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Back Where You Belong: Individuals, Corporations, and the Third Circuit's Redefinition of Personal Privacy Under FOIA

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BACK WHERE YOU BELONG: INDIVIDUALS, CORPORATIONS, AND THE THIRD CIRCUIT'S REDEFINITION OF PERSONAL PRIVACY UNDER FOIA

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ABSTRACT

The Freedom of Information Act ("FOIA" or "the Act") serves an important purpose in informing the citizenry of its government's actions. Congress created it as a disclosure statute, the Supreme Court has decided FOIA in favor of disclosure, and the D.C. Circuit has kept that goal of disclosure by refusing to broaden its exemptions. Despite this history of consistent treatment, the Third Circuit attempted to change the game with its holding in AT&T v. FCC. *The Third Circuit held that corporations may have personal privacy under FOIA Exemption 7(C). This paper will argue that this holding contradicted three FOIA principles established by Supreme Court decisions: (1) broad disclosure, narrow exemptions; (2) creating practical, workable standards; and (3) using Exemption 7(C) to protect the unique privacy interests of individuals. The manner of the Third Circuit's decision also created additional problems in interpretation and application of Exemption 7(C). Though overruled in the instant case, the Third Circuit's decision-making demonstrates a disregard for FOIA principles that could create problems in future cases.*

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I. INTRODUCTION

"One of these things is not like the other; one of these things just doesn't belong."[1] Anyone under a certain age or with a child under a certain age could probably finish that song. It is from a segment on the children's show *Sesame Street*.[2] The camera shows four items and the lyrics exhort the viewer to identify the item that does not belong by the time the song is finished.[3] Like most of the lessons from *Sesame Street*, they are useful into adulthood. Given the grouping of Willow Canyon Homeowners Association; Bass Industries, Inc.; a pick-up basketball team; and John Wayne, one would surmise that John Wayne does not belong with the other items because he is a human, whereas the other three are groups of humans formed into specific entities. But given different criteria, the odd-one-out can change. Pick-up basketball teams do not reach the level of structure and permanency that one would consider typical of an organization.[4] For this reason, the basketball team would not fit into the statutory definition of a person under 5 U.S.C. § 551, whereas the other three entities in that grouping would.[5] The law often makes distinctions like this whether they comport with one's usual sense of categorization or not.[6]

Even these legal categorizations do not remain constant. Though a statute groups an individual together with corporations and associations, courts have distinguished individuals from the others in the case of personal privacy under the Freedom of Information Act ("FOIA" or "the Act").[7] By singling out individuals, courts have denied the protection of personal privacy to corporations and businesses.[8] This changed in 2009 when the Third Circuit issued its opinion in *AT&T v. FCC*, giving AT&T the FOIA protection of personal privacy. This Comment will argue that this decision was incorrect because it violated the principles established by the Supreme Court in a line of cases spanning over thirty years and because the Third Circuit's hold-

1. *Videos: One of These Things*, SESAME STREET, http://www.sesamestreet.org/video_player/-/pgpv/videoplayer/0/878bf0b6-aac0-4030-98d0-6fbe5704f0ff/one_of_these_things (last visited Sept. 3, 2011).

2. *Id.*

3. *Id.*

4. *See Organization Definition*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/organization (last visited Sept. 3, 2011) (defining organization as an "association" or "society," or as "an administrative and functional structure").

5. Administrative Procedure Act § 1, 5 U.S.C. § 551(2) (2006) (defining person to include "an individual, partnership, corporation, association or public or private organization other than an agency").

6. *See, e.g.*, 15 U.S.C. § 68(a) (2006); 7 U.S.C. § 3402(l) (2006); 7 U.S.C. § 75(c) (2006) (defining person to include individuals, partnerships, corporations, associations, other entities, or business enterprises).

7. *See* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982); Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1228 (D.C. Cir. 2008); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1189 (8th Cir. 2000); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

8. *See Multi AG Media*, 515 F.3d at 1228.

ing would have created new problems to be solved by both the courts and the administrative agencies that operate under FOIA daily.

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

A. *Background*

The Federal Communications Commission ("FCC") administered a federal program called "E-Rate" to give schools more access to advanced telecommunications technology.[9] AT&T participated in this program by providing equipment and services to schools and then billing the government for the costs.[10] In 2004, AT&T informed the FCC that it may have overcharged the government for work done in the New London, Connecticut school district.[11] The FCC's Enforcement Bureau ("Bureau") conducted an investigation and collected documents from AT&T such as invoices, internal e-mails providing pricing and billing information for the New London schools, responses to Bureau interrogatories, and names of employees involved in the New London billing.[12] The Bureau also received AT&T's own assessment of whether the employees involved in the overcharging violated AT&T's internal code of conduct.[13]

In 2005, CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request for the pleadings and correspondence in the Bureau's investigation file of AT&T's E-Rate billing.[14] AT&T then also submitted a letter to the Bureau opposing the request because FOIA Exemption 7(C) prohibited the disclosure of the collected documents.[15] The Bureau rejected AT&T's argument because corporations do not have the personal privacy protected by the exemption.[16] AT&T then filed an application for the FCC to review the Bureau's ruling.[17] The FCC denied the application on procedural grounds, but on its own motion compelled disclosure because Exemption 7(C) does not apply to corporations.[18] AT&T then petitioned the Third Circuit to review the FCC's order; CompTel entered the case also as an intervener.[19]

9. AT&T Inc. v. FCC, 582 F.3d 490, 492 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).

10. *Id.* at 492.

11. *Id.*

12. *Id.* at 492–93.

13. *Id.* at 493.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 493–94.

