

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL COMMUNICATIONS COMMISSION, :

4 ET AL., :

5 Petitioners : No. 09-1279

6 v. :

7 AT&T INC., ET AL. :

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9 Washington, D.C.

10 Wednesday, January 19, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:18 a.m.

15 APPEARANCES:

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17 General, Washington, D.C.; on behalf of
18 Petitioners.

19 GEOFFREY M. KLINEBERG, ESQ., Washington, D.C.; on behalf
20 of Respondents.

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1 P R O C E E D I N G S

2 (10:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-1279, Federal
5 Communications Commission v. AT&T, Inc.

6 Mr. Yang.

7 ORAL ARGUMENT OF ANTHONY A. YANG

8 ON BEHALF OF PETITIONERS

9 MR. YANG: Mr. Chief Justice, and may it
10 please the Court:

11 The court of appeals has held that FOIA's
12 statutory protection for personal privacy in
13 Exemption 7(C) extends beyond the privacy of individuals
14 and protects the so-called personal privacy of
15 corporations. That holding is inconsistent with the
16 text of Exemption 7(C), FOIA's broader context, and the
17 statute's drafting history, and would lead to anomalous
18 results.

19 The word "personal," standing alone, refers
20 to individual -- an individual human being. "Privacy,"
21 standing alone, and even more so in the context of the
22 phrase "invasion of privacy," invokes purely individual
23 concepts. And the sum of those terms -- that is, the
24 statutory phrase used in FOIA, "personal privacy" -- is
25 greater than the sum of its parts. It's long been well

1 settled that corporations have no personal privacy.

2 JUSTICE ALITO: Isn't it true that there are
3 contexts in the law in which the word "personal" is used
4 to refer to a corporation? For example, you could refer
5 to personal jurisdiction over a corporation, couldn't
6 you?

7 MR. YANG: There are -- the term "personal"
8 is sometimes used as a term of art, and I think personal
9 jurisdiction is one of those. It is the modern, shorter
10 term of art for jurisdiction in personam and reflects a
11 distinction drawn still in the law between cases brought
12 in personam and cases brought in rem.

13 That -- the evolution of that term in the
14 law as a term of art does not reflect what the ordinary
15 meaning of "personal" is. It's just the same as the
16 term "personal property," which also invokes
17 long-established traditional distinctions between
18 property that could be recovered in rem or in real
19 actions versus property that might be recovered in
20 actions in personam.

21 So -- and, in fact, I think it -- it's
22 important to note that there are -- although maybe there
23 are some instances that -- I think there's one instance
24 that AT&T cites in its brief. Nothing -- it never cited
25 any use of the term "personal" to mean corporate or

1 pertaining to a corporation. And when -- when you --

2 JUSTICE GINSBURG: What about -- what about
3 personal appearances?

4 MR. YANG: A personal appearance, I think
5 that -- that supports our position as well. If you're
6 making a personal appearance, it's not something that a
7 corporation does. A corporation is a -- a legal
8 construct. It doesn't exist as a thing that can make an
9 appearance.

10 JUSTICE ALITO: Well, in ordinary speech,
11 the term "personal" is not -- the term "person" is not
12 used to refer to a corporation. That's -- that's
13 legalese. But in -- but since the -- the Administrative
14 Procedure Act defines a person to include a corporation,
15 why is it relevant here or dispositive here to look to
16 the ordinary usage of term "personal" as opposed to the
17 way it's -- it's used in the law? And in the law, it is
18 sometimes used to refer to a corporation.

19 MR. YANG: Well, I think that -- that point
20 actually reinforces our position, because although
21 "person" is used in certain legal contexts to refer
22 to artificial persons and corporations and the like,
23 "personal" is not.

24 And "personal," as we explain in our brief,
25 is not simply a grammatical alteration, an inflection of

1 the term "person." It has existed in its own right
2 since the late 1300s and has developed meaning that is
3 unique to the term "personal," which --

4 JUSTICE GINSBURG: Mr. Yang, can we go back
5 first to this -- the request came in and, as I
6 understand it, the Commission said there are two
7 exemptions: The one for trade secrets, commercial,
8 financial confidential information; and then there was
9 one with Exemption 7 itself but as to the employee.

10 MR. YANG: Correct. There was an additional
11 exemption, Exemption 5, which protected internal
12 government communications. But --

13 JUSTICE GINSBURG: How does the -- does the
14 Commission, unaided by AT&T, go through the papers and
15 decide what would be embarrassing for an AT&T employee,
16 as distinguished from the corporation?

17 MR. YANG: How does it do that?

18 JUSTICE GINSBURG: Yes.

19 MR. YANG: Well, I -- I don't think the
20 touchstone is necessarily embarrassment. What the
21 government does, following this Court's decision in
22 Reporters Committee, is tries to determine whether there
23 is a personal privacy interest about individuals, and
24 that is information that pertains to particular
25 individuals.

1 For instance, in this Court's decision in
2 DOD v. FLRA, the Court explained that, although an
3 agency released the name of individuals, it could
4 properly withhold the addresses, the home addresses, of
5 those individuals, even though that might be publicly
6 available in phone books, because individuals have at
7 least some small personal privacy interest in that.

8 So what the agency will do is try to
9 identify information pertaining to individuals and then
10 will conduct -- if there is certain information, will
11 try to conduct a balancing to determine whether there is
12 a public interest in disclosure, that is, whether
13 revealing this would disclose information against the
14 government.

15 JUSTICE KENNEDY: Well, in that instance,
16 does the corporation have standing to raise that
17 objection on the employee's behalf?

