

**AT&T Inc. v Federal Communications Commission**

582 F.3d 490 (3d Cir. 2009)

A US Federal Court of Appeals holds that a corporation is a person and, as such, can have a 'personal privacy' right entitled to protection under the Federal Freedom of Information Act.

On 22 September 2009, the United States Court of Appeals for the Third Circuit (the Court) held, for the first time, that a corporation has 'personal privacy' rights under a key provision in the federal Freedom of Information Act, also known as FOIA. Although the decision has meaningful implications for the application of certain FOIA protections for corporations, its impact on the broader privacy rights of corporations is less clear, as the Court's decision was grounded in the specific statutory language of FOIA.

The case arose in the context of the federal 'E-Rate' program, an initiative administered by the Federal Communications Commission (FCC) that uses federal funds to subsidize the provision of telecommunications technologies to schools and libraries. One E-Rate participant, AT&T, discovered that it possibly overcharged the FCC for certain services provided under the program, and they cooperated with an FCC investigation regarding those potential overcharges. Although the agency ultimately negotiated a consent decree with AT&T to resolve the matter, a trade association representing AT&T's competitors filed an FOIA request seeking disclosure of internal correspondence, rate and billing information, and other documents provided by AT&T to the FCC during its investigation.

AT&T opposed disclosure of these materials to the trade association, relying on a provision of the FOIA, Exemption 7(C), that excludes from disclosure obligations 'records or information compiled for law enforcement purposes. . . to the extent that the production of such law enforcement records or information. . . could reasonably be expected to constitute an

unwarranted invasion of personal privacy'<sup>1</sup>. AT&T also noted that the FOIA defines a 'person' to include a corporation. The FCC rejected AT&T's argument that disclosure would amount to an unwarranted invasion of AT&T's - a corporation's - 'personal privacy', holding instead that the exemption was intended to protect individuals from 'literal embarrassment and danger', not to shield corporations and other business entities from the more 'abstract impact' of disclosure of their internal documents<sup>2</sup>.

On appeal, the Court acknowledged that federal courts traditionally have understood Exemption 7(C) to apply primarily to individuals. It noted, however, that the US Supreme Court has never rejected an application of 'personal privacy' to corporations, and it distinguished between portions of the FOIA that refer to a 'person', as Exemption 7(C) does, and other provisions specifying that they are intended to protect 'individuals'<sup>3</sup>. It also observed that Exemption 7(C) was designed to encourage entities to cooperate with federal investigators and that reading the exemption narrowly to apply only to individuals and not corporations would frustrate that purpose. As a consequence, the Court rejected the FCC's argument, concluded that Congress's decision to define the term 'person' to include a corporation and incorporate it (instead of the term 'individual') in Exemption 7(C) was significant, and held that AT&T could have a 'personal privacy' interest protected by Exemption 7(C).

In light of that decision, the fundamental issue in the case became whether disclosure of the material sought by the trade association would constitute an 'unwarranted' invasion of AT&T's personal privacy, as Exemption

7(C) applies only if the impact of the disclosure on personal privacy would be 'unwarranted'. Although the Court declined to rule on this question - remanding it instead to the FCC - it distinguished between material that would 'be. . . likely to provide. . . insight into the functioning of a federal agency', the disclosure of which might be required, and documents requested primarily to gather information about a competitor, which more likely would be exempt from disclosure. Although the Court declined to place the trade association's entire request into one category or the other, it suggested that the distinction was consistent with a 1989 Supreme Court decision on Exemption 7(C), *Department of Justice v Reporters Committee for Freedom of the Press*, in which the Supreme Court held that, 'as a categorical matter. . . a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted'<sup>4</sup>.

Although the Court's decision is consistent with the language of the FOIA, the Court's rationale does not necessarily mean that a corporation will enjoy a privacy right under other federal and state statutes or under common law. This is because, as the Court found, the FOIA expressly defines a 'person' to include a corporation and apparently distinguishes between a 'person' and an 'individual'. Other federal privacy statutes, such as the Gramm-Leach-Bliley Act, which provides privacy protection for financial information, apply specifically to 'individuals' and, therefore, would

not be susceptible to the same textual analysis used by the Court in AT&T<sup>5</sup>.

Likewise, many state privacy statutes use terms like 'individual' and 'living person' to identify the group that they protect, and courts often use similar language to construe state common law privacy rights, including the right of publicity. By way of example, state courts across the country - including in Indiana<sup>6</sup>, Massachusetts<sup>7</sup>, Montana<sup>8</sup>, New York<sup>9</sup>, and Pennsylvania<sup>10</sup> - have, to varying degrees, found that state privacy rights do not extend to corporations. Nonetheless, in a few cases courts have recognized a limited constitutional privacy right for corporations. For instance, a California appeals court held in *Roberts v Gulf Oil Corp.* that, '[i]n the context of a tax assessor seeking needed information, the nexus between a corporation's right to privacy and an individual's right to be left alone is all but nonexistent'<sup>11</sup>.

Although the Court found that corporations are protected by Exemption 7(C) under the FOIA, it grounded that determination in the specific language of the statute, rendering it unclear whether the analysis could be extended to other types of corporate privacy interests. And while the AT&T decision appears to support the privacy rights of corporations in government investigations, AT&T's ability to protect its information from public disclosure under these particular circumstances will depend on how the FCC resolves the question whether the disclosure of AT&T documents is 'unwarranted'. More generally, however, the AT&T decision demonstrates the importance of considering specific statutory language in evaluating the application of privacy provisions, both within and outside of the

FOIA context.

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1. 5 U.S.C. § 552(b)(7)(C).
2. SBC Communications Inc., 23 FCC Rcd. 13704, 13708 (2008).
3. See, e.g., 5 U.S.C. § 552(b)(7)(F) (exempting from disclosure information gathered in a law enforcement investigation that, if released, 'could reasonably be expected to endanger the life or physical safety of any individual') (emphasis added).
4. 489 U.S. 749, 780 (1989).
5. See 15 U.S.C. § 6809(9) (defining a 'consumer' protected by the statute as 'an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual').
6. *Felsher v University of Evansville*, 755 N.E.2d 589 (Ind. 2001) (rejecting a right of privacy claim brought by a university against a website operator in part because privacy interests are limited to individuals).
7. *Warner-Lambert Co. v Execuquest Corp.*, 691 N.E.2d 545 (Mass. 1998) (holding that a corporation does not have a statutory right to privacy).
8. *Great Falls Tribune v Montana Public Service Commission*, 82 P.3d 876 (Mont. 2003) (holding that a privacy right does not extend to corporations).
9. *Shubert v Columbia Pictures Corp.*, 72 N.Y.S.2d 851 (Sup. 1947), *aff'd*, 80 N.Y.S.2d 724 (1st Dep't 1948) (holding that a corporation is not a 'living person' protected by a New York privacy statute).
10. *Eagle's Eye, Inc. v Ambler Fashion Shop, Inc.*, 627 F. Supp. 856 (E.D. Pa. 1985) (holding that, under a Pennsylvania law, a corporate symbol has no right of publicity, and distinguishing between 'the right of publicity [that] inures to an individual who seeks to protect and control the commercial value of his name or likeness' and 'a right of publicity [that] is alleged to inhere in a corporate trademark').
11. 147 Cal. App. 3d 770, 797 (5th Dist. 1983).