B. *The Court's Statutory Interpretation of FOIA and Holding*

After dealing with the FCC's procedural arguments, the court addressed the main issue: whether corporations such as AT&T may have personal privacy under FOIA.[20] The Third Circuit found that the plain text of Exemption 7(C) indicated that it applies to corporations.[21] The exemption protects personal privacy, and FOIA defines "person" to include a corporation.[22] The court stated that the adjectival form should refer back to the defined term; here, FOIA defined "personal" by defining "person."[23] Because the court found the statutory language unambiguous, it declined to consider the statutory purpose, relevant case law, and legislative history arguments set forth by the parties.[24] The Third Circuit agreed with AT&T and held that a corporation may have a personal privacy interest under the protection of Exemption 7(C).[25]

III. EXISTING LAW

A. *Freedom of Information Act*

In 1966, Congress passed FOIA as a revision of the public disclosure section of the Administrative Procedure Act, which fell "far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute."[26] FOIA requires federal agencies to make certain records available for public inspection and to make other information available to any person upon request.[27] FOIA seeks to permit public access to official information and has "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[28] Congress made these exemptions, found in 5 U.S.C. § 552(b), exclusive to establish "concrete, workable standards for determining whether particular material may be withheld or must be disclosed."[29] The exemptions may apply only to reasonably segregable portions of a record. After deleting the material exempted by § 522(b), the agency may then release the remainder of the record.[30]

The exemptions found in subsections 6 and 7(C) of FOIA prevent release of information that would constitute unwarranted invasions of

20. *Id.* at 494–96.
21. *Id.* at 497.
22. *Id.*
23. *Id.*
24. *Id.* at 498.
25. *Id.*
26. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 & n.5 (1973).
27. Freedom of Information Act, 5 U.S.C. § 552(a)(1)–(3) (2006).
28. Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976).
29. *Mink*, 410 U.S. at 79; 5 U.S.C. § 552(b) (2006).
30. *Id.* § 552(b).

personal privacy.[31] Exemption 6 prohibits the dissemination of personnel and medical files when their release would "constitute a clearly unwarranted invasion of personal privacy."[32] Exemption 7(C) varies in several respects. First, it concerns records or information compiled for law enforcement purposes.[33] Second, this exemption has a different standard: the production of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[34] Despite these differences, the Supreme Court has used reasoning from an Exemption 6 opinion to determine what constitutes personal privacy in the context of Exemption 7(C).[35]

B. *Supreme Court FOIA Decisions*

The Supreme Court has discussed the interpretation and application of the FOIA exemptions in a variety of cases.[36] These cases have revealed the Court's understanding of the purpose of FOIA, the narrowness of its exemptions, and the proper interpretation of these exemptions.[37] The Supreme Court has also described how the exemptions, especially Exemptions 6 and 7(C), relate and compare to one another.[38] Three principles appear repeatedly in these decisions. First, the purpose of FOIA, namely disclosure of information to the public, requires agencies and courts to construe the disclosure requirements broadly, the exemptions narrowly.[39] Second, Congress intended the exemptions to set up concrete workable standards that agencies and courts should interpret practically.[40] Third, Congress intended the exemptions to prevent disclosure of information that would infringe privacy interests of private citizens.[41]

1. Broad Disclosure Requirements, Narrow Exemptions

Congress created FOIA to permit greater public access to government information than previous disclosure statutes had permitted.[42] The central purpose was to open up government activities to "the

31. *Id.* § 552(b)(6), (7)(C).
32. *Id.* § 552(b)(6).
33. *Id.* § 552(b)(7).
34. *Id.* § 552(b)(7)(C).
35. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 768 (1989).
36. *See, e.g., id.*; Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976); Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 (1973).
37. *See Reporters*, 489 U.S. at 754–56; *Rose*, 425 U.S. at 360–67; *Mink*, 410 U.S. at 79–80.
38. *See Reporters*, 489 U.S. at 768.
39. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220–21 (1978); *Rose*, 425 U.S. at 366.
40. John Doe Agency v. John Doe Corp., 493 U.S. 146, 157 (1989); *Rose*, 425 U.S. at 381–82; *Mink*, 410 U.S. at 79.
41. *See Reporters*, 489 U.S. at 768.
42. *Mink*, 410 U.S. at 79.

sharp eye of public scrutiny."[43] In *Mink*, the Court stressed the Act's own language of making information available to the public for inspection.[44] This language places the emphasis on the "fullest responsible disclosure."[45] In *Reporters Committee,* the Court also recognized that government files incidentally contain information about private citizens and Congress did not intend the Act to disclose this second type of information.[46] For this reason, Congress "carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests."[47] In other cases, the Court stressed that the exemptions were intended to be narrow and exclusive.[48] Understanding that interpretations may differ even with seemingly simple statutes, the Court recognized the possibility of confusion brought out by conflict in the legislative history.[49] In *Rose*, the Supreme Court quoted, with approval, from a D.C. Circuit case that addressed legislative history.[50] There, the principle purpose of FOIA in promoting disclosure required the court to choose the interpretation that most favors disclosure.[51]

2. Exemptions Must Set Up Practical, Workable Standards

The dichotomy of broad disclosure and protecting privacy interests could pose a problem for agencies tasked with applying FOIA. However, in *John Doe*, the Supreme Court recognized Congress's attempt to balance the two with *specific* exemptions.[52] The specificity and the "clearly delineated statutory language" of the exemptions would inform agencies which information to not disclose.[53] In *Mink*, the Court described the exemptions as "plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed."[54] The Court stressed again the practical, workable nature of the exemptions in *Rose*.[55] In *Rose*, the Supreme Court considered the personal privacy implications of identifying information in case summaries of service academy honor and ethics hearings.[56] Having determined that disclosure of the summa-