18 MR. YANG: Well, I think the corporation to
19 the -- in a reverse FOIA case, for instance, which is
20 what we have here, where the corporation is alleging
21 that the government's decision-making process is
22 arbitrary and capricious, it has Article III standing to
23 resist the disclosure of documents. If you're using
24 standing kind of like a Fourth Amendment concept of
25 standing, I don't think that --

1 JUSTICE KENNEDY: Well, as an administrative
2 matter, can the corporation make a FOIA objection on
3 behalf of its employees?

4 MR. YANG: It can make an objection on its
5 own behalf, which is to say that the government has not
6 properly gone through the decision-making process by
7 not --

8 JUSTICE KENNEDY: All right. That's the
9 next -- that was going to be my next question: So the
10 corporation can raise FOIA on its own behalf?

11 MR. YANG: It's actually -- let me take a
12 step back. FOIA actions are actions which seek to
13 increase the amount of documents that the government has
14 released pursuant to a FOIA request.

15 We have also reverse FOIA actions, which are
16 actions under the APA and here under the Hobbs Act's
17 review provisions, that would give the court of appeals
18 jurisdiction. When there's a reverse FOIA action, the
19 claim is that the agency's final agency action is
20 somehow arbitrary, capricious, and not -- or contrary to
21 law. And so in this case, the FCC has certain
22 regulations which govern its processing of FOIA
23 requests. And AT&T's claim, as we understand it, is
24 that the FCC did not comply with its regulations, and,
25 therefore, its decision was arbitrary capricious because

1 its regulations required that it consider the personal
2 privacy interest of individuals.

3 And I should note that, with respect to
4 Exemption 6 or Exemption 7(C), the government itself
5 invokes personal privacy of individuals. That's what we
6 do when we process FOIA requests, because individuals
7 normally don't get any notice that there has been a FOIA
8 request. The government simply processes it and asserts
9 those rights, in a sense that they're rights, asserts
10 those interests on behalf of corporations -- on behalf
11 of individuals.

12 Going back to the text of the statute, the
13 term "privacy," and particularly an invasion of privacy,
14 invokes concepts that back to Warren and Brandeis's
15 right of privacy, the -- their article which explained
16 that or identified in the law certain human dignitary
17 interests that they gave the label "privacy."

18 CHIEF JUSTICE ROBERTS: Well, privacy
19 certainly isn't as limited as you argue "person,"
20 "personal," is. Corporations have private property.
21 They have private documents. The concept certainly
22 applies in the corporate context as it does in the
23 individual.

24 MR. YANG: I think the term "privacy," its
25 ordinary meaning, not the only meaning but the ordinary

1 and the commonly used meaning, does invoke individual
2 concepts. When corporations or other entities are at
3 issue, normally the more appropriate word would be
4 "confidentiality" or "secrecy." Those concepts --

5 CHIEF JUSTICE ROBERTS: You don't have
6 confidential property or secret property. You have
7 private property.

8 MR. YANG: Well, true. But it's is not
9 privacy. When we're talking about the right of privacy,
10 those -- that word we think -- again going back to
11 Warren and Brandeis and up through the fifties and
12 sixties when Prosser was elaborating the law of torts in
13 his groundbreaking article on privacy, those concepts
14 apply only to individuals, and particularly when you
15 combine the terms.

16 I mean, the Restatement makes clear, and
17 back to Prosser it was clear, that corporations have no
18 right of personal privacy. So when Congress in 1974 was
19 enacting Exemption 7(C), there would have been no basis
20 for it to conclude that the rights that it was
21 conferring through the phrase "personal privacy" would
22 confer rights not -- beyond individuals, to
23 corporations, and by necessarily implication, if AT&T is
24 correct, foreign governments, State governments, local
25 governments. There's no predicate for those types of

1 entities having personal privacy in the law.

2 JUSTICE GINSBURG: Mr. Yang --

3 JUSTICE SCALIA: Our cases assert, do they
4 not, that the exceptions to FOIA should be narrowly
5 construed?

6 MR. YANG: There are cases --

7 JUSTICE SCALIA: And we've said that on a
8 number of cases.

9 MR. YANG: In certain contexts, this Court
10 has indicated that exceptions are to be narrowly
11 construed. We think that, when read in context, those
12 cases and other cases of this Court explain that FOIA's
13 exemptions are to be given meaningful reach, because
14 what Congress was trying to do in FOIA -- and this is
15 somewhat against our interest in this case, and we
16 explain it more fully in our brief in Milner, which is
17 currently pending to the Court -- what Congress was
18 trying to do in FOIA was to establish a general
19 principle of disclosure, but in the exemptions it
20 identified very important interests that warranted an
21 exception from those general rules. And to narrowly
22 construe the exception, we think, would distort rather
23 than advance congressional purpose in enacting FOIA.
24 JUSTICE ALITO: Suppose Congress had used
25 the phrase "privacy of a person," "privacy of any

1 person." Would you make the same argument?

2 MR. YANG: Our argument would be a little
3 different, particularly in the context of Exemptions 6
4 and 7(C), where the phrase would be "an invasion of
5 privacy of any person."

