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.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, January 19, 2011

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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:

16   ANTHONY A. YANG, ESQ., Assistant to the Solicitor

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   C O N T E N T S

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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

4

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 --

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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

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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

11

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

17

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

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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

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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 --

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 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

25

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

26

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   "squirrelly." Right?

24   (Laughter.)

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

35

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

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