43. *Reporters*, 489 U.S. at 774.
44. *Mink*, 410 U.S. at 79.
45. *Id.* at 80.
46. *Reporters*, 489 U.S. at 774–75.
47. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220–21 (1978).
48. Dep't of the Air Force v. Rose, 425 U.S. 352, 366 (1976); *Mink*, 410 U.S. at 79.
49. *See Rose*, 425 U.S. at 365–66.
50. *Id.*
51. *Id.* at 366.
52. John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) (emphasis added).
53. *Rose*, 425 U.S. at 360–61.
54. *Mink*, 410 U.S. at 79.
55. *See Rose*, 425 U.S. at 361.
56. *Id.* at 355–57, 377.

ries could involve invasions of privacy, the Court turned to the remedy of redacting names and other identifying information.[57] Recognizing that redaction does not guarantee protection against identifiability and that the consequences of identification are severe, the Court still chose redaction over another remedy because of its practicability.[58] Brennan noted that redaction was a familiar technique and Congress intended the exemptions to be practical and workable.[59]

3. Congress Intended to Protect the Privacy Rights of Individual Citizens

In *Whalen v. Roe* and again in *Reporters Committee*, the Court defined the concept of personal privacy as the privacy interest of an individual.[60] In delivering the opinion of the Court in *Whalen*, Justice Stevens described two types of privacy interests: "One is the individual interest in avoiding disclosures of personal matters, and another is the interest in independence in making certain kinds of important decisions."[61] Justice Stevens later used a footnote to further describe the latter interest as an individual's right to freedom from government compulsion in "action, thought, experience, and belief."[62] In *Reporters Committee*, the opinion of the Court by Justice Stevens discussed the idea of privacy and how it fit within the purpose of FOIA.[63] He began with the basic definition: "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."[64] He then quoted two scholars who also defined privacy as an individual right: the right to control how much information about him is communicated to others.[65] According to the opinion of *Reporters*, Congress also took this approach when drafting FOIA and its exemptions.[66] The portion of the statute which permitted agencies to redact identifying information reflected "a congressional understanding that disclosure of

57. *Id.* at 381.

58. *See id.*

59. *Id.* at 381–82.

60. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989); Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

61. *Whalen*, 429 U.S. at 599–600.

62. *Id.* at 600 (quoting PHILLIP B. KURLAND, THE PRIVATE I: SOME REFLECTIONS ON PRIVACY AND THE CONSTITUTION 8 (1976)).

63. *Reporters*, 489 U.S. at 763–64.

64. *Id.* at 763.

65. *Id.* at 764 n.16 (quoting ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 1 (1970) ("Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others."); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others.")).

66. *Id.* at 766.

records containing personal details about private citizens can infringe significant privacy interests."[67]

IV. CASE ANALYSIS

A. *The Third Circuit's decision unnecessarily broadened the exemption beyond what Congress intended.*

The Third Circuit's decision in *AT&T* was incorrectly decided because it violated the principles previously established by the Supreme Court as to the purpose, scope, and interpretation of the FOIA exemptions, specifically Exemptions 6 and 7(C). Again and again, the Supreme Court has stressed that FOIA promotes broad disclosure which requires narrow exemptions.[68] Understanding Congress's intent to limit the amount of information protected under these exemptions, the Supreme Court had applied Exemption 7(C) only to individuals.[69] Opening this same exemption to corporations could exponentially increase the information kept from public discovery. A corporation's daily operations will usually generate more information than an individual's daily tasks. For example, an average person might make a few phone calls to family or friends, purchase some groceries, and pick out a movie to watch. In contrast, even a mid-sized corporation could make hundreds of phone calls per day, purchase items by the thousands, and set up a business plan to guide operations in several states for the next several months. Because a corporation tends to do things on a bigger scale, it produces more information that could potentially fit the exemption.

Additionally, the manner in which the Third Circuit expanded Exemption 7(C) to include corporations by definition also embraces several other types of organizations. The FOIA definition of a person includes corporations, partnerships, associations, and public or private organizations other than an agency.[70] The Third Circuit gave corporations the 7(C) personal privacy exemption because FOIA defined a corporation as a person, not because characteristics of a corporation make it deserving of a privacy-interest protection. This reasoning also gives personal-privacy exemptions to any of the groups listed in the definition. The Third Circuit drew no distinction between corporations and any other entity in the definition, leaving the door wide

67. *Id.*

68. Dep't of the Air Force v. Rose, 425 U.S. 352, 366 (1976); Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79–80 (1973).

69. *See* AT&T Inc. v. FCC, 582 F.3d 490, 496 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011) (noting that the Supreme Court had not squarely rejected a proffer of personal privacy for a corporation); *see also Reporters*, 489 U.S. at 762 (Exemption 7(C) privacy implicated was that of "an individual interest in avoiding disclosure of personal matters").

70. Administrative Procedure Act § 1, 5 U.S.C. § 551(2) (2006).

open for the other entities to argue for protection under this exemption by virtue of the statutory language.

The Third Circuit's decision was also incorrect because the protection of corporate information by Exemption 7(C) is a redundant safeguard. Corporations were already protected under FOIA through Exemption 4, which protects trade secrets and privileged commercial or financial information.[71] Though the Third Circuit did not provide a test for privacy in the context of a corporation, information that a corporation has kept secret or privileged would presumably fall within the personal privacy definition as well. Without a definitive judicial test, it is difficult to say whether *any* information protected by Exemption 7(C) would not also fall into the category of Exemption 4 protection. The amount of information requiring a separate shield under 7(C) is likely very limited. However, one cannot ignore the alternative that courts will find information that does not fit under Exemption 4 fits, instead, under Exemption 7(C). Giving corporations another exemption that is separate in both title and scope doubles the opportunity to keep information from the public. Either the new scope of Exemption 7(C) would do nothing or it would do too much. While a court may often find itself faced with unattractive consequences such as these, rarely did the court itself create the necessity for these consequences. Excepting a brief discussion of corporate reputation, the court's decision spelled out how AT&T could receive FOIA protection, not why AT&T needed this protection.