6 We think, particularly when we're talking
7 about invasions of privacy, even though a corporation
8 might have a broader definitional meaning in context,
9 Congress in that case would still, we think, be
10 referring to individuals. But, of course, that's not
11 this case. That would make it a little bit more
12 difficult. We think we would probably still prevail on
13 that reading. But --

14 JUSTICE GINSBURG: What about the Privacy
15 Act? The Privacy Act undoubtedly concerns individuals,
16 human individuals --

17 MR. YANG: Correct.

18 JUSTICE GINSBURG: -- not artificial beings.
19 But it uses the words "individual privacy" --

20 MR. YANG: Well, it actually uses both
21 phrases. It uses, as we explain in our brief, the
22 phrase "personal privacy" to explain that that's what
23 the Act was protecting. And then within the operative
24 portions of the Act, it uses "individual," but it does
25 so for a very specific reason. Congress was intending

1 to protect a subset of individuals, and it defined the
2 term "individual" to mean U.S. citizens and lawful
3 permanent residents.

4 So not all individuals would be protected by
5 the Privacy Act. Now, Congress did that, not because
6 had it used the phrase "personal privacy" it would have
7 been extending rights to corporations and foreign
8 governments, but because personal privacy would have
9 been too broad in that it would have -- even though it
10 would have been limited to individuals, it would have
11 included a set of individuals that Congress wanted to
12 exclude, that is, everybody who is not a U.S. citizen or
13 lawful permanent resident.

14 JUSTICE SOTOMAYOR: Can I ask you a
15 question? I'm not sure I understood your response to
16 Justice Scalia. If there is ambiguity, if a term can be
17 given two meanings, and it's not clear -- and I know
18 you're challenging the clarity question here -- I
19 thought that Congress's intent to have full disclosure
20 would necessarily mean that where there's ambiguity as
21 to the meaning of an exception, then we should change
22 the narrowest meaning.

23 MR. YANG: Well, I think we disagree, and I
24 think this is why: No legislation pursues its primary
25 goal at all costs, and the FOIA exceptions that are at

1 issue here protect very important values that Congress
2 deemed to warrant exceptions from the rule. And so if
3 the Court were to put a thumb on one scale of that
4 balance that Congress has tried to strike, after using
5 all the normal tools of construction, we think that
6 would distort rather than advance the intent of
7 Congress.

8 JUSTICE SCALIA: I don't understand that.
9 We're not putting a thumb on the scale. Taking account
10 of the fact that -- that Congress has many objectives in
11 any legislation and that the limitations are as
12 important as the -- the substantive end, nonetheless,
13 when, having applied all of that, you end up with, gee,
14 I don't know, it's ambiguous -- you say, even in that
15 situation, we don't apply the rule that --

16 MR. YANG: Well, if you were to -- after
17 using all the normal tools that the Court does and
18 you're --

19 JUSTICE SCALIA: Well, but that's what
20 ambiguity means. It does -- it means --

21 MR. YANG: That's usually a very rare
22 instance, that you're exactly at equipoise. And -- and
23 we certainly aren't relying on narrow construction in
24 this case, Justice Scalia.

25 JUSTICE SCALIA: Okay. The Government wants

1 to abandon the principle that we've set forth in our
2 cases --

3 MR. YANG: Well, we think --

4 JUSTICE SCALIA: -- that exceptions to FOIA
5 are to be narrowly construed. The Government does not
6 support that.

7 MR. YANG: We do not embrace that principle.

8 JUSTICE GINSBURG: Mr. Yang --

9 JUSTICE SCALIA: Even though we did? I
10 mean --

11 MR. YANG: Well, we think that those
12 cases -- there are -- there are two lines of this
13 Court's decisions. Sometimes the Court explains that
14 exceptions are narrowly construed, and sometimes the
15 Court explained that its decision has given -- its
16 decisions have given the exceptions practical reach in
17 order to strike the appropriate balance that Congress
18 has tried to strike in FOIA.

19 Now, let me just say, our narrow
20 construction, to the extent the Court would want to
21 reaffirm it here -- we're not advancing that -- would
22 only help the Government's position.

23 JUSTICE GINSBURG: Your argument is based on
24 a case that will come before us. So -- but in this
25 case, it's to your interest to say, yes, that has been

1 -- that has been the Court's precedent, that FOIA
2 exceptions are to be narrowly construed.

3 MR. YANG: Well, the Government has broader
4 interests beyond a single case, and we think that,
5 again, we're not embracing strict construction in this
6 case. But, again, that would only help the Government's
7 position if you were to disagree.

8 JUSTICE SCALIA: Well, I'm not going to help
9 the Government's position if the Government doesn't want
10 to be helped.

11 (Laughter.)

12 JUSTICE SCALIA: I'm happy to leave you
13 where you put yourself.

14 MR. YANG: And we -- we accept that in this
15 case, and we think that the language of the text,
16 particularly when read in context in light of the
17 statutory history, and particularly when you take a look
18 at what's gone on since 1974 -- I mean, in the more than
19 35 years since, there has been uniform agreement that
20 Exemptions 6 and 7(C) apply only to individuals.

21 CHIEF JUSTICE ROBERTS: I suppose -- I
22 suppose families have rights of personal privacy, don't
23 they?

24 MR. YANG: Well, in certain contexts, family
25 members, as this Court decided in *Favish*, can have a

1 right to personal privacy. But the Court in Favish
2 recognized that that was a very, you know, significant
3 departure from the prior understanding that the right of
4 personal privacy in FOIA protects information about the
5 individual, him- or herself, and recognized that there
6 was another strain of personal privacy, which from
7 longstanding tradition in terms of -- within our
8 society, the Court could draw on in saying that personal
9 privacy should also protect, at least in the context
10 of --

11 CHIEF JUSTICE ROBERTS: So in some
12 contexts -- in some contexts, personal privacy does go
13 beyond the individual?

14 MR. YANG: No, still it is individual. I
15 mean, those are individual members of the family.

16 CHIEF JUSTICE ROBERTS: Aggregations of
17 individuals?

18 MR. YANG: Well, no. I think an individual
19 member of the family has a personal privacy interest by
20 virtue of the relationship to the decedent in Favish.

