Commission Order[1] under review here, and has been stayed pending resolution of AT&T's "reverse FOIA" claim. *See infra*. n. 5.

[1] *See SBC Communications Inc. on Request for Confidential Treatment*, Memorandum Opinion and Order, FCC 08-207 (rel. Sept. 12, 2008) ("*Order*") (A 7). The Order and pleadings from the administrative proceedings in this case address petitioner as SBC Communications, Inc. ("SBC"). In November 2005, SBC acquired AT&T Corp., and changed its name to AT&T Inc. The name "AT&T" is used generally herein.

STATEMENT OF FACTS

I. The Commission's Investigation of AT&T

On August 6, 2004, AT&T informed the Commission that, during an internal investigation, it had discovered "certain irregularities" concerning invoices it had submitted to the Universal Service Administrative Company ("USAC") for services provided to schools and other entities in New London, Connecticut subsidized under the Universal Service Fund "Education Rate" ("E-Rate") program.[2] On August 24, 2004, the Commission's Enforcement Bureau notified AT&T that it was investigating whether these "irregularities" constituted a violation by AT&T of the Commission's rules and orders. The Enforcement Bureau issued AT&T a letter of inquiry ("LOI") directing it to provide the Commission with certain records and information pursuant to 47 U.S.C. §§ 154(i), 154(j), 218, and 403.[3] The LOI advised AT&T that "[i]f the Company requests that any information or Documents…responsive to this letter be treated in a confidential manner, it shall submit, along with all responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." *Order* n.26 (A 10). The LOI stated further that "[r]equests for confidential

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[2] USAC is an independent, not-for-profit corporation that admininisters the federal universal service fund on bahalf of the FCC. *See SBC Communications Inc.*, 19 FCC Rcd 24014 ¶ 3 n.5 (Enf. Bur. 2004) (2004 WL 2913392) ("Consent Decree"); 47 C.F.R. §§ 54.701-54.702. The E-Rate program is a universal service fund mechanism designed to assist schools and libraries in gaining access to telecommunications and related services. *See* Consent Decree ¶ 3; 47 C.F.R. §§ 54.500-54.523.

[3] The LOI is one of the records that AT&T asserts should be withheld from disclosure. *See* Certified List Of Items In The Record (A 21).

treatment must comply with the requirements of section 0.459, including the standards of specificity mandated by section 0.459(b)," that "blanket requests for confidentiality of a large set of Documents are unacceptable," and that "the Bureau will not consider requests that do not comply with the requirements of section 0.459." LOI at 1-2.

The Commission's rules permit (but do not require) the Commission to withhold from public disclosure various categories of information; the categories are based on the exemptions to the FOIA, 5 U.S.C. § 552(b)(1)-(9). *See* 47 C.F.R. § 0.457(f), (g)(3). A party requesting confidentiality of records submitted to the Commission must attach its request to the records; identify the records to which the request applies; and sufficiently explain the reasons for requesting confidentiality. *Id*. § 0.459(a), (b) (subsection (b) lists factors that a confidentiality request must address). Requests that do not comply with the requirements of § 0.459(a) and (b) will not be considered. *Id*. § 0.459(c). The Commission accords confidential treatment to information if the submitter "presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the [FOIA]." *Id.* § 0.459(d)(2). Here, AT&T produced the records, but did not request confidential treatment at the time of production.

On December 16, 2004, the FCC and AT&T executed a consent decree in "final settlement of the Investigation." *See* Consent Decree, 19 FCC Rcd 24014 ¶ 4 (Enf. Bur. 2004) (2004 WL 2913392). AT&T admitted no wrongdoing but agreed, *inter alia*, to "make a voluntary contribution to the United States

Treasury…of five hundred thousand dollars," and "establish and maintain an E-rate compliance training program." *Id*. ¶¶ 5-6.

II. CompTel's FOIA Request and AT&T's Request for Confidentiality

On April 4, 2005, CompTel submitted a FOIA request to the FCC seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342," the case file associated with the above-described investigation. *See* E-mail from Mary C. Albert, CompTel, to FOIA FCC (Apr. 4, 2005, 10:52 AM) (A 27). After receiving notice of CompTel's request from the FCC, AT&T, by letter dated May 27, 2005, opposed release of the records and, for the first time, requested that the FCC treat them as confidential under § 0.459 of the FCC's rules. *See* Letter from Jim Lamoureux, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau, FCC, (May 27, 2005) (A 28). AT&T asserted that all of the records were exempt from disclosure under Exemption 7(C), because they were "compiled for law enforcement purposes," and disclosure would cause an unwarranted invasion of AT&T's "personal privacy." *Id*. AT&T also asserted that certain records should be withheld under Exemption 4, which covers competitively sensitive privileged or confidential trade secrets and commercial or financial information, 5 U.S.C. § 552(b)(4). *Id*.

On June 28, 2005, CompTel replied to AT&T's request for confidentiality. CompTel did not object to the redaction of personally identifiable information concerning AT&T employees (*e.g*., names, telephone numbers, and home and e-mail addresses), but argued that Exemption 7(C) did not cover any other

information contained in the records because AT&T "is a large, publicly traded corporation…that…possesses no protectable personal privacy interest." Letter from Mary C. Albert, CompTel, to Judy Lancaster, Enforcement Bureau, FCC (June 28, 2005) (A 37).

III. The FCC Enforcement Bureau's Ruling

On August 5, 2005, the Commission's Enforcement Bureau found that AT&T had not timely complied with § 0.459(a) of the Commission's rules because AT&T had not requested confidentiality when submitting the records. *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel (Aug. 5, 2005) (A 43-44). The Bureau found further that AT&T failed to comply with sections 0.459(b)(3), (5), and (7) of the Commission's rules, because AT&T did not sufficiently explain why the Enforcement Bureau should withhold all the records. *Id*. (A 44).

The Enforcement Bureau nonetheless, on its own motion, determined that the records contained extensive confidential information, which it redacted under FOIA Exemption 4; Exemption 5 (deliberative inter-agency or intra-agency materials); and Exemption 6 (personal information of individuals contained in personnel, medical, and similar files); and Exemption 7(C) (personal information

of individuals contained in the records).[4] *Id*.; s*ee also* 47 C.F.R. § 0.457(d)-(g). None of those redactions is at issue here.

The Enforcement Bureau denied in part AT&T's request insofar as AT&T claimed that it, as a corporate entity, possessed a cognizable "personal privacy" interest that justified withholding *all* of the records under Exemption 7(C). As to that assertion, the Enforcement Bureau found that AT&T failed to carry its burden to establish a case for non-disclosure consistent with the FOIA, because businesses do not possess cognizable "personal privacy" interests under Exemption 7(C). *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel (Aug. 5, 2005) (A 46); 47 C.F.R. § 0.457(g)(3).

IV. Commission Review of the Enforcement Bureau's Ruling

On September 12, 2008, the Commission denied AT&T's application for review of the Bureau's decision, and directed the Bureau to release the redacted records to CompTel.[5] The Commission first concluded that AT&T's application

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[4] The Exemption 4 redactions included "costs and pricing data…billing and payment dates, and identifying information of [AT&T's] staff, contractors, and the representatives of its contractors and customers." *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary Albert, CompTel (Aug. 5, 2005) (A 45).

[5] On September 6, 2005, CompTel filed an application for review challenging the Enforcement Bureau's decision to invoke Exemptions 4 and 5. On October 5, 2006, CompTel initiated an action in the U.S. District Court for the District of Columbia under 5 U.S.C. § 552(a)(4)(B) seeking a judicial order compelling production of the records responsive to its FOIA request. *See CompTel v. FCC*, Civil Action No. 06-1718 (HHK) [Docket No. 1]. AT&T intervened as a

for review failed to conform with its rules because, despite having received proper notice of its right to do so, AT&T failed to make a timely request for confidential treatment, and its application for review was thus not properly before the Commission. *See Order* ¶ 6, citing 47 C.F.R. § 0.459(a), 0.461(j) (A 9-10). This violation could alone have justified denial of AT&T's confidentiality request. *Id.* (A 10); 47 C.F.R. § 0.459(c).

