

No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.
AT&T INC. AND COMPTEL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN,
CITIZENS FOR RESPONSIBILITY AND ETHICS IN
WASHINGTON, THE NATIONAL SECURITY
ARCHIVE, OPENTHEGOVERNMENT.ORG, THE
ELECTRONIC FRONTIER FOUNDATION, AND THE
REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS IN SUPPORT OF PETITIONERS**

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*¹

Amici Curiae are all organizations that promote openness and accountability in government and that rely on the Freedom of Information Act (FOIA) for their work. *Amici* are concerned that the decision below threatens the public's access to government records concerning agency oversight of corporate activity and diminishes government transparency.

Public Citizen is a non-profit consumer advocacy organization headquartered in the District of Columbia, with approximately 150,000 members and supporters nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including government transparency and corporate accountability. Since its inception, Public Citizen has represented numerous public interest organizations, journalists, academics, and other individuals seeking to obtain information under the Freedom of Information Act (FOIA) and other open government laws. Over the past five years alone, Public Citizen has been involved in more than thirty open government cases.² Many of those cases involve records

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of amicus Public Citizen's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than Public Citizen made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent are being submitted concurrently.

² For a list of cases, see <http://www.citizen.org/Page.aspx?pid=2698>.

that pertain to corporations. In addition, Public Citizen and its members are frequent FOIA requesters on a wide variety of topics that implicate corporate activity. Accordingly, Public Citizen is concerned about the issues of government and corporate secrecy generally and in particular about an expanded notion of corporate privacy that could potentially allow information from investigations into corporate misconduct to be withheld from the public.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government agencies and officials and to ensure the integrity of those officials. As part of its research, CREW uses government records made available to it under FOIA. Currently, CREW has FOIA requests pending with multiple federal agencies on a wide range of issues, including, among other things, a request for documents that would shed light on the Environmental Protection Agency's oversight of a Dow Chemical plant polluting the Saginaw Bay and Lake Huron.

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters obtained under FOIA. As part of its mission to broaden access to the historical record, the Archive is a leading user of FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information.

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

The Electronic Frontier Foundation (EFF) is a non-profit public interest organization that examines the potential impact of cutting edge information technology on individual liberties and strives to inform the public about these issues. In support of its mission, EFF pursues FOIA requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation since 1970.

BACKGROUND

1. The Freedom of Information Act, first enacted in 1966, was designed to “ensure an informed citizenry,” which is “needed to check against corruption and to hold the governors accountable to the governed.” *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA protects the public’s right to know “what [its] government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749,

773 (1989). Understanding how agencies oversee the spending of public tax dollars and enforce laws and regulations is a core purpose of FOIA. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

FOIA's requirement that agencies provide public records to "any person," upon request, 5 U.S.C. § 552(a)(3)(A), is tempered only by statutorily enumerated exemptions, which are to be construed "narrowly in favor of disclosure." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993). Accordingly, "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Certainly, important interests are protected by FOIA's exemptions, including the integrity of law enforcement investigations protected by exemption 7. *See* 5 U.S.C. § 552(b)(7). As originally enacted, courts construed exemption 7 to allow the government to withhold *any* law enforcement records, without requiring a showing that releasing the records would cause an identifiable harm. *See Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974) ("Since these files are 'investigatory files compiled for law enforcement purposes,' our duty is 'at an end.'").

Concerned about these decisions broadly construing exemption 7, Congress amended exemption 7 in 1974 to make clear that law enforcement records were only exempt when disclosure would interfere with certain enumerated interests. Relevant here, as amended in 1974, exemption 7(C) protects from mandatory disclosure law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Senator Hart, who introduced the exemption 7 amendment on behalf of himself and 14 co-sponsors, explained why narrowing the exemption was necessary:

Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in House Committee on Government Operations, Senate Committee on the Judiciary, 94th Cong., *Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, & Other Documents* (Joint Comm. Print) (1975). That is, Congress determined that disclosure of investigative records concerning various corporate activities was central to the functioning of FOIA as a disclosure statute and amended exemption 7 specifically to ensure public access to such records.