21 Let me go back. Just -- I think I would be
22 remiss if I didn't remark upon this Court's decision --

23 JUSTICE SCALIA: Excuse me. To go back to
24 the Chief's question, you do not deny that the
25 individuals who form the corporation, the officers and

1 the employees, are protected by the right of personal
2 privacy, and, indeed, you will -- you will edit any FOIA
3 responses to protect those individuals, even though
4 there are many of them, right?

5 MR. YANG: Correct. If there were --

6 JUSTICE SCALIA: But as individuals, not as
7 -- not as the corporation.

8 MR. YANG: As individuals, because the
9 information pertains to them.

10 Now, going to the American Express case,
11 which we explain in our reply, I think that is fatal to
12 the proposition that -- the proposition of AT&T that
13 there's a grammatical imperative that adjectives take
14 the meaning of a related noun.

15 In American Express, the Court construed the
16 Truth in Lending Act, which includes the definition of
17 "person" to include, for instance, corporations. It
18 then went on to construe a term, "consumer," which
19 concerns transactions primarily for personal, family,
20 household, or, at the time, agricultural purposes. The
21 Court explained that a transaction -- the transaction
22 that was conducted for a corporation's business
23 purposes, that it could not -- there was -- "it did not
24 fall within any of the purposes specified" -- that was a
25 quote -- in the definition of "consumer." That is, it

1 did not concern personal purposes. We think that's
2 fatal.

3 The Court, in fact, said it was the only
4 possible conclusion and that there was no other possible
5 interpretation of the statutory phrase, after repeating
6 the enumeration of those four factors three times and
7 then on the very next page saying corporate -- a
8 transaction for corporate business purposes could not
9 be fit within that definition.

10 Finally, I'd like to remark upon the
11 anomalies that this Court would set us forth upon if it
12 were to decide that corporations have personal privacy.

13 At least in the context of individuals,
14 there's an established body of law and societal
15 understanding of what a person, an individual, might
16 have a personal privacy interest in. But if we expand
17 personal to include corporations, foreign governments,
18 State governments, local governments, defining what
19 would be personal privacy of those institutions would
20 require an extraordinary exercise, a simple policy
21 judgment on the part of the agencies first and then the
22 Court.

23 And this Court in Favish was careful to
24 explain that that type of decision making would be
25 improper in that appropriate guides to -- to limit and

1 make objective a court and agency's decision making is
2 required.

3 Congress provided no benchmarks, never
4 addressed corporate, foreign governments, or any other
5 non-human entity in the context of personal privacy.

6 And, again, for 36 years, there's been
7 uniform agreement that personal privacy applies in this
8 context only to corporations.

9 If there are no further questions --

10 JUSTICE SOTOMAYOR: Counsel, if an
11 individual has been -- individual human being has been
12 investigated by the FBI and a FOIA request is made for
13 records related to that investigation, would the name of
14 the individual not be turned over?

15 MR. YANG: Well, if someone is asking for an
16 investigation of Tony Yang --

17 JUSTICE SOTOMAYOR: Yes.

18 MR. YANG: -- our -- I don't -- I can't say
19 definitively, but I think I can probably answer that
20 that even -- even answering the question of whether
21 there is a responsive record answers the question. So
22 I --

23 JUSTICE SOTOMAYOR: Well, that's the point.
24 So really your adversary is saying that the same harm
25 that occurs to an individual -- putting aside the

1 difficulty of defining privacy more broadly, but the
2 same harm that occurs to an individual who is disclosed
3 to have been the target of an investigation is an
4 identical privacy right of a corporation, that a
5 corporation has the same negative effects as the
6 individual.

7 MR. YANG: I think --

8 JUSTICE SOTOMAYOR: So I think they would
9 concede that privacy might need to be defined
10 differently for corporations. They're simply saying
11 this privacy interest is not.

12 MR. YANG: Well, the key point is that we
13 don't deny that corporations have some interest in
14 confidentiality that exists out there. For instance,
15 AT&T has relied upon the common law of defamation where
16 a corporation's business interests, business reputation,
17 is implicated. But even --

18 JUSTICE SOTOMAYOR: Well, parts of -- they
19 pled guilty already. So it is hard to imagine how much
20 exponentially more damaging --

21 MR. YANG: Well, to be fair to AT&T, there
22 was a settlement agreement in which they did not admit
23 any wrongdoing. So --

24 JUSTICE SOTOMAYOR: But that presupposes
25 some sort of investigation. So that's public knowledge

1 already.

2 MR. YANG: That is public knowledge. But I
3 think the key point is that the corporate -- a
4 corporation's interests in maintaining its business
5 reputation has been not regarded as a personal privacy
6 interest. It's true that they have interests, and FOIA
7 protects those interests, for instance, interests in
8 confidential commercial or financial information under
9 Exemption 4.

10 And so what really the -- we come back to
11 the key point, which is when Congress used the phrase
12 "personal privacy," it would have had no reason in 1974,
13 or even now, to think that term would have referred to
14 corporations. The fact that corporations have other
15 interests and other rights that might be legitimate is
16 kind of beside the point because those interests are not
17 referred to in the law or otherwise as personal privacy
18 interests.