The Commission nevertheless proceeded to consider AT&T's application for review on its own motion. *See* 47 C.F.R. § 0.459(f) ("[i]f no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection."). The Commission rejected AT&T's argument that a corporation has a "personal privacy" interest within the meaning of Exemption 7(C), because "a corporation's interests are of necessity business interests." *Order* ¶ 7 (A 11). The Commission found that AT&T's position was "at odds with established Commission and judicial precedent," because Exemption 7(C) covers disclosures of "an intimate

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defendant. Following cross-motions for summary judgment, on March 5, 2008, the district court stayed the case, concluding that it could not address AT&T's "reverse FOIA" claim that the records should be withheld from disclosure under Exemption 7(C) because that claim could only be reviewed under the APA after final Commission action. *Id.,* Memorandum Opinion and Order at 5-6 [Docket No. 36]. The court concluded further that the interests of judicial economy and efficiency were served by staying CompTel's action until the Commission ruled on AT&T's application for review. *Id*. That Commission ruling is the subject of this proceeding.

personal nature," and not "information relating to business judgments and relationships, even if disclosure might tarnish someone's professional reputation." *Id.* (A 10-11). The Commission explained that "protecting a corporation from embarrassment" does not fall within the purposes of Exemption 7(C), and that "[j]udicial discussion of the purposes…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." *Id.* ¶ 8 (citations omitted) (A 11-12). The Commission explained further that these cases "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." *Id.* (A 12). The Commission noted that AT&T had identified "no Exemption 7(C) cases that are to the contrary." *Id.* ¶ 7 (A 11).

Finally, the Commission rejected AT&T's argument that because a corporation may be treated as a "person" and have "privacy interests" for some purposes, it has personal privacy interests under Exemption 7(C), explaining that "[s]uch reasoning cuts too broadly." *Id.* ¶ 10 (A 12). The Commission found that "[t]he interests underlying other forms of privacy that might be relevant in other contexts are not controlling for purposes of Exemption 7(C)." *Id.*

V. Other Pertinent Matters

On September 23, 2008, AT&T requested that the Commission stay its Order. On September 26, 2008, before the Commission acted on that request,

AT&T filed its Petition for Review of the Commission's Order and a Motion for Stay pending judicial review. The parties subsequently agreed that the Commission would not release the redacted records to CompTel until this Court had the opportunity to address AT&T's "reverse FOIA" claim, and that AT&T would consent to the Commission's request for the Court to expedite review. *See* Respondent Federal Communications Commission's Response to AT&T's Motion for Stay, *AT&T Inc. v. FCC*, No. 08-4024 (3d Cir. Oct. 6, 2008); Respondent Federal Communication's Commission's Consent Motion for Expedited Treatment, *AT&T*, No. 08-4024 (3d Cir. Oct. 6, 2008). AT&T withdrew its Motion for Stay and, by Order dated October 10, 2008, the Court granted the Commission's Motion for Expedited Treatment (A 14).

STANDARD OF REVIEW

When an agency determines that records requested under the FOIA do not fall within a FOIA exemption and must be disclosed, a party opposing release of the records may bring suit "through the vehicle of the Administrative Procedure Act [("APA")]…this type of suit is commonly referred to as a 'reverse FOIA' suit." *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000). "Reverse-FOIA" decisions are considered informal agency adjudications; therefore the Court's review of the Commission's *Order* here is governed by the "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706(2)(A). *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 337 (D.C. Cir. 1989) (citations omitted). Under this standard, a court has a very limited basis of review of an agency's decision, and can only

determine whether the agency had a rational basis for its decision. *See Occidental Petroleum Corp.*, 873 F.2d at 337; *Envt'l Def. Fund, Inc. v. Costle,* 657 F.2d 275, 282-83 (D.C. Cir. 1984). An agency's decision may be set aside only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41 (1983).

In "reverse FOIA" cases, a court first inquires whether any nondisclosure statute or regulation is applicable to the material the agency intends to release. *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 598 F.2d 790, 800 (3d Cir. 1979), citing *Chrysler Corp. v. Schlesinger*, 565 F.2d 1190, 1192 (3d Cir. 1977), *aff'd in relevant part sub nom., Chrysler Corp v. Brown*, 441 U.S. 281 (1979). Where, as here, no such statute or regulation applies, the court determines "whether the contested information falls within an FOIA exemption and, if so, whether the agency has considered the proper factors in determining that disclosure was permitted…under its own disclosure regulations." *Id*. We agree with AT&T that the Commission's interpretation of the FOIA is not entitled to *Chevron* deference since it is a government-wide statute (*Br*. at 13).

SUMMARY OF ARGUMENT

The Court should dismiss this case because AT&T has waived the claims that it attempts to raise here. AT&T failed to submit to the Commission a timely request for confidential treatment of the records in this case. The Commission held that this failure was an adequate and independent basis for denying AT&T relief, and AT&T has not challenged that determination here. Therefore, AT&T is

precluded from litigating its claim that the agency should have withheld all of the records from release.

In any event, AT&T's challenges to the Commission's alternative, *sua sponte* finding that AT&T, as a corporation, did not come within the scope of Exemption 7(C) fall wide of the mark. That Exemption protects only "personal privacy," a phrase commonly understood to relate to individuals, not artificial entities like corporations. Federal courts have uniformly interpreted Exemption 7(C) to protect individual privacy interests, and all courts to have addressed the question have held that the exemption does not apply to corporations. Moreover, courts interpreting Exemption 6 – which also uses the phrase "personal privacy" – have likewise held that it does not protect corporations.

The statutory text, structure of the FOIA, and the legislative history of Exemption 7(C) support the reading of the phrase "personal privacy" in its everyday sense to mean the privacy due to an individual. When Congress intended to include corporations within the terms used in the FOIA and its exemptions, it stated that intention expressly. It did not do so in Exemption 7(C). Indeed, the legislative history of both Exemptions 6 and 7(C) demonstrates that Congress intended both to protect an individual's private affairs from unnecessary public scrutiny.

Finally, in the event the Court concludes that the Commission erred in finding AT&T ineligible for protection under Exemption 7(C), it should remand to the Commission so that the agency can conduct the balancing required under that

provision. There is no basis for AT&T's request that this Court conduct that fact-intensive exercise on its own in the first instance.

ARGUMENT

I. AT&T'S FAILURE TO MAKE A TIMELY REQUEST FOR CONFIDENTIALITY PROVIDES AN INDEPENDENT AND UNCHALLENGED BASIS FOR THE COMMISSION'S DECISION.

As a threshold matter, the Court should deny AT&T's petition because AT&T has failed to challenge an independent and alternative basis for the Commission's decision below. As the Commission reminded AT&T in the LOI, FCC rules require that any request for confidential treatment of materials submitted to the Commission must be made *simultaneously* with the submission of the materials. 47 C.F.R. § 0.459(a). AT&T failed to comply with this rule. Indeed, AT&T sought confidential treatment of its records only *after* it entered into a consent decree and *after* CompTel made its FOIA request. *Cf. Order* ¶ 6 n.27 (the Commission's rules do "not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as [AT&T] did, until a FOIA request is filed") (A 10).

In the Order on review, the Commission concluded "[a]s an initial matter" – before examining the scope of Exemption 7(C) – that AT&T's failure to file a timely request for confidentiality "would alone justify the [Commission's] denial" of AT&T's request. *Order* ¶ 6 (A 10). Because that finding, by itself, is sufficient to support the agency's decision and because AT&T has not challenged it in its opening brief, the Court should deny the petition for review without addressing

AT&T's statutory arguments. *See Casino Airlines, Inc. v. NTSB*, 439 F.3d 715, 717 (D.C. Cir. 2006) (when agency decision rests on multiple independent grounds, court should affirm if at least one is correct); *FDIC v. Deglau*, 207 F.3d 153, 169-70 (3d Cir. 2000) (argument not raised in opening brief is waived).

The fact that the Commission went on to find, in the alternative, that AT&T's arguments about the scope of Exemption 7(C) were wrong does not change the analysis. The Commission's rules provide that where, as here, "no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection." 47 C.F.R. § 0.459(f). Accordingly, AT&T was not entitled to *any* consideration by the Commission of its arguments as to why its documents should be kept confidential. The fact that the Commission, on its own motion, considered those arguments anyway does not mean that it excused AT&T's failure to follow its procedural rules.[6]

II. THE COMMISSION CORRECTLY DETERMINED THAT AT&T DOES NOT POSSESS A COGNIZABLE "PERSONAL PRIVACY" INTEREST UNDER FOIA EXEMPTION 7(C).

