

Government Contracts Team

To: Our Clients and Friends

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Supreme Court Says Two Exemptions Are Unavailable to Companies Trying to Protect Their Information From Disclosure Under FOIA

Companies frequently find that information they submit to the Federal government is sought by others - perhaps their competitors - under the Freedom of Information Act ("FOIA"). The submitting company may be able to block such disclosure if the information falls within one of the exemptions in FOIA.

The Supreme Court on March 1 made two of those exemptions unavailable to companies. In FCC v. AT&T Inc., No. 09-1279, slip op. (U.S. Mar. 1, 2011), the Court in an 8-0 decision made short shrift of a company's attempt to block such a disclosure by invoking Exemption 7(C) of FOIA, which allows Federal agencies to withhold from disclosure law enforcement records, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In that case, AT&T had submitted various records to the Federal government in response to an investigation of whether the company had overcharged the government for services it had provided under the Federal Communications Commission's E-Rate program. A trade association representing some of AT&T's competitors sought under FOIA all the pleadings and correspondence that AT&T submitted to the agency in connection with the investigation.

AT&T argued that it was a "'private corporate citizen' with personal privacy rights that should be protected from disclosure that would 'embarrass' it" It pointed out that FOIA's definition of "person" included corporations and argued that the adjectival form of a defined term should refer back to the defined term and, thus, corporations could have a "personal privacy" right under FOIA. Although the Agency rejected AT&T's argument, when AT&T challenged that ruling before the Court of Appeals for the Third Circuit, that court accepted it.

The Supreme Court did not, pointing out numerous instances where an adjective does not reflect the meaning of a noun - "corny" has little to do with "corn." It concluded that the phrase "personal privacy" suggested "a type of privacy evocative of human concerns - not the sort usually associated with an entity like, say, AT&T." In the course of the opinion, the Court made it clear that Exemption

6, which allows agencies to withhold personnel, medical, "and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," also does not extend to corporations, although it did not address whether a corporation could assert a privacy right of its employees in such files. Justice Roberts, who wrote the Court's opinion, concluded the rejection of AT&T's argument by saying "[w]e trust that AT&T will not take it personally."

Although these two exceptions have been put beyond the reach of corporations trying to protect their information from disclosure, others remain. One that is commonly invoked is Exemption 4, protecting from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Here, it is clear that the word "person" includes corporations.

Companies trying to protect their information from disclosure should not make the too frequent mistake of sending to the agency a cursory objection to disclosure, while thinking that if the agency decides nevertheless to disclose the information, they can fight it out later in court. Although court review is available, it is usually done pursuant to the Administrative Procedure Act, under which the court decides whether the agency was acting unlawfully or arbitrarily and capriciously based upon the record that was before the agency. If the company did not present to the agency the facts and argument necessary to invoke an exemption, it will almost certainly fail if it tries to get a court to overturn an agency decision to disclose the company's information. We all too often have had to advise clients that, having failed to present a good argument against disclosure before the agency, they have little prospect for success in court.

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