19 I'd like to reserve the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.

21 MR. YANG: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Klineberg.

23 ORAL ARGUMENT OF GEOFFREY M. KLINEBERG

24 ON BEHALF OF THE RESPONDENTS

25 MR. KLINEBERG: Thank you,

1 Mr. Chief Justice, and may it please the Court:

2 The question in this case is whether any
3 organization, including not only business corporations
4 like AT&T but also nonprofit organizations and political
5 associations, should be categorically excluded from
6 protection under Exemption 7(C), such that this
7 exemption will now offer less protection for privacy
8 interests than the Constitution and the common law.

9 This Court has consistently held that the
10 privacy protections under FOIA are broader. And the
11 text supports that position.

12 JUSTICE GINSBURG: Do you include in this
13 the people, the persons that you say are shielded by
14 this privacy exemption, as Mr. Yang said, foreign
15 governments, State and local governments? Those have
16 all -- those all fall under the APA definition of
17 person.

18 MR. KLINEBERG: Justice Ginsburg, they do.
19 And we would agree that, as a matter of statutory
20 construction, the concept of personal privacy does apply
21 to those -- those other categories of actors. Now,
22 whether once that privacy interest is balanced against
23 the public's interest in disclosure, that balance may
24 well be different with respect to public or foreign
25 entities, but -- but certainly they -- they have a right

1 to personal privacy under the terms of the statute.

2 JUSTICE GINSBURG: Can you give us an idea
3 of -- the corporation has been shielded by Exemption 4
4 for its confidential financial information, trade
5 secrets; and its employees have been protected under
6 Exemption 7.

7 What is it, what would be -- would fall
8 within this privacy exception that would not be
9 confidential business information or relate to employees
10 of the corporation?

11 MR. KLINEBERG: Justice Ginsburg, we -- I
12 could give you two categories or kinds of examples. One
13 is, for example, a series of e-mails among corporate
14 officers -- granted, whose own personal names and
15 identifying information have been redacted, but in those
16 e-mails, they may engage in a frank exchange about the
17 competence and intelligence of a would-be regulator of
18 the corporation or a -- disparaging comments about
19 potential --

20 JUSTICE SCALIA: Excuse me. Why does that
21 relate to their privacy? I don't understand that. Why
22 does that relate to the corporation's privacy interest?
23 Anything that would embarrass the corporation is -- is a
24 privacy interest?

25 MR. KLINEBERG: Well, Justice Scalia, the --

1 the answer is simply that these were communications,
2 conversations, that were occurring with an expectation
3 of privacy by the individuals involved on behalf of
4 their employer, and to the extent that they could be
5 used to harm the reputation or the customer goodwill of
6 -- of the company, they do, indeed, have a -- a personal
7 privacy interest in --

8 JUSTICE SCALIA: Anything that hurts the --
9 the -- the image or the goodwill of the company?

10 MR. KLINEBERG: Your Honor, everything that
11 with -- that is intended to be private is certainly
12 subject to the balancing that we're asking for under
13 Exemption 7(C); indeed, that Congress provided, that if
14 it's -- it's an interest in personal privacy, then it is
15 to be balanced to determine whether the disclosure of
16 that document is unwarranted.

17 JUSTICE SCALIA: Mr. Klineberg, can you give
18 me any example of -- your -- your brief talks a lot
19 about the adjective "personal." But we're not talking
20 just about the adjective "personal." What about the
21 phrase "personal privacy"?

22 "Personal," yes, can indeed apply to
23 corporations sometimes, but there are certain phrases
24 where it clearly does not. For example, you talk about
25 personal characteristics. That doesn't mean the

1 characteristics of General Motors. You talk about
2 personal qualities. It doesn't mean the qualities of
3 General Motors. You talk about a point of personal
4 privilege. It's not a privilege of a corporation.

5 And I think personal privacy is the same
6 thing. Can you give me any examples in common usage
7 where people would refer to the personal privacy of a --
8 of a corporation? It's a very strange phrase to me.

9 MR. KLINEBERG: Well, Your Honor, as
10 Justice Alito asked my -- my colleague earlier, the --
11 the whole concept of -- of "person" as including a
12 corporation would surprise many people, the proverbial
13 person on the street.

14 JUSTICE SCALIA: Yes. I'm not talking about
15 that. I'll grant you that -- that "personal" could
16 sometimes refer to a corporation, although the
17 Government distinguishes it by etymology and so forth.
18 Never mind that. I'm talking about personal privacy.
19 Do you have any examples from the New York Times, from,
20 you know, Boswell, from anywhere, that anybody refers to
21 the interests of a corporation as the "personal privacy"
22 of General Motors?

23 I cannot imagine somebody using the phrase
24 like that.

25 MR. KLINEBERG: Your Honor, we're not aware

1 of that phrase being used certainly in any statutory
2 context --

3 JUSTICE GINSBURG: But you were about to
4 give a second example of where, even though it hasn't --
5 personal privacy hasn't been used in -- but you said one
6 example is the two officials who are saying unpleasant
7 things about a regulator. And what was your other
8 example?

9 MR. KLINEBERG: Well, there's a -- there's a
10 sub-example within that category which is the
11 disparaging of an important customer, some unpleasant
12 comments about an important customer of the corporation
13 that could then be used quite -- quite clearly by a --
14 by a competitor to -- to harm the goodwill of the -- of
15 the corporation with respect to that customer.

16 But there is indeed another whole category
17 of documents that goes beyond the -- the context of
18 AT&T's interest here, and the example is internal
19 documents within, say, an environmental nonprofit
20 organization talking about their political strategies
21 for defeating an amendment to the Clean Air Act.

