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U.S. SUPREME COURT FINDS THE DEFINITION OF "PERSONAL PRIVACY" IN ONE STATUTE TO EXCLUDE THE PRIVACY OF CORPORATIONS

To Our Clients and Friends:

On March 1, 2011, the United States Supreme Court issued its opinion in *Federal Communications Commission v. AT&T Inc.*, No. 09-1279, addressing whether corporations are eligible to benefit from certain "personal privacy" protections under the Freedom of Information Act ("FOIA"). In a unanimous opinion written by Chief Justice Roberts, the Court held that corporations do not fall within the "personal privacy" exception at issue. Slip op. at 11-12. This decision is being treated in some quarters as a far-ranging repudiation of a "right to privacy" for corporations. A closer reading of the case, however, suggests that the effect may be limited to the precise statutory disclosure exemption at issue.

Background

The case arises from an investigation that the Federal Communications Commission ("FCC") conducted into AT&T in 2004, after AT&T itself reported that certain of its customers may have been overcharged under the E-Rate program--a program that seeks to "enhance access for schools and libraries to advanced telecommunications and information services." *Id.* at 1-2. After AT&T provided the FCC with numerous internal documents about the program, the FCC and AT&T entered into a consent decree settling the investigation. *Id.*

Subsequently, an association of communication industry service providers and suppliers sought access to the FCC's documents about the AT&T investigation under FOIA. *Id.* The FCC agreed to limit the disclosure of some documents about AT&T pursuant to the FOIA exemption relating to trade secrets, 5 U.S.C. § 552(b)(4), and also agreed to limit the disclosure of other categories of documents about certain employees under the "personal privacy" exemption, § 552(b)(7)(C). *Id.* The FCC refused, however, to concede that AT&T could assert its own right to "personal privacy" under the latter FOIA exemption. *Id.* at 3. AT&T appealed to the Third Circuit, which held that a corporation is a "person" under the law and, therefore, entitled to "personal privacy" under FOIA. *Fed. Comm'n Comm'n v. AT&T*, 582 F.3d 490 (3d Cir. 2009). The FCC then sought and received Supreme Court review of the Third Circuit's decision.

The Supreme Court's Decision in *FCC v. AT&T*

In a unanimous opinion with Justice Kagan taking no part, the Supreme Court reversed the appellate court's decision, concluding that corporations are not protected by FOIA's "personal privacy" exemption. Slip op. at 11-12. Importantly, the Court rejected the assertion that a corporation is covered by FOIA's "personal privacy" exemption simply because the word "personal" is the adjective form of the word "person"--a term Congress has defined to include corporations. *Id.* at 3-4.

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As Chief Justice Roberts noted, adjectives that incorporate nouns, as "personal" incorporates "person," do not always "reflect the meaning of corresponding nouns." *Id.* at 4. Relying on definitions from Webster's Third New International Dictionary, the Court noted that even though the noun "crab" refers "to a crustacean and a type of apple . . . the related adjective 'crabbed'" refers to handwriting that is "difficult to read," that the adjective "corny" bears little relationship to the noun "corn," and that "cranky" as in "fretful fussiness" differs from the noun "crank." *Id.* at 4-5.

The Court instead examined the ordinary meaning, context, and statutory construction of the term "personal privacy" to define its scope. *Id.* at 5-9. Critically, the Court noted that in common parlance, "we often use the word 'personal' to mean precisely the opposite of business-related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company's view." *Id.* at 5-6. The opinion then analyzed several other dictionary definitions supporting the same conclusion. *Id.* at 6. The Court acknowledged AT&T's argument that the term "personal jurisdiction" in case law often refers to jurisdiction over corporations, but distinguished that usage as mere shorthand to differentiate between "jurisdiction *in personam*, as opposed to *in rem*, not the jurisdiction 'of a person.'" *Id.* at 7.

The phrase "personal privacy," the Court concluded, "suggests a type of privacy evocative of human concerns," rather than those of a corporation. *Id.* at 8.

Larger Implications

Some commentators have hailed this decision as a potentially game-changing case, one that signals an end to the concept of corporate privacy. While the decision in *AT&T* helps clarify the protections that apply to corporations under FOIA, its application in other contexts may be limited. Indeed, the decision contains no sweeping consideration of the basis, status, or limits of the concept of corporate privacy in general. To the contrary, the opinion eschews the invitation to embrace arguments grounded in "constitutional or common law" because the "discrete question" under consideration requires interpretation of only a single provision in FOIA. *Id.* at 8-9. The decision places great emphasis on the unique history of the term "personal privacy" within FOIA and the phrase's relationship to other parts of FOIA's structure. *Id.* at 9-11. In fact, the concluding paragraph makes clear that the Court viewed its opinion as narrowly addressing "Exemption 7(C)" of FOIA. *Id.* at 12.

The Court, moreover, notes on multiple occasions that corporations' privacy interests *can* properly be shielded under a different FOIA exemption. *Id.* at 4, 10-11. Specifically, the Court points to 5 U.S.C. § 552(b)(4) as prohibiting disclosure of "trade secrets and commercial or financial information," and further states that this exception "clearly applies to corporations." *Id.* at 10-11. As a result, the opinion does not reflect a fundamental hostility toward corporate privacy interests, but rather a careful textual analysis of the words chosen for one specific privacy exemption.



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