In the event the Court reaches the merits of AT&T's challenge, it should reject it. Exemption 7(C) covers "records or information compiled for law

[6] If an agency's decision to supplement a finding of procedural default with an alternative explanation as to why the party's claims fail on the merits meant that the procedural default disappeared for purposes of judicial review, then the agency will have a strong incentive not to provide such alternative holdings.

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) (emphasis added). The Commission does not dispute that the records here were "compiled for law enforcement purposes;" they were assembled by the Commission during its investigation of AT&T for alleged violations of law in connection with the E-Rate program. *See, e.g., Abdelfattah v. U.S. Dept. of Homeland Sec.* 488 F.3d 178 (3d Cir. 2007); *Order* ¶ 7 (A 10). The Commission correctly found, however, that AT&T as a corporate entity has no "personal privacy" that can be "inva[ded]" by the documents' disclosure. That determination is fully supported by consistent judicial precedent interpreting Exemption 7(C) and the closely related Exemption 6, as well as the statute's text, structure, and legislative history.

The FOIA creates "a strong presumption in favor of disclosure." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995), citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). This presumption means that all of FOIA's exemptions (including Exemption 7(C)) "must be narrowly construed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). AT&T's novel construction of Exemption 7(C) runs exactly counter to this admonition because it would result in a dramatically expansive reading of that exemption.

A. Legal Precedent Fully Supports The Commission's Interpretation Of "Personal Privacy" In Exemption 7(C).

Federal courts have uniformly interpreted Exemption 7(C) to protect *individual* privacy interests, and all courts to have addressed the question have held

that the exemption does not apply to corporations. Moreover, courts interpreting Exemption 6 – which uses the same phrase, "personal privacy" – have likewise held that it does not protect corporations.

Courts have found that Exemption 7(C) protects individuals who are suspects, witnesses, interviewees, informants, investigators, and corporate employees from disclosure of their names or other personally identifiable information in connection with the fact and subject matter of an investigation, so as to avoid possible embarrassment, harassment, retaliation, or stigma. *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 167, 170 (2003); *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763-64 (1989); *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984) (citations omitted); *Miles v. U.S. Dep't of Labor*, 546 F. Supp. 437, 440 (M.D. Pa 1982) (citations omitted). These cases' discussion of the purpose underlying Exemption 7(C) makes clear that it has no relevance to corporations.

In *Reporter's Committee*, for example, the Supreme Court identified two privacy interests that are encompassed by Exemption 7(C): "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id*. at 762, (citing *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (footnotes omitted)). With respect to the latter interest, the Court characterized such decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Whalen*, 429 U.S. at 599 n.26, citing *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Court specifically noted that "[p]rivacy is the claim of *individuals* ...

to determine for themselves when, how, and to what extent information about them is communicated to others." *Reporters Committee,* 489 U.S. at 764 n.16 (citation omitted) (emphasis added).

The Third Circuit has similarly found that Exemption 7(C) is intended to protect an individual's privacy interests. Specifically, it has stated that Exemption 7(C) "protects the disclosure of the identity of *individuals* where such disclosure would be likely to cause harassment or embarrassment because of the person's cooperation in the investigation or the nature of the information disclosed by that individual." *See Cuccaro v. Sec'y of Labor*, 770 F.2d 355, 359 (3d Cir. 1985) (emphasis added), *citing Lame v. Dep't of Justice,* 654 F.2d 917, 923 (3d Cir. 1981); *Manna v. U.S. DOJ,* 51 F.3d 1158, 1166 (3d Cir. 1995) (finding requester's identity relevant to "the protection of individual privacy interests that Exemption 7(C) is meant to protect"); *Davin v. U.S. Dep't of Justice,* 60 F.3d 1043, 1058 (3d Cir. 1995), citing *Landano v. U.S. Dep't of Justice,* 956 F.2d 422, 426 (3d Cir. 1992), *vacated in part on other grounds and remanded,* 508 U.S. 165 (1993); *Docal v. Bennsinger,* 543 F. Supp. 38, 45 (M.D. Pa. 1981) ("the Third Circuit adopted the reasoning…in *Lamont v. Dep't of Justice,* 475 F. Supp. 761 (S.D.N.Y. 1979) regarding the purpose of this privacy exemption, [which] protects against the disclosure of the identity of individuals"); *Miles,* 546 F. Supp. at 440 ("[t]he purpose of [Exemption 7(C)] is to protect against the disclosure of the identity of individuals...") (citations omitted).[7]

[7] Courts in several other circuits similarly have discussed the purpose and applicability of Exemption 7(C) in the limited context of an individual's privacy

Given the purpose of Exemption 7(C), the courts that have confronted arguments similar to AT&T's have uniformly rejected them. For example, in *Washington Post Co. v. U.S. Department of Justice*, 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. 863 F.2d 96, 100-101 (D.C. Cir. 1988). The court explained that the disclosures with which the FOIA is concerned are those of "an intimate personal nature" such as "marital status, legitimacy of

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interests. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 485 (2d Cir. 1999) ("[e]xemption 7(C) protects against unwarranted invasion of personal privacy…This language has given rise to a test that balances the individual's interest in privacy in a withheld document against the public's need for information"); *Church of Scientology Intern. v. U.S. I.R.S.*, 995 F.2d 916, 920 (9th Cir. 1993) ("[t]o determine whether production of a particular document would constitute an unwarranted invasion of personal privacy, a court must determine whether the public interest in disclosure outweighs the individual privacy interests that would suffer from disclosure"); *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1487 (11th Cir. 1992), *overruled on other grounds by U.S. Dep't Of Justice v. Landano*, 508 U.S. 165 (1993) ("a court considering the applicability of [Exemption 7(C)] must balance the individual's privacy interest against the public interest in disclosure"); *KTVY-TV, a Div. of Knight-Ridder Broad., Inc. v. U.S*, 919 F.2d 1465, 1469 (10th Cir. 1990) ("[t]o determine whether Exemption 7(C) is applicable, courts must balance the individual's privacy interest against the public's interest in the release of information"); *Halloran v. Veterans Admin.*, 874 F.2d 315, 318 (5th Cir. 1989) ("[o]ne of the most important concerns counterbalancing the public's general interest in disclosure is the desire to protect individuals' privacy interests; it is for this reason that two out of the nine exemptions, exemptions 6 and 7(C), refer explicitly to "privacy"); *New England Apple Council v. Donovan*, 725 F.2d 139, 144 (1st Cir. 1984) ("[e]xemption 7(C) requires a court to mediate between the public interest in disclosure and the individual's privacy interest in nondisclosure") (additional citations omitted for the foregoing cases).

children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." *Id*. In contrast, the report "would not reveal anything of a private nature about any employees mentioned, as it is an investigation and assessment of the business decisions of [the] employees during the development and marketing of a commercial product." *Id*.

In *Cohen v. EPA*, the U.S. District Court for the District of Columbia likewise found that Exemption 7(C) "does not apply to information regarding professional or business activities." 575 F. Supp. 425, 429-30 (D.D.C. 1983). The 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. *Id*.

AT&T suggests (*Br*. at 36) that the D.C. Circuit's decision in *Washington Post* is "wrong," and argues that it has been superseded by that court's more recent decision in *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006). In reality, there is no inconsistency in the D.C. Circuit's decisions, and *Judicial Watch* supports the Commission's position that Exemption 7(C) is limited to individual privacy interests.

As an initial matter, however, AT&T's reliance on *Judicial Watch* is barred by Section 405 of the Communications Act. That provision specifies that when a party seeks review of a Commission order it may not raise an issue "upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C.

§ 405(a); *Serv. Elec. Cable TV, Inc. v. FCC,* 468 F.2d 674, 676-77 (3d Cir. 1972). AT&T did not cite *Judicial Watch* in any of its filings with the Commission prior to issuance of the Order on review; nor did it seek reconsideration based on that decision.