22 As an example, those political strategies
23 that were shared internally by -- by members of the
24 organization without any intent to -- to have them
25 become public would become subject to -- to automatic

1 disclosures, categorical disclosure, were the Government
2 to prevail in this case.

3 CHIEF JUSTICE ROBERTS: Do you think it's --
4 how does that work? If you have -- the president of the
5 environmental organization says something about whatever
6 it is -- we can lobby this guy to get this change -- is
7 he able to protect that on the grounds of his personal
8 privacy, even though the embarrassment would go to the
9 -- the organization as a whole?

10 MR. KLINEBERG: Mr. Chief Justice, I believe
11 the answer is in most cases "yes," that in -- that the
12 identity of the -- the specific speaker and any
13 identifying information corresponding to him or her
14 would be protected.

15 CHIEF JUSTICE ROBERTS: Well, why is it such
16 a big deal, then, to extend that to the organization as
17 a whole, if the individual's privacy is already going to
18 be protected?

19 MR. KLINEBERG: Indeed, Your Honor, I think
20 that is -- that is our position, that -- that the
21 personal privacy of the corporation is -- is affected by
22 such disclosure.

23 CHIEF JUSTICE ROBERTS: No. I mean
24 you're -- you're already protected, at least to a
25 significant extent, because the individual officers

1 would be able to assert a privacy interest, to the
2 extent at least that what you find embarrassing to -- to
3 the corporation is also individually embarrassing to
4 them.

5 MR. KLINEBERG: Right. But the -- but the
6 redactions that would occur would in all likelihood
7 simply be redactions of their names and perhaps their
8 titles, but their -- the substance of their comments
9 would certainly be -- would be disclosed under the
10 Government's view.

11 JUSTICE BREYER: Are there any examples that
12 you have? That is, in the last 35 years, has there been
13 any instance where the Justice Department or some other
14 law enforcement agency compiled a file for law
15 enforcement purposes, that in that file there were, for
16 whatever reasons, a bunch of conversations about the
17 organization's strategy, and it did not interfere to
18 release it with -- with anybody's personal privacy, but
19 it might interfere with that organization's strategy,
20 and so the organization, whatever it was, the NRDC or
21 something, was very upset about it?

22 Did you find a single example or a thousand
23 examples? Or how many examples did you find of that
24 happening?

25 MR. KLINEBERG: Well, Justice Breyer, one of

1 the -- one of the things that has puzzled us in this
2 case is why -- why it has taken 35 years --

3 JUSTICE BREYER: Well, one reason might be
4 that this has really never been a problem because all
5 the legitimate -- or most of them, anyway -- that these
6 organizations that have interests in privacy are
7 actually taken care of by the other 17 exemptions here.

8 JUSTICE SCALIA: Another reason might be
9 that personal -- nobody ever thought that personal
10 privacy would cover this.

11 JUSTICE BREYER: This may be the first one.
12 That's why I want to know, is there -- one of the things
13 you would have looked for is an example of a real
14 problem of the kind you're talking about. I'm not
15 saying you don't have one. I would just like to know if
16 you found any, and what they are, so I could read them.

17 MR. KLINEBERG: Your Honor, we haven't found
18 anything specific to the -- in response to your
19 question.

20 But I -- I will say that one of the
21 explanations for why this issue has become more
22 important today than maybe it has been in recent past --
23 there really are three reasons. One is that Exemption
24 4, which Mr. Yang discussed, has been increasingly
25 narrowed by the courts of appeals to the point where

1 they specifically say, and, indeed, the Government
2 concedes, that -- that the reputational concerns and the
3 harm to customer goodwill is not the sort of harm that
4 Exemption 4 guards against.

5 And so that has become increasingly clear
6 among the courts of appeals, that the interests in
7 confidentiality that we're talking about under exception
8 7(C) are not --

9 JUSTICE BREYER: I mean, one possible reason
10 you don't find them is because it's very rare that a law
11 enforcement agency is going to try to subpoena the top
12 strategy of the -- of the NRDC, confidential strategy.
13 There might not be too many such records.

14 It -- another reason might be is that they
15 don't really care. Another reason might be -- I don't
16 know.

17 But if you haven't found any examples, what
18 we're back to -- or -- and maybe there are actual
19 examples of that -- of what you said to Justice Ginsburg
20 of the other instance, where the -- what was that first
21 one?

22 MR. KLINEBERG: Right.

23 JUSTICE BREYER: I'd like to know about the
24 example. What was the first one again?

25 MR. KLINEBERG: Well, the -- the first one

1 was comments -- comments about a regulator or --

2 JUSTICE BREYER: They're worried about
3 saying something mean about a regulator. Okay. Yes,
4 fine. Are there examples of that? Is this the first
5 one, and what's the empirical state?

6 MR. KLINEBERG: Your Honor, it's a -- I
7 cannot point you to specific examples. They're --
8 they're sort of hard to -- hard to find in the -- in the
9 sense that they are -- that they're not typically
10 litigated, and they certainly haven't been litigated
11 under -- under this -- under this exemption before.

12 But -- but I think the other explanation for
13 why this matters today in a way that it might not have
14 mattered so much before, two -- two other reasons: One
15 is that -- that increasingly, FOIA is being used by --
16 by competitors and legal adversaries to obtain
17 information, not about what the government is doing, not
18 about what the government is up to, but about what
19 evidence the government might have gathered from private
20 parties.