2. In 2005, CompTel submitted to the FCC a FOIA request for records obtained by the agency during the course of its investigation of AT&T for alleged overbilling of the government. Pet. App. 3a. When the FCC concluded that FOIA mandated the release of some of those records, AT&T sued FCC, claiming that the release would invade AT&T's "personal privacy." *Id.* 5a. Although up to that point exemption 7(C) had been applied only to records that concerned the personal privacy of human beings, the Third Circuit, in the decision below, concluded that this exemption could be invoked to allow

withholding of records that implicate the “personal privacy” of corporate entities. *See* Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit’s Decision Undermines the Core Purpose of FOIA.

The decision below warps the concept of “personal privacy” in FOIA exemption 7 to cover the “privacy” interests of corporate entities, including those entities’ potential feelings of “embarrassment” about their own conduct. Such a ruling permits a veil of secrecy to cover records that are at the heart of FOIA’s disclosure goal, and directly contravenes Congress’s purpose in amending exemption 7, which was, in part, to clarify that records concerning government oversight of industry are to be made freely available to the public.

Under the Third Circuit’s reading, the very records that the 1974 amendments sought to bring outside the scope of exemption 7 are precisely the type of records that could be the subject of a corporate privacy claim under exemption 7(C). For example, the meat inspection reports such as those singled out by Senator Hart might be withheld under 7(C) on the theory that the meat processor’s privacy rights would be invaded because of the public “embarrassment” the corporation might feel if its filthy processing plant conditions were known. *See* Pet. App. 14a n.5 (corporations can suffer “embarrassment”). But records concerning the government’s oversight of meat processing and its response to a poor inspection result that a company might find “embarrassing” are records of significant importance to the public and fall within the core of FOIA’s purpose.

Likewise, under the Third Circuit’s view, nursing homes could claim a privacy interest in their Medicare reports—also mentioned in exemption 7’s legislative history—and could therefore prevent or delay the public from accessing these records despite the public’s undeniably strong interest in information that the companies might find embarrassing, such as how the government is responding to inadequate quality of care, insufficient staffing levels, or a poor health inspection. Indeed, knowing how the government regulates and monitors industries such as meat processing and health care is central to the purpose of FOIA.

Rather than to protect corporate privacy, Congress enacted exemption 7(C) to provide for “the protection for *personal* privacy” in law enforcement records, just as it had already protected personal privacy in other types of records under exemption 6. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). Even under the Third Circuit’s rationale, exemption 6 would not cover so-called corporate privacy, *see* Pet. App. 13a, and exemption 7(c) “simply make[s] clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption.” 120 Cong. Rec. at 17,033 (statement of Sen. Hart).

In fact, Congress protected corporations’ legitimate business interests separately in exemption 4, which exempts from disclosure trade secrets and confidential commercial and financial information. 5 U.S.C. § 552(b)(4). Exemption 4 is designed to “protect persons who submit financial or commercial data to government agencies from . . . competitive disadvantages.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). But courts

have held that a competitive disadvantage is the “affirmative use of proprietary information by *competitors*... [and] should not be taken to mean simply any injury to competitive position, as might flow from . . . the embarrassing publicity attendant upon public revelations concerning, for example . . . violations of civil rights, environmental or safety laws.” *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983). The Third Circuit’s decision would allow companies to circumvent the limits on exemption 4 by shoehorning claims of embarrassment and fears of bad publicity into a “personal privacy” claim under exemption 7(C).

The error of the Third Circuit’s interpretation of exemption 7 is evident in light of Congress’s stated objective to give the public access to records revealing the operations of government with respect to its oversight of corporate activities. This Court should grant FCC’s petition to prevent the Third Circuit’s decision from impeding the functioning of FOIA.

II. The Question Presented in the Petition Is of Exceptional Importance to the Public.

FOIA is the public’s strongest tool for holding government agencies accountable in the performance of their oversight and regulatory functions. Often when potential corporate wrongdoing becomes known, the media, public interest groups, and concerned members of the public submit FOIA requests to learn what the government is doing to investigate the wrongful activities and take enforcement action.