Even more critically, AT&T took a position before the Commission diametrically opposed to what it now argues. In its filing with the Commission, AT&T said: "Exemption 6 protects information that could only pertain to an individual and which might reveal personal private information pertaining to that individual…It thus makes plain sense to conclude that *Exemption 6 implicates only individual privacy concerns and does not apply to corporations." See SBC Application for Review* (A 52) (emphasis added). AT&T went on to argue, however, that Exemption 7 was broader than Exemption 6 and therefore was uniquely applicable to corporations. *Id*. Now AT&T argues the opposite (*Br*. at 15, 27-28), contending, based on *Judicial Watch*, that "the term personal privacy in Exemption 6 encompasses the privacy rights of corporations," and that Exemption 7(C), which uses the same phrase, "personal privacy," must therefore have a scope at least as broad (*Br*. 28). Where a party seeking review "seem[s] to abandon its argument... by taking inconsistent positions," the Commission has not been afforded a fair opportunity to pass on an issue. *Busse Broadcasting Corp. v. FCC,* 87 F.3d 1456, 1461 (D.C. Cir. 1996). Because AT&T did not give the Commission the opportunity to pass on its newly-minted argument that Exemption 7 must be read to cover corporations since that is the way that Exemption 6 has been read, it is barred under Section 405 from asserting the claim now.

In any event, AT&T's reading of *Judicial Watch* is erroneous. The D.C. Circuit in that case upheld the redaction of business names and addresses and names of agency and business employees under Exemption 6 as permissible because it protected the privacy interests of the *individual employees* of these companies to be safe from the danger of physical violence. It was the individual employees' "personal privacy" – not the "personal privacy" of a corporation – that was at issue.

In *Judicial Watch*, the FDA had withheld under Exemption 6 "the names of agency personnel and private individuals and companies who worked on the approval of mifepristone," a drug used for medical abortion, as well as the street addresses of companies associated with the creation and manufacturing of the drug. 449 F.3d at 152. The privacy interest cited by the FDA was "the danger of abortion-related violence to those who developed mifepristone, worked on its FDA approval, and continue to manufacture the drug." *Id.* at 153. To support its withholdings, the FDA provided evidence of abortion clinic bombings and "websites that encourage readers to look for mifepristone's manufacturing locations and then kill or kidnap employees once found." *Id.*

In evaluating the FDA's showing, the court noted that "the FDA fairly asserted abortion-related violence as a privacy interest for both the names and addresses of persons and businesses associated with mifepristone." *Id*. The court stated that the asserted privacy interest applied "to all such employees." *Id*. The court applied that interest to protect only the personal privacy of the individual employees who worked at these locations, not the privacy interest of the

corporation. *Id*. Redaction of the business names and addresses under Exemption 6 was permissible because release of that information would be akin to informing those who had expressed a specific intent to harm the businesses' employees where to locate them, and withholding this information protected "all such employees" from physical danger.

The court explained that: "to determine whether the FDA appropriately withheld these names and addresses, we must balance the private interest involved (namely, the *individual's* right of privacy) against the public interest." 449 F.3d at 153 (internal quotations and citations omitted) (emphasis added). The court found that an individual did not surrender any privacy interest because the matter at issue involved his employment with a business.

AT&T asserts (*Br*. at 28) that the D.C. Circuit in *Judicial Watch* extended the "personal privacy" protections in Exemption 6 to both private individuals and corporations. AT&T, however, conflates the privacy concerns of individuals employed by a business with those of the business itself. AT&T's reliance on *Judicial Watch* is misplaced and does not change the fact that there are no cases supporting its reading of Exemptions 6 or 7(C).

Moreover, if there was any doubt about the meaning of Judicial Watch, the D.C. Circuit dispelled it last year. In *Multi AG Media LLC v. Dep't of Agric.*, that court said "[i]t is clear that businesses themselves do not have protected privacy interests under Exemption 6, but where their records reveal financial information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects." 515 F.3d 1224, 1228 (D.C. Cir. 2008)

(emphasis in original); *see also id.* at 1227 (citing *Judicial Watch).*[8] Even if this statement constitutes "*dicta*" (*Br.* at 29 n.9), it represents the D.C. Circuit's latest statement on what "is clear" from its precedents: Exemption 6 does not protect the "personal privacy" of corporations. Indeed, if AT&T were truly confident that D.C. Circuit precedent supported its position here, it presumably would have filed its petition for review in that court. *See* 28 U.S.C. § 2343 (establishing venue in either the circuit where "the petitioner resides" *or* the D.C. Circuit).

AT&T asserts (*Br.* at 28) that because *Judicial Watch* held that "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)." First, as discussed, *Judicial Watch* does not stand for the proposition that AT&T suggests. Moreover, the "broader" coverage of Exemption 7(C) goes only to the degree of protection that is afforded *after* it is found that a privacy interest is implicated. There is nothing "broader" about the privacy interest itself that would trigger such balancing, especially given that Congress used the identical phrase, "personal privacy," in both exemptions. *Fed. Labor Relations Auth. v. U.S. Dept. of Veterans Affairs*, 958 F.2d 503, 509 (D.C. Cir. 1992) (holding the same degree of privacy interest is required to trigger

[8] This understanding of Exemption 6 is consistent with longstanding D.C. Circuit precedent. *Sims v. CIA*, 642 F.2d 562, 572 n. 47 (D.C. Cir. 1980), *rev'd in part on other grounds*, 471 U.S. 159 (1985) (citations omitted) ("Exemption 6 is applicable only to individuals"); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) (citations omitted) ("[t]he sixth exemption has not been extended to protect the privacy interests of businesses or corporations").

balancing under Exemptions 6 and 7(C)); *Fed. Labor Relations Auth. v. Dep't of Treasury*, 884 F.2d 1446, 1451-52 (D.C. Cir. 1989) (the difference between Exemptions 6 and 7(C) "goes only to the *weight* of the privacy interest needed to outweigh disclosure") (emphasis in original).

It is a "normal rule of statutory construction" to afford the same meaning to an identical phrase used in two separate statutory subsections. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation marks and citations omitted). This is particularly true, and "more imperative," where, as here, "the same word or term is used in different statutory sections that are similar in purpose and content." *C.I.R. v. Ridgeway's Estate*, 291 F.2d 257, 259 (3d Cir. 1961) (citations omitted). In this case, the same phrase – "personal privacy" – in both Exemption 6 and Exemption 7(C) has the same meaning: the privacy of individuals, not corporations.

B. The Statutory Text And Structure Demonstrate That The Exemption For "Personal Privacy" In Exemption 7(C) Pertains Only To Individuals.

Given the uniform precedent supporting the Commission's interpretation of "personal privacy," it is not surprising that AT&T's textual argument fails based upon the text and structure of the statute, even if there were no special rule of construction for FOIA exemptions. *See John Doe Agency*, 493 U.S. at 152 (FOIA exemptions "must be narrowly construed"). When interpreting the meaning of a statute, analysis must begin with the statutory language itself. *Bailey v. United States*, 516 U.S. 137, 144-45 (1995), citing *United States v. Ron Pair Enterprises., Inc.*, 489 U.S. 235, 241 (1989). Moreover, as the Supreme Court has explained,

the "words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Malat v. Riddell,* 383 U.S. 569, 571 (1966). The "ordinary, everyday" meaning of the phrase "personal privacy" is the privacy due to an individual. Conversely, few, if any, people would understand a corporation to have "personal privacy."

By giving the word "personal" in Exemption 7(C) a virtually limitless scope, AT&T's interpretation essentially reads it out of the statute. Yet Congress clearly meant the word "personal" to provide some limitation on the kind of "privacy" protected by Exemption 7(C) or else it would not have included it in the statute. *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004) ("[i]f possible, we must give effect ... to every clause and word of a statute, and be reluctant to treat statutory terms as surplusage") (internal citations and quotations omitted). The Commission's interpretation – that "personal" limits the privacy interests to individuals – gives effect to all of the statute's terms.