21 JUSTICE GINSBURG: Is that a reason to
22 change what was the understanding of Exemption 7? One
23 of the items that doesn't work in your favor was the
24 Attorney General's memorandum at the time of the '74
25 amendments.

1 MR. KLINEBERG: Well, actually, Justice
2 Ginsburg, at the time of the '74 amendments the only
3 existing Attorney General memorandum was that of
4 Attorney General Clark, which read "personal privacy" --

5 JUSTICE GINSBURG: I'm talking about the --
6 Attorney General Levi.

7 MR. KLINEBERG: Right, and that -- that was
8 issued subsequent to the amendments in 1974, and that
9 was an -- an interpretive gloss on the recent
10 amendments.

11 JUSTICE GINSBURG: Yes, that's what I meant.

12 MR. KLINEBERG: Right. And so at the time
13 that Congress enacted the amendments, both under the
14 Privacy Act as well as Exemption 7(C), the -- the only
15 existing statement about what personal privacy might
16 mean would be -- would have been Attorney General
17 Clark's understanding that personal privacy can in fact
18 incorporate interests of corporations.

19 JUSTICE SCALIA: But if Attorney General
20 Levi's description, which was -- which was issued for
21 the purpose of telling all the agencies of the Federal
22 Government what this new statute meant -- and it had a
23 lot of ambiguities in it -- if that was wrong about --
24 about this subject, you'd have thought somebody would
25 have objected.

1 I mean, did some members of Congress who --
2 who had passed FOIA say this is outrageous; what about
3 the personal privacy of General Motors? I'm not aware
4 of any objections along those lines.

5 MR. KLINEBERG: Well, Your Honor, the --
6 Attorney General Levi's memorandum did not go into a
7 long discussion or description of the -- of the
8 analysis. It simply said it does not appear or does not
9 seem to apply to -- to corporations. And it's
10 absolutely true. There -- this is not -- this issue
11 hasn't -- hasn't really been litigated and presented.

12 But our position is that there is nothing in
13 the plain language that would indicate that Congress
14 intended to categorically exclude corporations. It is
15 certainly true that the legislative history at the time,
16 as the Government spends quite a bit of time exploring,
17 does suggest that what was -- what was in most people's
18 minds was protection of individual privacy. But there
19 is no indication that they intended to exclude --

20 JUSTICE SCALIA: Is it the burden of the
21 Government to show that they intended to exclude
22 corporations, or is it your burden to show that this
23 exception was meant to include corporations? I would
24 think the latter is where the burden lies in this case.

25 MR. KLINEBERG: Well, Justice Scalia, our --

1 our burden is to -- is to defend our view of the
2 statute.

3 JUSTICE SCALIA: Well, but if you're asking
4 the Government to show that the -- there was an intent
5 to exclude corporations, I don't think that's their
6 burden. I think it's your burden to show that this
7 exemption was intended to include corporations.

8 MR. KLINEBERG: I agree, Your Honor, that we
9 are -- our burden is to demonstrate to you why the words
10 "personal privacy" in the statute apply to corporations.
11 I think one of the background facts is that there is no
12 indication that anyone thought that it was not to be
13 included. But let me --

14 CHIEF JUSTICE ROBERTS: Counsel, your
15 central argument is that because "person" is defined to
16 include corporation, "personal" in the same statute must
17 include corporate.

18 I tried to sit down and come up with other
19 examples where the adjective was very different from the
20 root noun. And it turns out it's not hard at all. You
21 have "craft" and "crafty." Totally different. "Crafty"
22 doesn't have much to do with "craft." "Squirrel,"
23 "squirrely." Right?

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: I mean, "pastor" --

1 you have a "pastor" and "pastoral." Same root, totally
2 different.

3 So I don't understand -- I don't think
4 there's much to the argument that because "person" means
5 one thing, "personal" has to be the same relation.

6 MR. KLINEBERG: Mr. Chief Justice, let me
7 try to explain precisely what our proposed rule of
8 construction is, because I think there's been some
9 confusion, and I -- and I think the Government has --
10 has not properly characterized it, and certainly in
11 their reply brief.

12 We do not agree -- or we do not sign on to
13 the term "grammatical imperative," because our concern
14 with that phrase is that it might suggest that the rule
15 is to be applied regardless of the consequences, and
16 that is not our position.

17 Our position is that where the adjective
18 means "of or relating to" a term that Congress has
19 expressly defined, that definition should be applied, so
20 long as it makes sense to do so in light of the text and
21 structure of the statute as a whole.

22 So, in this case, Your Honor, "personal"
23 does -- is defined -- when you open up the dictionary,
24 the very first definition is "of or relating to a
25 particular person." "Person" is, then, defined by

1 Congress as -- to include not only individuals, but --
2 but corporations and other associations.

3 So in this particular context, it makes
4 perfect sense to look to --

5 JUSTICE GINSBURG: Mr. Klineberg, you have
6 read the brief of the Project on Government Oversight,
7 where they give dozens and dozens of examples to show
8 that, overwhelmingly, "personal" is used to describe an
9 individual, not an artificial being. And it is the
10 overwhelming use of "personal."

11 MR. KLINEBERG: Justice Ginsburg, we do not
12 dispute that personal is often, even many, many times,
13 used to describe an individual and can only be
14 understood in that context. Indeed, the Truth in
15 Lending Act argument that the Government made in its
16 reply brief is a perfect example. The word "personal"
17 there is -- is mentioned alongside "personal," "family,"
18 and "household."