B. *The Third Circuit erred in making this decision because it incorrectly relied only on statutory language and ignored legislative intent and Supreme Court precedent.*

For such a broad-reaching decision, the Third Circuit relied on relatively few bases for reaching its decision. The Third Circuit chose to interpret Exemption 7(C) on statutory language alone, both the language of the exemption itself and the statutory definitions provided in § 551.[72] Using these definitions, the court decided that the language unambiguously included corporations in the category of entities protected by that exemption. Having made this decision, the Third Circuit then declined to consider the arguments made about statutory purpose, other case law, and legislative history.[73]

71. Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2006).

72. *See AT&T,* 582 F.3d at 497. Because language was the basis for the Third Circuit's decision, this was also the ground on which the Supreme Court overruled the case. AT&T v. FCC, 131 S. Ct. 1177 (2011).

73. *AT&T,* 582 F.3d at 498.

1. The Third Circuit only used statutory language and one definition found therein.

The Third Circuit looked only at the language of the FOIA exemption. The language of Exemption 7 provided protection against disclosure of records or information compiled for law enforcement purposes when it would infringe on various interests, such as the right to a fair trial, disclosure of confidential sources, or the endangerment of life or physical safety of an individual.[74] Exemption 7(C) protects personal privacy.[75] Rather than using the common understanding of personal privacy or using the Supreme Court's definitions mentioned above, the Third Circuit chose to break apart the phrase to define it.[76] The root of "personal" is "person," and § 551 defines the meaning of the word "person" for FOIA.[77] Despite three years earlier declining to conclusively link an adjectival form to its statutorily-defined root, the Third Circuit insisted that it "would be very odd indeed" for the adjective to not refer back to the defined root term.[78] The definition of person in § 551 includes an individual, partnership, corporation, association, or public or private organization other than an agency.[79] Because this definition included corporations, the Third Circuit held that the language of Exemption 7(C) unambiguously indicated that a corporation may have personal privacy under the exemption.[80]

2. The Third Circuit ignored persuasive congressional intent as evidenced by House Reports and clear legislative history.

Once the court made that decision, it chose to ignore the other arguments proffered by the parties, including congressional intent, legislative history, and other courts' decisions that were relevant though not controlling.[81] The Third Circuit noted that congressional intent was evidenced through the statutory language, and only if that language was ambiguous should the courts look to legislative history.[82] The court pointed out that legislative history has several shortcomings as an interpretive tool, not the least of which concerns the problem of multiple intents from the hundreds of representatives who must vote for a bill.[83] While the Third Circuit had a valid point, it cannot exclude all investigations into legislative intent. Practicality requires

74. 5 U.S.C. § 552(b)(7) (2006).
75. *Id.* § 552(b)(7)(C).
76. *AT&T*, 582 F.3d at 497.
77. Administrative Procedure Act § 1, 5 U.S.C. § 551(2) (2006).
78. *AT&T*, 582 F.3d at 497; *see* Del. River Stevedores v. DiFidelto, 440 F.3d 615, 620 (3d Cir. 2006) (the term "disabled employee" need not be linked to definitions of "disability" and "employee").
79. § 551(2).
80. *AT&T*, 582 F.3d at 498.
81. *Id.*
82. *Id.* at 498 n.7.
83. *Id.*

brevity, and a legislature cannot always say everything it wants to say in the wording of the statute alone.

Actions speak louder than words, and the enactment of the Freedom of Information Act provided clear information about legislative intent. Congress had already created a disclosure statute that would allow the public access to information about its government.[84] Called the Administrative Procedure Act, Congress enacted this disclosure statute in 1946.[85] However, the broad exemptions within the Administrative Procedure Act prompted Congress to revise the Act in 1966.[86] In the House Report created before FOIA was passed, Representative Dawson described the Administrative Procedure Act and listed the abuses that occurred in administration of that Act.[87]

Dawson identified three sources of improper government secrecy: one, a "housekeeping" statute, which gave government officials general authority to operate their agencies; two, executive privilege, which affected legislative access to executive branch information; and three, section three of the Administrative Procedure Act.[88] Dawson equated the information withheld by a privilege claimed with the information withheld by a disclosure statute;[89] this fact would reduce the confidence one had in the efficacy of the disclosure statute. Dawson noted attempts to fix the secrecy caused by the housekeeping statute and executive privilege, but called the Administrative Procedure Act "the major statutory excuse for withholding government records from public view."[90] Considering such congressional opinions of the current disclosure statute, one does not question the steps Congress took in creating FOIA.

Comparing the Administrative Procedure Act and FOIA, the changes between them provide a clear road map highlighting the direction Congress chose to move within this field. While the Administrative Procedure Act required that potential requesters pass a properly and directly concerned test, FOIA makes the majority of records available to any person.[91] By broadening the pool of potential requesters, Congress broadened the release of information. Congress also changed the language of the exemptions. The Administrative Procedure Act provided exemptions for materials by using phrases such as "good cause found," "in the public interest," and "internal

84. *See* WILLIAM DAWSON, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 89-1497, at 1 (1966).

85. *Id.*

86. *See* Thomas Blanton, *Freedom of Information at 40*, THE NAT'L SEC. ARCHIVE (July 4, 2006), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm.

87. H.R. REP. NO. 89-1497, at 1–3.

88. *Id.* at 2.

89. *See id.*

90. *Id.* at 2–3.