Further, in other parts of the FOIA where there could be ambiguity as to whether a phrase applies only to an individual or also to a business entity, Congress expressly clarified the meaning of that phrase. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III), *amended by* Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 ("[i]n this clause, the term a representative of the news media means any person or entity") (internal quotations omitted). Similarly, within the exemptions themselves, where ambiguity could exist, Congress expressly made clear whether a particular phrase was supposed to apply also to business entities. *See* 5 U.S.C. § 552(b)(7)(D) (clarifying that the phrase "confidential source"

includes "a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis"). No such clarifying language was included in Exemption 7(C).

AT&T's textual argument rests largely on the definition of a term, "person," that does not even appear in Exemption 7(C). As AT&T points out (*Br*. at 19, citing 5 U.S.C. § 551(2)), the APA (of which FOIA is a part) defines "person" to "include an individual, partnership, corporation, association, or public or private organization other than an agency." AT&T then posits (*Br*. at 20) that it is a "'grammatical imperative[]'" that the (undefined) statutory term "personal" must have the same scope.

Rather than advancing AT&T's argument about the meaning of "personal," the statutory definition of "person" actually weakens it. It is because the word "person" is not commonly understood to include a "corporation" or other entity that Congress needed to provide a special definition for it in the APA. Without such a definition, the word "person" would have been interpreted in its everyday sense to mean an individual. Yet Congress provided no special definition for "personal" and thus the default rule that statutory terms are to be construed according to their ordinary meanings applies to that term.

Congress's use of the term "person" in the statute demonstrates why it decided to provide it with a special and unusually broad definition. For example, Congress provided that a "person" can file a FOIA request, and it makes sense that it would have intended corporations to be among the entities that could request public records. 5 U.S.C. §§ 552(a)(3)(A); 552(a)(6)(C)(i). Even more telling is

Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a *person* . . . ." *Id.* § 552(b)(4) (emphasis added). An exemption for commercial information should clearly apply to corporations. The use of the word "person" in Exemption 4 thus makes perfectly clear why Congress decided to define it to include them.[9]

The statute includes no such examples of the use of the word "personal" that would make clear why Congress would have wanted to give it an unusually broad definition. To the contrary, the statute's other use of the phrase "personal privacy" is most naturally read to apply only to individuals. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 47 U.S.C. § 552(b)(6). There is no reason to believe that Congress would have intended the "personal privacy" discussed in this exemption to apply to corporations; indeed,

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[9] The presence of Exemption 4 also demonstrates that reading Exemption 7(C) to exclude corporations nonetheless leaves them with ample protection. Exemption 4 protects competitively sensitive privileged or confidential trade secrets and commercial or financial information. *See* 5 U.S.C. § 552(b)(4). The corporate interest that the FOIA protects is disclosure that would result in substantial competitive harm. "Exemption 4 was intended, according to the legislative history, to extend privacy to a number of interests," and include information "considered private and confidential in business life," such as "business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiating positions." *See N.Y. Pub. Interest Research Group v. U.S. E.P.A.*, 249 F. Supp. 2d 327, 332 (S.D.N.Y. 2003), citing H. Rep. No. 89-1497, at 10 (1966). The type of business information that AT&T seeks to protect here (*Br*. at 26 n.8, 44-45 n.14) would therefore typically be considered under Exemption 4. The Commission has already redacted all records falling within that exemption, and AT&T does not challenge those redactions here.

such a reading would be bizarre since corporations do not have "medical files" or "personnel files" about the corporation itself (personnel files pertain to individuals). *See, e.g.*, *Multi AG Media LLC*, 515 F.3d at 1228.

AT&T also points to the Privacy Act of 1974, 5 U.S.C. § 552a, claiming (*Br.* 20) that it "demonstrate[s] that Congress knows how to extend protections exclusively to natural persons when it intends that result." As AT&T notes, the Privacy Act's protections apply only to an "individual," which is statutorily defined to include only natural persons. 5 U.S.C. § 552a(a)(2). This definition certainly demonstrates that Congress intended "individual" and "*person*" to have distinct meanings in these statutes, but it says nothing about what Congress intended "personal" to mean.[10]

In fact, rather than advancing AT&T's argument, the Privacy Act actually undermines it. That statute's Congressional findings demonstrate that Congress understood "personal" to be a synonym to the adjectival version of the word "individual." For example, Congress described the purpose of the Privacy Act as "to provide certain safeguards for an *individual* against an invasion of *personal* privacy." Pub. L. No. 93-579, § 2(b), 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a) (emphases added). Congress likewise found that "the privacy of an *individual* is directly affected by the collection, maintenance, use, and dissemination of *personal* information by Federal agencies." *Id.* § 2(a)(1)

[10] Likewise, AT&T asserts (*Br.* at 22) that an inference should be drawn based on the use of the word "individual" in Exemption 7(F). Again, all this demonstrates is that Congress intended "individual" and "person" to have different meanings. It sheds no light on what Congress meant by the word "personal."

(emphases added). Finally, Congress stated that "the right to privacy is a *personal* and fundamental right protected by the Constitution of the United States." *Id.* § 2(a)(4) (emphases added). If the Congress that made this pronouncement thought that the word "personal" encompassed corporations, it would not have limited the Privacy Act's protections to individuals.

AT&T asserts (*Br*. at 25) that reading Exemption 7(C) to include a "corporate privacy" interest is consistent with its purpose, because corporations are "routinely suspects or cooperating parties (or both) in law-enforcement investigations,…[and] face the prospect of public embarrassment, harassment, and stigma based upon their involvement in such investigations." The Commission has already redacted from the records information about individuals, consistent with Exemptions 6 and 7(C) and the case-law, as well as competitively sensitive commercial information under Exemption 4. So all information that could potentially embarrass individuals will be withheld, as will information that could competitively harm AT&T. There is no basis to suggest that the exemptions demand withholding even more information – that which is not embarrassing to an individual or commercially sensitive but that is somehow "embarrassing" to an abstract corporate entity.

Last, AT&T asserts (*Br*. at 29-33) that because corporations may be treated as a "person" and have "privacy interests" in other contexts, they should have "personal privacy" under Exemption 7(C). The Supreme Court has squarely rejected that mode of analysis: "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." *Reporters Committee*, 489 U.S. at 762 n.13; *see Order* ¶ 10 (A 12) ("[s]uch reasoning cuts too broadly," because "[t]he interests underlying other forms of privacy that might be relevant in other contexts are not controlling for purposes of Exemption 7(C)") (internal quotation omitted). This case is about statutory construction of FOIA, not the scope or meaning of the Constitution, and, as demonstrated, FOIA itself makes clear that corporations do not enjoy "personal privacy" for purposes of Exemption 7(C).

C. The Legislative History Supports The Commission's Interpretation Of "Personal Privacy" In Exemption 7(C).

Given the text and structure of FOIA and the consistent judicial interpretation of it, there is no need to resort to legislative history in this case. In any event, the legislative history confirms the correctness of the Commission's interpretation of "personal privacy" in Exemption 7(C).

As an initial matter, Senator Long of Missouri explained in the Report of the Judiciary Committee when FOIA was first enacted that "[t]he phrase clearly unwarranted invasion of personal privacy" in Exemption 6 "enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny…." S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965).

In 1974, Congress amended FOIA to add a "personal privacy" qualification to Exemption 7. Exemption 7, in its original 1966 form, had broadly exempted from disclosure "investigatory files compiled for law enforcement purposes except

to the extent available by law to a private party." *John Doe Agency*, 493 U.S. at 156. Senator Hart of Michigan successfully offered a floor amendment to provide that release of such information would be barred only where it would constitute a "clearly unwarranted" invasion of "personal privacy." *See* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents (Jt. Comm. Print 1975) ("1975 Source Book"). Senator Hart explained that "the protection for personal privacy" that was the subject of his amendment "is a part of the sixth exemption in the present law," and "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Id*. Various legislators echoed Senator Hart's statement, making clear they understood the phrase "personal privacy" to pertain to individuals. *See* Remarks of Senator Hruska of Nebraska, 1975 Source Book at 340 ("[w]e have held extensive hearing on these bills and throughout these hearings the point has been repeatedly stressed that information in law enforcement files must be kept in confidence to insure that the individual's right to privacy is secure"); Statement of Senator Thurmond of South Carolina, *Id*. at 342 ("we are…concerned about a mutual problem of invasion of an individual's privacy"); *see also* Remarks of Senator Kennedy, *Id*. at 349 ("it was clearly the interpretation in the Senate's development of [the FOIA] that the investigatory file exemption would be extremely narrowly defined") (internal quotations omitted).