19 And, indeed, even in that very same
20 statutory definition of "consumer," the word is referred
21 to as "a natural person." So, in that context, it would
22 be absurd or inappropriate to -- to borrow the concept
23 of the definition of "person."

24 All we're saying is when it is not absurd,
25 when it is not -- does not do violence to the statute,

1 under those circumstances, it makes perfect sense to
2 borrow the definition that Congress provided.

3 JUSTICE SOTOMAYOR: What would be similar to
4 medical files and such, under Exemption 6, that uses the
5 same phrase, "unwanted invasion on personal privacy"?
6 So what would your reading do to Exemption 6, and how
7 would we create or even make sense of Exemption 6?

8 MR. KLINEBERG: Your Honor, we don't believe
9 our reading does any -- any damage to this Court's
10 jurisprudence in Exemption 6, and the -- and the simple
11 reason is that while the words "personal privacy" in
12 Exemption 6 do mean -- and we agree with the Attorney
13 General Clark in this -- do mean that -- that -- the
14 same thing as it means in Exemption 7(C), but because --
15 precisely for the reason you said, Justice Sotomayor --
16 the personnel and medical and similar files limits the
17 likely scope of that privacy interest to individual,
18 natural -- natural persons. And that's simply not
19 because of the words "personal privacy," but because of
20 the company that those words keep in that -- in that
21 particular exemption.

22 JUSTICE SOTOMAYOR: Why? I mean, if you're
23 saying that personal privacy has some overlap with
24 individual privacy -- obviously, it has to if you're
25 going to give meaning to personal privacy -- don't we

1 have to give meaning to "and similar files"? And so
2 what would those be?

3 MR. KLINEBERG: Well, Your Honor, as this
4 Court said in the Washington Post case, the
5 understanding of "similar files" is defined by the two
6 benchmarks that are expressly provided, right?
7 Personnel and medical. So the kinds of files are
8 limited to the sorts of files in which individual
9 information is likely to be contained. In that case, it
10 was a passport file.

11 Again, our -- our argument is simply that
12 it's that part of Exemption 6 that does the limiting
13 work in terms of its scope. The words "personal
14 privacy" mean the same thing in Exemption 6 as -- as
15 they do in Exemption 7(C).

16 The -- the other point that I -- I certainly
17 want to make clear is that our position is that personal
18 privacy is only the first step in the determination
19 whether or not a particular document is disclosed,
20 because if the Government prevails, there will be no
21 need even to articulate a public interest in the
22 disclosure of potentially harmful documents. Instead,
23 they will be automatically available to any competitor
24 or legal adversary.

25 And all we are asking for and, indeed, all

1 that Congress provided for is that the privacy interest
2 be weighed against the public interest in disclosure.
3 And what the -- what the FCC did here was to
4 categorically exclude corporations from the protections
5 of Exemption 7(C). And -- and all we are saying is that
6 those interests are legitimate and just need to be
7 balanced. And what the government's obligations under
8 these circumstances are is that they need to weigh the
9 private interests in -- in the documents against the
10 articulated public interest in disclosure. And that
11 interest, of course, has to do with what the government
12 is up to. What do these documents tell us about what
13 the government is doing?

14 And if, as the amici on the Government's
15 side suggests, there are lots of public -- lots of
16 public value and public interest in the disclosure, then
17 that balance is more likely to be weighed in favor of
18 disclosure. And all we are asking for, though, is that
19 that balance take place. And what's happened here is
20 that -- is, as I said; it's a categorical exclusion that
21 simply is inconsistent with the terms that Congress laid
22 out in exemption 7(C).

23 Congress did not intend for FOIA to be a
24 tool for an organization's adversaries to obtain access
25 to harmful or embarrassing documents compiled for law

1 enforcement purposes where such documents do nothing to
2 open agency action to public scrutiny. If the
3 Government has its way in this case, the result will be
4 what this Court decried in *Favish*, which was that it
5 would be the failure to protect the privacy of citizens
6 against the uncontrolled release of information compiled
7 through the power of the state.

8 If there are no further questions, I urge
9 that the -- that the Third Circuit be affirmed. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Yang, you have 6 minutes left.

13 REBUTTAL ARGUMENT OF ANTHONY A. YANG

14 ON BEHALF OF THE PETITIONERS

15 MR. YANG: Thank you, Mr. Chief Justice.

16 AT&T appears to have changed or at least
17 modified its position somewhat from the position
18 articulated at page 14 of its brief. There AT&T
19 says, "By expressly defining the noun 'person' to
20 include corporations, Congress necessarily defined the
21 adjective form of that noun -- 'personal' -- also to
22 include corporations."

23 Now, AT&T has given up on the grammatical
24 imperative that guided exclusively the court of appeals'
25 decision in this case. There's nothing left. AT&T can

1 provide no example where the term "personal privacy" has
2 ever been used to refer to a corporation, much less a
3 foreign government or State or local government in any
4 context, whether it be FOIA, the law generally, or even
5 in common usage.

6 AT&T can provide no example of any problems
7 that have arisen in over 35 years of the government's
8 consistent administration of this provision. In fact,
9 all indications point in simply one direction. Personal
10 privacy applies only to individuals. The terms
11 "personal" and the terms "privacy" do that alone. And,
12 together, "personal privacy makes" that clear.

13 The legislative history, the decisions of
14 this Court pointing to the balance applying only to
15 individuals, individual rights. All point in the same
16 direction.

17 We would ask that the Third Circuit be
18 reversed.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Counsel.

21 The case is submitted.

22 (Whereupon, at 11:07 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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