91. *Id.* at 1.

management."[92] In comparison, FOIA lists exemptions with specific definitions, such as "specifically authorized under criteria established by an Executive order" and "related solely to the internal personnel rules and practices of an agency."[93] An agency choosing to withhold information would receive more deference under a standard of "in the public interest" than under a standard requiring "criteria established by an Executive order." Again, Congress broadened the release of information—in this case, conversely through narrower exemptions. Thus, by comparing the language of the statutes, one may infer a few statements of congressional intent. This interpretation of intent does not rely on external statements of intent from various members of the legislature; rather, much like the Third Circuit's reasoning, it focuses on the words of the statute.

3. The Third Circuit also rejected the Supreme Court's consistent treatment of FOIA, as well as persuasive D.C. Circuit decisions.

The Third Circuit also declined to consider relevant decisions from other courts.[94] The parties discussed FOIA exemption cases, including those from the D.C. Circuit.[95] Both the D.C. Circuit and the Supreme Court highlighted the same important facts in the legislative history of FOIA. The previous disclosure statutes had failed to provide information to the public to the extent Congress desired.[96] Congress replaced loosely-constructed exemptions with tightly-drawn categories of exemption.[97] In promulgating this Act, Congress set forth a presumption of disclosure and thus, a narrow construction of the exemptions listed.[98]

a. Both the Supreme Court and the D.C. Circuit stressed the importance of narrow FOIA exemptions.

Because the courts found that Congress had created the statute with a presumption of disclosure, they interpreted the exemptions narrowly.[99] In *Washington Post*, the D.C. Circuit had an opportunity to apply Exemption 7(C) to a report dealing with an investigation into a harmful drug.[100] The corporation involved sought to protect the government report from a FOIA request based on the presence of em-

92. *Id.* at 2.
93. Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A), (2) (2006).
94. AT&T Inc. v. FCC, 582 F.3d 490, 498 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).
95. *Id.* at 498 n.6.
96. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 (1973).
97. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976); Wash. Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 101 (D.C. Cir. 1988).
98. *See Rose*, 425 U.S. at 361; *Wash. Post*, 863 F.2d at 101.
99. *Rose*, 425 U.S. at 360–61; *Wash. Post*, 863 F.2d at 101.
100. *Wash. Post*, 863 F.2d at 99–100.

ployee names in the report.[101] Even though employees were named in the report, the presence of the name did "not divulge whether the individual was a target of any law enforcement investigation."[102] The report also contained employees' business decisions; the D.C. Circuit again refused to protect this information on the grounds that it was not of a private nature.[103] Though given an opportunity to expand or, as some might consider, simply apply the exemption, the D.C. Circuit interpreted the exemption to a very strict sense of personal privacy.

b. The Supreme Court and the D.C. Circuit decisions discussed personal privacy, both the type of information encompassed and the reasons for protecting that information.

The Supreme Court and the D.C. Circuit also discussed the very thing AT&T sought to protect in this case: the concept of personal privacy.[104] In *Rose*, the Supreme Court listed several intimate details that would have constituted an invasion of personal privacy had they been present in the files under the Court's consideration. These included an individual's birth place, his parents' names, where he has lived from time to time, his high school or other school records, examination results, and work performance evaluations.[105] The D.C. Circuit had its own list of details that would fall under the protection of an exemption for personal privacy. In *Washington Post*, the court listed them: "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation."[106]

However, the D.C. Circuit drew the line at exemptions protecting information connected to business judgments and relationships, even if disclosure of this information would tarnish someone's professional reputation.[107] The court conceded an exception where the two intersect: when business records reveal financial information that one can easily trace to an individual, disclosure of those records jeopardizes a personal-privacy interest.[108] This exception was discussed in a case involving family farms, where the financial information about the farm would reveal at least a portion of the owner's personal finances.[109] Thus, the D.C. Circuit did not utilize the exception to protect the privacy of the business, but rather the privacy of the person whose finances were mirrored by the business.

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101. *Id.* at 101.
102. *Id.*
103. *Id.* at 100.
104. *See Rose*, 425 U.S. at 377; *Wash. Post*, 863 F.2d at 100.
105. *Rose*, 425 U.S. at 377.
106. *Wash. Post*, 863 F.2d at 100.
107. *Id.*
108. Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1228 (D.C. Cir. 2008).
109. *Id.* at 1229.

Not only have these courts listed specific examples of information protected as personal privacy, but the courts' reasons for doing so also shed light on the correct understanding of personal privacy. In *Washington Post*, the Supreme Court understood House and Senate Reports to suggest that Congress's primary purpose in enacting Exemption 6 was to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."[110] Similarly, the Supreme Court sought to protect families from disruption of peace of mind, additional anguish, annoyance, or harassment that would result from release of graphic details about a loved one's death.[111]

The Third Circuit considered several of these arguments and dismissed them.[112] It mentioned the D.C. Circuit's list of details protected as personal privacy yet ignored the exception found in the same case as that list. The Third Circuit quoted these intimate details, including reputation, and then argued that a corporation also has a strong interest in protecting its reputation.[113] This argument disregards the D.C. Circuit's later point that personal privacy does not extend to business judgments or relationships, even at the risk of tarnishing a person's professional reputation.[114] If the FOIA exemptions do not protect the professional reputation of an individual (who undoubtedly has a personal privacy interest), why would a corporation receive that protection?

Further, determining when a corporation has suffered embarrassment, harassment, anguish, or annoyance would present a new list of difficulties. Most, if not all, corporations put themselves out in the public eye, which would expose them to harassment, annoyance, or embarrassment anyway. Corporations are often required to share information with shareholders, who, in a publicly traded corporation, could be anyone with enough money to buy a share. For example, in South Carolina, a corporation must issue annual financial statements to its shareholders.[115] While a shareholder is an owner at the time the report is received, in two or three weeks, he may be a member of the general public again. In contrast, individuals are rarely *required* to disclose personal financial information equivalent to that in a financial statement, much less disclose that information to relative strangers.[116]

110. U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982).

111. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004).