By letter dated August 20, 1974, President Ford expressed concern to the conference committee leaders that the amendments to Exemption 7 would not sufficiently protect individual privacy. *See* 1975 Source Book at 370 ("I am … concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is clearly unwarranted … I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals") (emphasis in original). Senator Kennedy and Representative Moorhead of Pennsylvania informed the President by letter dated September 23, 1974 that to "respond to your suggestion on the withholding of information in law enforcement records involving personal privacy the conference committee agreed to strike the word 'clearly' from the Senate-passed language" (therefore making it more difficult for a requester to obtain a record pertaining to an individual). *Id*.

Reading the phrase "personal privacy" to refer only to individuals is also supported by the Attorney General's Memorandum on the 1974 Amendments to FOIA, prepared shortly after their enactment. That Memorandum states that "[t]he phrase personal privacy pertains to the privacy interests of individuals," and "does not seem applicable to corporations or other entities." *See* 1975 Source Book at 519 (Appendix 5). The Memorandum was prepared following "an extensive consultative process" including "the professional staffs of the congressional committees responsible for the Amendments." *Id.* at 509 (Foreword). Although the Memorandum is not entitled to deference, *Benavides v. DEA,* 968 F.2d 1243,

1247-48 (D.C. Cir. 1992), the Supreme Court and others have cited the Memorandum (and other Attorney General Memoranda) as authority for interpretation of Exemption 7(C) and other FOIA exemptions. *Favish*, 541 U.S. at 169; *F.B.I. v. Abramson*, 456 U.S. 615, 622 n.5 (1982); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 n.3 (1982); *Pratt v. Webster*, 673 F.2d 408, 413 n.10 (D.C. Cir. 1982).

The FOIA and Exemption 7 were subsequently amended several times. *See* Government in Sunshine Act of 1976, 5 U.S.C. § 552b (1982) (amending Exemption 3); Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207-48 to -50 (1986) (codified as amended at 5 U.S.C. § 552 (amending Exemption 7(C) to read "… could reasonably be expected to constitute an unwarranted invasion of personal privacy"); Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552); Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306 116 Stat. 2382, (codified as amended at 5 U.S.C.A. § 552(a)(3)(A), (E) (West Supp. 2003)) (limiting ability of foreign agents to get records from U.S. intelligence agencies); Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. The phrase "personal privacy" was left intact on each occasion; Congress never saw fit to alter the phrase despite widespread precedent interpreting it in both Exemptions 6 and 7(C) as applying only to individual privacy interests. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) ("courts have long recognized that the meaning of a statute

may be inferred partly from the course of its implementation over time") (Fisher J. concurring).

III. THE FCC, NOT THE COURT, SHOULD CONDUCT ANY NECESSARY BALANCING TEST.

If the Court reaches the merits of AT&T's challenge, and if the Court disagrees with the Commission's interpretation of Exemption 7(C) as limited to individual privacy interests, the appropriate remedy is remand to allow the Commission to engage in the process of balancing AT&T's alleged privacy interest against the public interest in disclosure. There is no basis for this Court to accept AT&T's invitation (*Br*. at 41) to conduct such balancing itself.

"[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, __ F.3d __, 2008 WL 5214642, at *4 (D.C. Cir. Dec. 16, 2008). "Only in extraordinary circumstances" does a reviewing court "issue detailed remedial orders." *Id.*

No such "extraordinary circumstances" are present in this case. There is no reason for this Court to step into the shoes of the agency and conduct the fact-intensive balancing that would be required by Exemption 7(C) (if it is found to be applicable). AT&T would not be harmed by leaving those determinations to the Commission, as no documents would be released until the Commission made a decision. Moreover, to the extent AT&T believed such a subsequent decision were

in error, it could seek judicial review again. This Court would then review the Commission's determination under the arbitrary and capricious standard, *Chrysler Corp.*, 441 U.S. at 317-18; *Occidental Petroleum Corp.*, 873 F.2d at 337 (D.C. Cir. 1989), not the *de novo* standard AT&T's request for this Court to make the determinations itself would necessarily entail.

AT&T asserts (*Br*. at 43) that "[n]one of the AT&T records that CompTel seeks contains official information about the FCC or otherwise pertains to the conduct of the FCC;" therefore no public interest in disclosure exists and no balancing would be required. But the Commission is not merely a warehouse storing the records in this case. The records concern an FCC investigation of its regulatee for alleged violations of rules, orders, and laws enforced by the Commission. The Commission received AT&T's records in response to a letter of inquiry, and the FCC's investigation resulted in a public consent decree to which the Commission is a party. Had this been merely a private matter, the Commission would not have become involved. The Commission possesses the records, reviewed them, and already invoked Exemption 7(C) to the ends of its permissible purpose, by redacting the names and other personally identifiable information of individuals, thus protecting those individuals' "personal privacy." Should this Court disagree, the appropriate remedy is remand for the Commission to conduct a balancing of the interests and ascertain page by page which records may be withheld.

Additionally, AT&T's request that this Court issue an order providing for the blanket withholding of all the disputed documents ignores the fact that the

FOIA requires redaction of portions of records and release of the remainder. *See* 5 U.S.C. § 552(b) (requiring that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt"). Any non-exempt information must be segregated and released, unless the "exempt and nonexempt information are inextricably intertwined, such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Mays v. Drug Enforcement Admin.*, 234 F.3d 1324, 1328 (D.C. Cir. 2000) (internal quotations omitted), citing 5 U.S.C. § 552(b), *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981). Similarly, Exemption 7(C) does not justify wholesale concealment of entire records, but rather "permits the Government to withhold only the specific information to which it applies, not the entire page or document in which the information appears." *Mays*, 234 F.3d at 1327; *Abdelfattah*, 488 F.3d at 186 (an "agency cannot justify withholding an entire document simply by showing that it contains some exempt material") (citations omitted).

AT&T fails to explain, much less establish, why every single part of every single page of the records should be covered by Exemption 7(C). Accordingly, in the event this Court finds that Exemption 7(C) protects AT&T's "personal privacy," it should remand to the Commission for it to conduct the required balancing and required redactions.

CONCLUSION

Based on the foregoing, this Court should deny the petition for review.

Respectfully submitted,

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COMBINED CERTIFICATIONS

Bar Membership: Pursuant to Third Circuit Rules 28.3(d) and 46.1(e), and the Committee Comments on Third Circuit Rule 28.3, I hereby certify that I am an attorney employed with the Federal Government and thus bar membership in the Third Circuit is not required.

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 9,438 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in 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 Rule 31.1(c), that the text of the electronic (PDF) version of this brief (filed with the Court on its electronic filing system) is identical to the text in the paper copies of the brief sent to the Court via overnight mail.

Virus Check: I hereby certify, pursuant to Third Circuit Rule 31.1(c), that a virus detection program (Symantec AntiVirus, version 10.1.6.1610) has been run on the electronic version of the brief and that no viruses have been detected.

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January 16, 2009

ADDENDUM

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5 U.S.C.A. § 552

UNITED STATES CODE ANNOTATED

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I. THE AGENCIES GENERALLY

CHAPTER 5--ADMINISTRATIVE PROCEDURE

SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

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

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

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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

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

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

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

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

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

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

maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

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

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

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

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term “search” means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

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

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

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a

court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so

that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to

judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(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.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each

statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of

days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The

Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

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

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

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

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

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

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a

proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

CODE OF FEDERAL REGULATIONS

TITLE 47. TELECOMMUNICATION

CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER A. GENERAL

PART 0. COMMISSION ORGANIZATION

SUBPART C. GENERAL INFORMATION

PUBLIC INFORMATION AND INSPECTION OF RECORDS

§ 0.457 Records not routinely available for public inspection.

The records listed in this section are not routinely available for public inspection. The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; and under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, it is important to appreciate that there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of agency or advisory committee meetings will be considered under § 0.603 rather than under the provisions of this section.

