

Telecommunications/Privacy Alert: Third Circuit Rejects FCC Finding That AT&T Lacks "Personal Privacy" under Federal Freedom of Information Act Definition

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Last week, the U.S. Court of Appeals for the Third Circuit, in a case involving the FCC's release of documents obtained during an investigation into alleged "E-Rate" program overcharging by AT&T Inc.,¹ found that corporations such as AT&T have a "personal privacy" interest under the federal Freedom of Information Act (FOIA).²

Background

AT&T participated in the FCC-administered "E-Rate" program designed to increase schools' access to telecommunications technology. AT&T provided equipment and services to schools and billed the government for the costs. In 2004, AT&T discovered that it may have overcharged for the program administered in a Connecticut school district and voluntarily reported the situation to the FCC. The FCC instructed AT&T to produce documents including invoices, internal e-mails, and the names of employees involved in the "E-Rate" billing overcharge.

CompTel, a trade association representing some of AT&T's independent telephone competitors, submitted a FOIA request in 2005 for all pleadings and correspondence contained in the FCC Enforcement Bureau's investigation file. AT&T opposed the request, but the Enforcement Bureau rejected AT&T's argument that its personal privacy would be violated, asserting that corporations lack personal privacy. AT&T petitioned the FCC to review the Bureau's decision. In 2008, the FCC issued an order denying AT&T's application for review of the Bureau's ruling and compelling disclosure.

FCC Interpretation of "Personal Privacy"

The FCC held that a corporation lacks "personal privacy" within the meaning of FOIA's Exemption 7(C). The FCC concluded that this interpretation fell within the FOIA Exemption's "purpose to protect key players in an investigation—targets, witnesses, and law enforcement officers—from the 'literal embarrassment and danger' that an individual might suffer, rather than the 'more abstract impact' that a corporation might suffer."

Third Circuit Court of Appeals Reverses FCC Ruling, Finds Corporations Have "Personal Privacy"

The Third Circuit agreed with AT&T that the FCC incorrectly interpreted FOIA's Exemption 7(C) when it held that a corporation lacks the "personal privacy" protected by that exemption. Exemption 7(C) protects from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."³

The Third Circuit noted that although FOIA does not define "personal," it does define "person" to include "an individual, partnership, corporation, association or public or private organization other than an agency."⁴ The court found that FOIA's other exemptions demonstrate that Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to. Because FOIA defines "person" to include a corporation, the court held that the adjective form of "person"—"personal"—indicates that the Exemption applies to corporations. Further, the court found that a reading of "personal privacy" to exclude corporations would undermine the purpose of Exemption 7(C) by discouraging corporations from cooperating in federal agency investigations.

Whether Potential Invasion of AT&T's "Personal Privacy" Was "Unwarranted" Left for FCC To Decide

AT&T further argued that, as a matter of law, the potential invasion of personal privacy in this case could reasonably be considered "unwarranted" within the Exemption. However, because the FCC had held that "personal privacy" does not apply to corporations, the FCC had not addressed whether this particular potential invasion of AT&T's personal privacy would be "unwarranted." Therefore, the Third Circuit remanded the case back to the FCC for further consideration of this issue.

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Please contact any Mintz Levin attorney listed on this Alert for further information on this decision and subsequent actions by the FCC.

Endnotes

¹ *AT&T Inc. v. FCC*, Case No. 08-4024 (3rd Cir. Sept. 22, 2009).

² 5 U.S.C. §§ 551-59.

³ 5 U.S.C. § 552(b)(7)(C).

⁴ *Id.* at § 551(2).

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Howard J. Symons
Chair, Communications Practice
(202) 434-7305
HJSymons@mintz.com

Michael H. Pryor
(202) 434-7365
MHPryor@mintz.com

Frank W. Lloyd
(202) 434-7309
FWLloyd@mintz.com

Cynthia J. Larose
(617) 348-1732
CJLarose@mintz.com

Rebecca Geller
(202) 434-7391
RGeller@mintz.com