112. *See* AT&T Inc. v. FCC, 582 F.3d 490, 498 n.5 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).

113. *See id.* at 498 n.6.

114. Wash. Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988).

115. S.C. CODE ANN. § 33-16-200(a) (2010).

116. The author recognizes that individuals are often required to share financial information, for example, to run a credit check. However, the individual chooses to apply for a line of credit that necessitates the credit check.

Financial information, however, is one of the few types of information that has equivalence between corporations and individuals. One must look more specifically at the type of information disclosed. While a corporation undoubtedly has information it would rather keep private, it is difficult to imagine that a corporation has information as intimate as an individual. What is the corporate equivalent of alcoholic consumption or of a medical diagnosis of a sexually transmitted disease? Though a corporation has a reputation to protect, it does not have vulnerabilities to that reputation that an individual has. Does disclosure of a subsidiary's failure cause the same anguish as that of publication of a child's autopsy photographs? Though a corporation may be embarrassed, it does not have the same capacity for emotional anguish that an individual has.

C. *If left standing, this decision demolishes three FOIA principles.*

Regardless of how the Third Circuit reached its decision in *AT&T v. FCC*, if left standing, this decision would have demolished the three FOIA principles set up by the language of the statute and identified by the Supreme Court. Not only has the Supreme Court identified these principles, but it has used them consistently and emphasized them in multiple opinions.[117] This decision contradicted all of these principles. First, it would have destroyed the rule of broad disclosure and narrow exemptions. Second, it would have made the standards and remedies for each exemption anything but practical and workable. And third, it would have contradicted the history of Congress and the courts using Exemption 7(C) to protect the personal privacy interests of individuals.

1. This decision destroyed the FOIA principle of broad disclosure and narrow exemptions.

As previously discussed, the main FOIA principle favors disclosure of information—that was the reason Congress felt it necessary to replace the Administrative Procedure Act with FOIA.[118] Though ideally any and all information would be released to a member of the public who requested it, other considerations require limits on this flow of information. The exemptions should not act as a dam, but rather a sieve. Increasing either the number of entities who may claim an exemption or the amount of information covered by an exemption also increases the sieving capabilities of the exemption. The Third Circuit's decision increased both the number of entities who may

117. *See* Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976); Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 (1973).

118. *See* WILLIAM DAWSON, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 89-1497, at 1–2 (1966).

claim a personal privacy interest under Exemption 7(C) and the amount of information that falls within that zone of privacy.

a. The Third Circuit's decision meant that Exemption 7(C) would cover more entities than before.

The purpose of FOIA, as emphasized by the Supreme Court and D.C. Circuit, is to promote dissemination of information about the government to the public. By permitting corporations to claim personal privacy, the Third Circuit broadened the exemptions available and made more information unavailable to the public. More troublesome than the result reached are the implications of the way the court reached its decision. Instead of analyzing the unique characteristics of a corporation that entitle it to protection under the exemption, the Third Circuit took a purely definitional route. In doing so, the Third Circuit opened the door for the other entities included in the statutory definition of person. With this decision as precedent, a personal-privacy exemption could be available for the other entities called a "person" in § 551: "a partnership, association, or public or private organization other than an agency."[119] An "agency" means each authority of the United States government except for Congress, the courts of the United States, the governments of the territories or possessions of the United States, and the government of the District of Columbia.[120]

Using these definitions, a public organization other than an agency could include state and municipal governments. In *City of Sausalito*, the Ninth Circuit had to determine whether the City of Sausalito had standing to bring suit against the National Park Service.[121] Because the statute on which the City based its claim did not explicitly provide statutory standing, the Ninth Circuit had to look at the Administrative Procedure Act, which provides standing for any person "adversely affected or aggrieved by agency action."[122] The Administrative Procedure Act uses the same definitions as FOIA, namely § 551(2).[123] Using this definition of person, the court concluded that Sausalito qualified as a person because it was a municipal corporation.[124] If municipal governments qualify under the definition, courts could also stretch it to include other state governments or agencies.

This definition of "person" reaches far beyond cities though; it could mean the National Football League or the Hollywood Foreign Press Association. Any group of people, no matter how loosely associated, can organize itself somehow and then claim eligibility for pro-

119. Administrative Procedure Act § 1, 5 U.S.C. § 551(2) (2006).
120. *Id.* § 551(1).
121. City of Sausalito v. O'Neill, 386 F.3d 1186, 1196 (9th Cir. 2004).
122. *Id.* at 1200.
123. *Id.*
124. *Id.*

tection under Exemption 7(C). This provides a textbook example of the slippery slope theory. Another analysis may have limited the damage of this decision to only a select group; however, the Third Circuit's choice of reasoning opened the door for all of these other groups. This broadened the exemption to the point of nullity and had the potential to hide a larger amount of information from members of the public.

b. An exemption for a corporation's privacy interest would likely keep a larger amount of information from disclosure, because a corporation generally has a wider reach than an individual.

First, the Third Circuit's decision contradicted the purpose of FOIA in providing full disclosure because this holding creates an enormous group of protected entities. This decision hacked a broad swath of information that would be made unavailable for public viewing. Not only did the decision broaden the amount of information protected under a corporate application of 7(C), but it broadened this amount to an undetermined and possibly exponential sum. Though a corporation may be small, with only a few employees and a limited number of transactions per day, many, like AT&T, are large with thousands of employees and thousands of transactions per day. Additionally, large corporations will likely have more interaction with several branches of the federal government than smaller companies may. For example, a company like Wal-Mart sells products that fall under the authority of the Food and Drug Administration; pays its employees, requiring interaction with the IRS; and has at least forty-three records in the Trademark Electronic Search System.[125] This is only a sample of the possible agencies that could have interaction with a large corporation and compile records about the corporation for investigatory purposes.