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

(1) E.O. 10450, “Security Requirements for Government Employees,” 18 FR 2489, April 27, 1953, 3 CFR, 1949-1953 Comp., p. 936. Pursuant to the provisions of E.O. 10450, reports and other material and information developed in security investigations are the

property of the investigative agency. If they are retained by the Commission, it is required that they be maintained in confidence and that no access be given to them without the consent of the investigative agency. Such materials and information will not be made available for public inspection. See also paragraphs (f) and (g) of this section.

(2) E.O. 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," 18 FR 7049, November 10, 1953, as amended, 3 CFR, 1965 ed., p. 450. E.O. 10501, as amended, provides for the classification of official information which requires protection in the interests of national defense, and prohibits the disclosure of classified information except as provided therein. Classified materials and information will not be made available for public inspection. See also, E.O. 10033, February 8, 1949, 14 FR 561, 3 CFR, 1949-1953 Comp., p. 226, and 47 U.S.C. 154(j).

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

(1) Materials related solely to internal management matters, including minutes of Commission actions on such matters. Such materials may be made available for inspection under § 0.461, however, unless their disclosure would interfere with or prejudice the performance of the internal management functions to which they relate, or unless their disclosure would constitute a clearly unwarranted invasion of personal privacy (see paragraph (f) of this section).

(2) Materials relating to the negotiation of contracts.

(3) All materials used in conducting radio operator examinations, including test booklets, Morse Code tapes, and scoring masks.

(c) Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b): *Provided*, That such statute (1) requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of materials to be withheld. The Commission is authorized under the following statutory provisions to withhold materials from public inspection.

(1) Section 4(j) of the Communications Act, 47 U.S.C. 154(j), provides, in part, that, "The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense." Pursuant to that provision, it has been determined that the following materials should be withheld from public inspection (see also paragraph (a) of this section):

(i) Maps showing the exact location of submarine cables.

(ii) Minutes of Commission actions on classified matters.

(iii) Maps of nation-wide point-to-point microwave networks.

(2) Under section 213(f) of the Communications Act, 47 U.S.C. 213(f), the Commission is authorized to order, with the reasons therefor, that records and data pertaining to the valuation of the property of common carriers and furnished to the Commission by the carriers pursuant to the provisions of that section, shall not be available for public inspection. If such an order has been issued, the data and records will be withheld from public inspection, except under the provisions of § 0.461. Normally, however, such data and information is available for inspection. See § 0.455(c)(8).

(3) Under section 412 of the Communications Act, 47 U.S.C. 412, the Commission may withhold from public inspection certain contracts, agreements and arrangements between common carriers relating to foreign wire or radio communication. Reports of negotiations regarding such foreign communication matters, filed by carriers under § 43.52 of this chapter, may also be withheld from public inspection under section 412. Any person may file a petition requesting that such materials be withheld from public inspection. To support such action, the petition must show that the contract, agreement or arrangement relates to foreign wire or radio communications; that its publication would place American communication companies at a disadvantage in meeting the competition of foreign communication companies; and that the public interest would be served by keeping its terms confidential. If the Commission orders that such materials be kept confidential, they will be made available for inspection only under the provisions of § 0.461.

(4) Section 605 of the Communications Act, 47 U.S.C. 605, provides, in part, that, “no person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.” In executing its responsibilities, the Commission regularly monitors radio transmissions (see § 0.116). Except as required for the enforcement of the communications laws, treaties and the provisions of this chapter, or as authorized in section 605, the Commission is prohibited from divulging information obtained in the course of these monitoring activities; and such information, and materials relating thereto, will not be made available for public inspection.

(5) Section 1905 of the Criminal Code, 18 U.S.C. 1905, prohibits the unauthorized disclosure of certain confidential information. See paragraph (d) of this section.

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

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

(i) Financial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks are not routinely available for inspection.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (See § 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection. This information includes that necessary to prevent modification of scanning receivers to receive Cellular Service frequencies, such as schematic diagrams, technical narratives describing equipment operation, and relevant design details. Portions of applications for equipment certification of software defined radios that describe the operation of the device's software and security features will not be made available for inspection.

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

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

(v) Prior to July 4, 1967, the rules and regulations provided that certain materials submitted to the Commission would not be made available for public inspection or provided assurance, in varying degrees, that requests for nondisclosure of certain materials would be honored. See, e.g., 47 CFR chapter I revised as of October 1, 1966, §§ 0.417, 2.557, 5.204, 5.255, 15.70, 21.406, 80.33, 87.153, 89.215, 91.208, 91.605 and 93.208. Materials submitted under these provisions are not routinely available for public

inspection. To the extent that such materials were accepted on a confidential basis under the then existing rules, they are not routinely available for public inspection. The rules cited in this paragraph (d)(1)(v) were superseded by the provisions of this paragraph (d), effective July 4, 1967. Equipment authorization information accepted on a confidential basis between July 4, 1967 and March 25, 1974, will not be routinely available for inspection and a persuasive showing as to the reasons for inspection of such information will be required in requests for inspection of such materials submitted under § 0.461.

(vi) Information on the users and locations of radio frequency identification systems submitted to the Commission pursuant to § 15.240 will be made available to other Federal Government agencies but will not otherwise be made available for inspection.

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

(e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). Interagency and intra-agency memorandums or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in § 0.461. Only if it is shown in a request under § 0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

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

(1) Under Executive Order 10561, 19 FR 5963, September 13, 1954, 3 CFR, 1954-1958 Comp., page 205, the Commission maintains an Official Personnel Folder for each of its employees. Such folders are under the jurisdiction and control, and are a part of the records, of the U.S. Office of Personnel Management. Except as provided in the rules of the Office of Personnel Management (5 CFR 294.701-294.703), such folders will not be made available for public inspection by the Commission. In addition, other records of the Commission containing private, personal or financial information concerning particular employees will be withheld from public inspection.

(2) [Reserved]

(3) Information submitted to the Commission by applicants for commercial radio operator licenses concerning the character and mental or physical health of the applicant is available for inspection only under procedures set forth in § 0.461. Except in this respect, or where other aspects of a similar private nature warrant nondisclosure, commercial radio operator application files are available for 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).

47 C.F.R. § 0.459

CODE OF FEDERAL REGULATIONS

TITLE 47. TELECOMMUNICATION

CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER A. GENERAL

PART 0. COMMISSION ORGANIZATION

SUBPART C. GENERAL INFORMATION

PUBLIC INFORMATION AND INSPECTION OF RECORDS

§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.

(a) Any person submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection. (If the materials are specifically listed in § 0.457, such a request is unnecessary.) A copy of the request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials. If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified.

(b) Each such request shall contain a statement of the reasons for withholding the materials from inspection (see § 0.457) and of the facts upon which those records are based, including:

(1) Identification of the specific information for which confidential treatment is sought;

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(c) Casual requests which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.

(d)(1) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461. The information will be accorded confidential treatment, as provided for in § 0.459(g) and § 0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted. If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate Bureau or Office Chief, who is directed to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection. A copy of the ruling shall be forwarded to the General Counsel.

(e) If the materials are submitted voluntarily (i.e., absent any direction by the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the

public interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection.

(f) If no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection. See § 0.457(g).

(g) If a request for confidentiality is denied, the person who submitted the request may, within 5 working days, file an application for review by the Commission. If the application for review is denied, the person who submitted the request will be afforded 5 working days in which to seek a judicial stay of the ruling. If these periods expire without action by the person who submitted the request, the materials will be returned to the person who submitted them or will be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this subsection is the day after the date of oral notice. Materials will be accorded confidential treatment, as provided in § 0.459(g) and § 0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

(h) If the request is granted, the status of the materials is the same as that of materials listed in § 0.457. Any person wishing to inspect them may submit a request for inspection under § 0.461.

(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

47 C.F.R. § 0.461

CODE OF FEDERAL REGULATIONS

TITLE 47. TELECOMMUNICATION

CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER A. GENERAL

PART 0. COMMISSION ORGANIZATION

SUBPART C. GENERAL INFORMATION

PUBLIC INFORMATION AND INSPECTION OF RECORDS

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

Any person desiring to inspect Commission records which are not listed in § 0.453 or § 0.455 shall file a request for inspection meeting the requirements of this section.

(a)(1) The records in question must be reasonably described by the person requesting them, so as to permit their location by staff personnel. See § 0.460(c).

(2) The person requesting records under this section may specify the form or format of the records to be produced.

(b)(1) Requests shall be captioned "Freedom of Information Act Request," shall be dated, shall list the telephone number (if any) of the person making the request and, for each document requested, shall set out all information known to the person making the request which would be helpful in identifying and locating the document.

(2) The request shall, in addition, specify the maximum search fee the person making the request is prepared to pay (see § 0.467).

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

(d)(1) Requests shall be delivered or mailed to the Managing Director, sent by electronic mail to foia@fcc.gov, or sent by facsimile. (For purposes of this section, the custodian of the records is the Chief of the appropriate Bureau or Office.)

(2) If the request is enclosed in an envelope, the envelope shall be marked, “Freedom of Information Act Request.”

(3) An original and two copies of the request shall be submitted. If the request is for materials not open to routine public inspection under § 0.457(d) or § 0.459, or if a request for confidentiality is pending pursuant to § 0.459, one copy of the request will be mailed by the custodian of the records to the person who originally submitted the materials to the Commission.

(e) When the request is received by the Managing Director, it will be assigned to the Freedom of Information Act (FOIA) Control Office, where it will be date-stamped and assigned to the custodian of the records.

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

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

(2) If the records are the property of another agency, the request will be referred to that agency and the person who submitted the request will be so advised, with the reasons therefor.

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

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

(5) If there is a statutory basis for withholding part of a document only from inspection, that part will be deleted and the remainder will be made available for inspection.

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

(g) The custodian of the records will make every effort to act on the request within 20 working days after it is received by the FOIA Control Office. If it is not possible to locate the records and to determine whether they should be made available for inspection within 20 working days, the custodian may, in any of the following circumstances, extend the time for action by up to 10 working days:

(1) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) It is necessary to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) It is necessary to consult with another agency having a substantial interest in the determination of the request, or among two or more components of the Commission having substantial subject matter interest therein.

The custodian of the records will notify the requester in writing of any extension of time exercised pursuant to paragraph (g) of this section. If it is not possible to locate the records and make the determination within the extended period, the person or persons who made the request will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. If the requester agrees to an extension, the custodian of the records will confirm the agreement in a letter specifying the length of the agreed-upon extension. If he or she does not agree to an extension, the request will be denied, on the grounds that the custodian has not been able to locate the records and/or to make the determination within the period for a ruling mandated by the Freedom of Information Act, 5 U.S.C. 552. In that event, the custodian will continue to search for and/or assess the records and will advise the person who made the request of further developments; but that person may file an application for review by the Commission. When action is taken by the custodian of the records, written notice of the action will be given.

(h)(1) Requesters who seek expedited processing of FOIA requests shall submit such requests, along with their FOIA requests, to the Managing Director, as described in § 0.461(d). If the request is enclosed in an envelope, the envelope shall be marked "Request for Expedited Proceeding--FOIA Request." An original and two copies of the request for expedition shall be submitted, but only one copy is necessary if submitted by electronic mail. When the request is received by the Managing Director, it, and the accompanying FOIA request, will be assigned to the FOIA Control Office, where it will be date-stamped and assigned to the custodian of records.

(2) Expedited processing shall be granted to a requester demonstrating a compelling need that is certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) For purposes of this section, compelling need means--

(i) That failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(4)(i) Notice of the determination as to whether to grant expedited processing shall be provided to the requester by the custodian of records within 10 calendar days after receipt of the request by the FOIA Control Office. Once the determination has been made to grant expedited processing, the custodian shall process the FOIA request as soon as practicable.

(ii) If a request for expedited processing is denied, the person seeking expedited processing may file an application for review within five working days after the date of the written denial. The application for review and the envelope containing it (if any) shall be captioned “Review of FOIA Expedited Proceeding Request.” The application for review shall be delivered or mailed to the General Counsel. (For general procedures relating to applications for review, see § 1.115 of this chapter.) The Commission shall act expeditiously on the application for review, and shall notify the custodian of records of the disposition of such an application for review.

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d) or § 0.459 is granted, an application for review of the action may be filed by the person who submitted the records to the Commission or by a third party owner of the records. The application for review and the envelope containing it (if any) shall be captioned “Review of Freedom of Information Action.” The application for review shall be filed within 10 working days after the date of the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records. The first day to be counted in computing the time period for filing the application for review is the day after the date of the written ruling. If an application for review is not filed within this period, the records will be produced for inspection. The person who filed the request for inspection of records may respond to the application for review within 10 working days after it is filed.

(2) If the request for inspection of records submitted to the Commission in confidence under § 0.457(d) or § 0.459 is partially granted and partially denied, the person who submitted the records to the Commission, a third party owner of the records and the person who filed the request for inspection of those records may file an application for review within the 10 working days after the date of the written ruling. The application for review and the envelope containing it (if any) shall be captioned "REVIEW OF FREEDOM OF INFORMATION ACTION." The application for review shall be delivered or mailed to the General Counsel. If either person files an application for review, it shall be served upon the other person.

(3) If an application for review is denied, the person filing the application for review will be notified in writing and advised of their rights.

(4) If an application for review filed by the person who submitted the records to the Commission or who owns the records is denied, or if the records are made available on review which were not initially made available, the person who submitted the records to the Commission or who owns the records will be afforded 10 working days from the date of the written ruling in which to move for a judicial stay of the Commission's action. The first day to be counted in computing the time period for seeking a judicial stay is the day after the date of the written ruling. If a motion for stay is not made within this period, the record will be produced for inspection.

(j) Except as provided in paragraph (i) of this section, an application for review of an initial action on a request for inspection may be filed only by the person who made the request. The application shall be filed within 30 days after the date of the written ruling by the custodian of records, and shall be captioned, "Review of Freedom of Information Action." The envelope (if any) shall also be so captioned. The application shall be delivered or mailed to the General Counsel and shall be served on the person (if any) who originally submitted the materials to the Commission. That person may file a response within 10 working days after the application for review is filed. If the records are made available on review, the person who submitted them to the Commission (if any) will be afforded 10 working days after the date of the written ruling to seek a judicial stay. See paragraph (i) of this section. The first day to be counted in computing the time period for filing the application for review or seeking a judicial stay is the day after the date of the written ruling. (For general procedures relating to applications for review, see § 1.115 of this chapter.)

(k) The Commission will make every effort to act on an application for review of an action on a request for inspection of records within 20 working days after it is filed. See, however, paragraph (i) of this section. If it is not possible to locate the records and to determine whether they should be made available for inspection within 20 working days, the General Counsel may, in the following circumstances and to the extent time has not

been extended under paragraphs (g)(1)(i), (ii), or (iii) of this section, extend the time for action up to 10 working days. (The total period of extensions taken under this paragraph and under paragraph (g) of this section without the consent of the person who submitted the request shall not exceed 10 working days.):

(1) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) It is necessary to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the Commission having substantial subject matter interest therein.

If these circumstances are not present or if it is not possible to locate the records and make the determination within the extended period, the person who made the request will be advised of his/her rights and asked to consent to an extension or further extension. If the requester or person who made the request agrees to an extension, the General Counsel will confirm the agreement in a letter specifying the length of the agreed-upon extension. If the requestor or person who made the request does not agree to an extension, the Commission will continue to search for and/or assess the record and will advise the person who made the request of further developments; but that person may file a complaint in an appropriate United States district court.

(l) Subject to the application for review and judicial stay provisions of paragraphs (h) and (i) of this section, if the request is granted, the records will be produced for inspection at the earliest possible time.

(m) Staff orders and letters denying requests for inspection are signed by the official (or officials) who give final approval of their contents. If a request is denied by the Commission, notice of denial will set forth the names of the Commissioners participating in the decision.

(n) Records shall be inspected within 7 days after notice is given that they have been located and are available for inspection. After that period, they will be returned to storage, and additional charges may be imposed for again producing them.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T, Inc, Petitioner,

v.

Federal Communications Commission and the United States of America, Respondents.

Certificate of Service

I, Michael A. Krasnow, hereby certify that on the 16th day of January, 2009 the foregoing "Brief for Respondents" was served electronically by the Third Circuit Court of Appeal's Notice of Docket Activity on the following Filing Users and via U.S. mail:

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