This interaction between government agencies and corporations would create more work for both. Previously, a corporation only had to worry about information covered by Exemption 4 (trade secrets) and Exemption 6 (personnel files). The Third Circuit gave a corporation the option of protecting every piece of information that the government obtained from it—corporations could have monitored these government disclosures to prevent the embarrassment and damage to

125. *See FDA Fundamentals*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/Transparency/Basics/ucm192695.htm (last updated Aug. 29, 2011) (FDA assures safety, effectiveness, and security of nation's food supply, cosmetics, and dietary supplements); *All Departments*, WAL-MART, http://www.walmart.com/catalog/catalog.gsp?cat=121828 (last visited Sept. 1, 2011) (Wal-Mart has grocery, beauty, and diet & nutrition departments); *Businesses with Employees*, IRS.GOV, http://www.irs.gov/businesses/small/article/0,,id=98862,00.html (last updated May 11, 2011); *Trademark Electronic Search System*, U.S. PATENT & TRADEMARK OFFICE, http://tess2.uspto.gov (follow "Basic Word Mark Search;" search "Wal Mart;" follow "Search Query") (last visited Sept. 1, 2011).

reputation that the Third Circuit feared. Under the banner of "personal privacy," a corporation could have kept a large percentage of currently available information unavailable to requests for disclosure. Of course, each corporation would have the option; the government agencies that must respond to any disclosure challenges would have no such choice. A large corporation could tie up the resources of several government agencies at once, either by challenging disclosures or by creating the threat of a challenge and forcing the agencies to check and double check the information to be disseminated.

2. The Third Circuit's decision also destroyed the "practical and workable" FOIA principle.

This same hypothetical undermines the second important principle of FOIA: the exemptions must provide practical and workable standards. In *Mink*, the Supreme Court emphasized the purpose of specific exemptions—to create concrete workable standards for determining whether information should be withheld or released.[126] Of course, this was probably primarily for the benefit of the agencies. The government established agencies like the FCC to accomplish goals other than informing the public. FOIA imposes an additional burden on these agencies. It is not logical to assume that Congress would want this burden to be complicated as well. If the standards are clear-cut, agencies would have little trouble disseminating the information as well as accomplishing their other tasks. Similarly, a clear standard saves time and money for the requestor as well. Knowing in advance that information falls under an exemption may deter a requestor from asking for the information. Finally, if the requestor and agency disagree on the categorization of information, concrete standards provide guidance for a court to adjudicate the matter.

a. Agencies and courts would have difficulty in determining a standard for corporate privacy that will fulfill the practical and workable principle.

The exemptions are intended to be workable standards to ensure the public has speedy access to the information held by its government. However, the Third Circuit's decision burdened this process with additional, ill-defined standards. First, because the Third Circuit simply granted corporations the right to personal privacy without defining it, the burden would fall upon agencies to determine what fits within the scope of a corporation's personal privacy. As discussed above, the standards already defined for an individual's personal privacy interest do not easily translate to a corporation. Corporations and other organizations do not have health or familial concerns. Also, as mentioned before, corporations disseminate larger amounts of in-

126. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 (1973).

formation amongst the general public than the average individual does.

Attempting to set a standard reveals the inherent problems. For example, how would one determine the privacy interest of AT&T? Which AT&T information would fall under the protection of this privacy? The previous discussion of shareholder reports highlights the lack of secrecy for information that the corporation shares with its owners. Then, there is the information disseminated only within the corporation. But where should the courts draw the line: amongst upper management or amongst any number of employees? Once a court draws such a line, it would apply only to AT&T and similar corporations. A smaller corporation would require a different standard; a larger corporation yet another standard. Even after a standard of corporate privacy had been determined, agencies would be charged with examining requested information under at least five additional standards (agency, corporation, partnership, public organization, private organization) in addition to screening for the other exemptions. The inclusion of associations, partnerships, and other organizations incorporates even more multifarious structures, each of which could demand a different standard. Finally, there remains the question of whether any information shared with an AT&T customer can still qualify for the 7(C) exemption. These are examples of questions that the Third Circuit decision opened up for protracted debate and litigation.

b. Agencies and courts would also have difficulty finding a remedy that will fulfill the "practical and workable" principle.

Even if agencies and courts find definite standards for determining corporate privacy, these standards do not prescribe the remedy. In keeping with the purpose of full disclosure, the exemptions found in § 552 do not prohibit the entire document from being released. Rather, the statute permits the release of nonexempt information after redacting the portions covered by the exemptions.[127] Agencies and courts have generally applied this by requiring names and other identifying information to be redacted.[128] If the individual cannot be identified, releasing information about him cannot invade his personal privacy because no one can connect the details to the person. Doing the same for a corporation may be difficult if not impossible.

Much like the categories of information, there are no clear equivalents of identifying information between individuals and corporations. While redacting a corporation's name would make identification more challenging, other details could pinpoint an identity. Companies tend to specialize, whether in the products manufactured

127. Freedom of Information Act, 5 U.S.C. § 552(b) (2006).
128. Dep't of the Air Force v. Rose, 425 U.S. 352, 374–75 (1976).

or services provided. Even something as vague as a mission statement could give the reader a hint about the identity of the company. For example, this mission statement: "It has always been, and will always be, about quality. We're passionate about ethically sourcing the finest coffee beans, roasting them with great care, and improving the lives of people who grow them. We care deeply about all of this; our work is never done."[129] Though it does not contain a name, address, or anything unique to that company, one could narrow down the possibilities to include Starbucks simply by the use of the word "coffee." In contrast, the fact that a person works at a Starbucks would not sufficiently distinguish that individual so as to invade his personal privacy.

If preventing identification would not protect the corporation's interest, larger amounts of information would have to be redacted in order to protect the privacy interest involved. Instead of redacting names and releasing only generic details, agencies would have to redact the privacy-invading details themselves. Depending on the type of details, this redaction may create gaps in the investigatory record, which make it difficult for the public to understand how the government agency operates. For example, a government agency could investigate billing procedures and make the determination that a company had proper procedures. But a citizen would find it difficult to ascertain the method by which the agency made the determination if the investigated billing information was not available, in any form, to the public.

3. Congress and the courts use Exemption 7(C) to protect the unique privacy rights of individuals.

The final principle undermined was the precedent set by the courts to use Exemption 7(C) to protect the unique privacy rights of individuals. The difficulties discussed above in determining standards for identifying and redacting a corporation's personal information highlight the folly of using this exemption for entities other than individuals. Until the Third Circuit decision in *AT&T*, courts had used the exemption only for the protection of individuals.[130] These decisions were based on an understanding of privacy as an individual's right to choose how and when information about him or her is disseminated.[131] Though the law often uses the word "person" to denote corporations, partnerships, or other entities, this concept of privacy was structured only around the idea of an individual's rights. A corporation does not have the same types of concealed information or the same vulnerabilities as an individual.

129. *Our Starbucks Mission Statement*, STARBUCKS, http://www.starbucks.com/about-us/company-information/mission-statement (last visited Sept. 3, 2011).

130. AT&T Inc. v. FCC, 582 F.3d 490, 496 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).

131. *See* Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

D. *The Third Circuit's decision also raises several public policy issues.*

In addition to the practical concerns, the Third Circuit's decision creates several public policy issues. First, corporate personal privacy arguments against disclosure must meet a heavy burden and are unlikely to overcome the public interest in releasing information. By granting corporations a protection that they cannot successfully wield, the Third Circuit created the potential for inefficiency, both in the agencies and in the courts. In *Washington Post*, the D.C. Circuit set out the requirements for a party attempting to withhold information under a FOIA exemption.[132] The burden of proof rests on the party who seeks to prevent disclosure.[133] The D.C. Circuit framed its test in terms of an agency attempting to withhold information; in the instant case, AT&T, as a concerned third party, sought to prevent disclosure.[134] The party with the burden cannot meet it with conclusory statements.[135] Rather the party must show how the release of that particular information would cause the adverse consequences that FOIA defends against.[136] As discussed above, a corporation has, at best, tenuous arguments for the level of secrecy of its information and for the intimate consequences of disclosure. Given the difficulty of defining and redacting segregable portions of information, the public interest in disclosure would likely outweigh the privacy interests of a corporation in most instances of a FOIA request. With the balance in favor of disclosure, this expansion of the exemption has no teeth and would waste the time and energies of government agencies and courts.

Additionally, this is not the only statute that utilizes the definition of the word "person" to include a corporation or other type of agency, association, or partnership.[137] These definitions are often used in statutes creating standing or in bankruptcy statutes. Though it failed here, the Third Circuit's definition-based reasoning could lead to expansion in other areas typically reserved for individuals. There is a greater risk of this in statutes that are not as well defined or consistently litigated as FOIA exemptions.

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132. *See* Wash. Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 101 (D.C. Cir. 1988).

133. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 79 (1973); *Wash. Post*, 863 F.2d at 102.

134. *AT&T*, 582 F.3d at 493; *Wash. Post*, 863 F.2d at 101.

135. *Wash. Post*, 863 F.2d at 101.

136. *Id.*

137. City of Sausalito v. O'Neill, 386 F.3d 1186, 1200 (9th Cir. 2004); Constructores Civiles de Centroamerica, S. A. v. Hannah, 459 F.2d 1183, 1190 n.114 (D.C. Cir. 1972); Carolene Prods. Co. v. U.S., 140 F.2d 61, 62 (4th Cir. 1944), *aff'd*, 323 U.S. 18 (1944).

V. CONCLUSION

Any given statutory scheme will not be perfect. It will have gaps, loopholes, or redundancies. Frequent litigation can help fill in those gaps, block the loopholes, and tidy up the redundancies. After more than thirty years of courts applying the FOIA exemptions, one would assume that things would be clearer than at the passage of these statutes. The FCC appeared to think so, having based its decision on judicial precedent, as well as its own precedent.[138] But the Third Circuit's decision would have the judiciary "muddy the waters" once again by opening the door, not only to AT&T, but also to any other corporation, organization, partnership, or agency willing to make the argument. By making its decision on purely definitional bases, the Third Circuit avoided examining why individuals no longer deserve to be singled out from the other entities in the § 551 definition. A thorough discussion of the notion of privacy suggests that individuals are *not* just like the other entities in that definition. Individuals have privacy interests that have no corporate equivalent, and a violation of those interests has intimate consequences that a corporation cannot feel. But individuals are not the only ones who do not belong. To make any sense, the Third Circuit's holding must sit in a vacuum, separate from its consequences. The decision does not provide a compelling explanation of the benefits of permitting corporations this privacy interest, does not weigh the likelihood of a corporation's success under this exemption, and does not fully consider the administrative burden imposed. This holding would create a myriad of problems in an attempt to solve a problem that may not have existed at all. Recognizing where the Third Circuit went wrong is essential to preventing similar decisions in the future. Courts cannot disregard the purpose of FOIA and the principles established to promote that purpose. The Supreme Court, fortunately, overturned this decision, putting individuals and corporations back where they belong.

138. AT&T Inc. v. FCC, 582 F.3d 490, 493 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).