Recent events of national importance show how records obtained or created during government investigations into corporate activities can contain information

that is crucial for the public to know. For instance, the investigation of Goldman Sachs concerns potential malfeasance that may have cost the taxpayers billions of dollars in bailout money.³ Likewise, the BP oil rig explosion and resultant massive oil spill in the Gulf of Mexico, which has the potential to affect hundreds of thousands of residents and businesses, has already provoked government investigation.⁴ And an investigation is underway as to the myriad alleged safety violations by Massey Coal that might be connected to the West Virginia mine explosion that took the lives of 29 mine workers.⁵ The public has a strong interest in knowing how the government is responding to these crises, whether the response is adequate, and what more should be done.

If companies like Goldman Sachs, BP, and Massey Coal can interject a claim of corporate privacy into an exemption designed to recognize only “valid governmental and *individual* interests in confidentiality,” then each time a request is made for records concerning newsworthy topics like the economic downturn, oil spill, and mine explosion, delay and withholding could result. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). For each request, if the Third Circuit’s decision

³ See, e.g., Louise Story & Gretchen Morgenson, *S.E.C. Accuses Goldman of Fraud in Housing Deal*, N.Y. Times (April 16, 2010), available at www.nytimes.com/2010/04/17/business/17goldman.html.

⁴ See, e.g., Elizabeth Shogren, *Cementing Becomes One Focus In Gulf Oil Probe*, National Public Radio (May 5, 2010), available at www.npr.org/templates/story/story.php?storyId=126536457.

⁵ See, e.g., *Feds Launch Investigation into Mine Explosion*, CBS News, (April 7, 2010), available at www.cbsnews.com/stories/2010/04/07/national/main6371864.shtml.

is not reversed, it is possible—even likely—that an agency would be sued by a company seeking to bar disclosure if the agency decides to release records that reflect unfavorable facts about a corporation under investigation, or that the agency would decide not to disclose records to avoid such a lawsuit.

Currently, agencies routinely make available substantial amounts of information that *amici* are concerned companies will now seek to push within exemption 7(c) in light of the Third Circuit’s rule. For instance, the Food and Drug Administration’s Office of Regulatory Affairs (ORA), which describes itself as having “investigators” who “enforce [food and drug safety] laws,” routinely posts inspection reports⁶ and warning letters to companies about legal violations,⁷ subject only to exemption 4 redactions. These records contain information a company may well find “embarrassing,” such as the observation that a cheese manufacturer’s “[p]lumbing constitutes a source of contamination to food, equipment, and utensils.”⁸ Similarly, the United States Department of Agriculture Food Safety and Inspection Services (FSIS) publishes a Quarterly Enforcement Report that lists various types of enforcement actions and names companies that have been subject to those actions.⁹

⁶ See ORA, Electronic Reading Room, <http://www.fda.gov/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/default.htm>.

⁷ See FDA, Warning Letters, www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm.

⁸ Inspection report for Quesos Mi Pueblito, LLC, *available at* www.fda.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM198180.pdf.

⁹ See FSIS, Quarterly Enforcement Reports, www.fsis.usda.gov/regulations_&_policies/Quarterly_Enforcement_Reports/index.asp.

Agencies also routinely release records in response to FOIA requests that could now be the subject of an exemption 7(C) dispute. For example, EPA did not make any sort of corporate privacy claim in response to a FOIA request for “notice letters” sent to corporations that were potentially liable for cleanup of hazardous wastes; but those letters might have been subject to exemption 7(C) withholding under the decision below. *See Cohen v. Environmental Protection Agency*, 575 F. Supp. 425 (D.D.C. 1983). Likewise, in *Aguirre v. Securities and Exchange Commission*, the SEC released, in response to a FOIA request, government records concerning a company’s potentially unlawful trading practices, withholding under exemption 7(C) only information that pertained to individuals. 551 F. Supp. 2d 33, 47 (D.D.C. 2008). Had a claim of corporate privacy been available, the agency might have kept secret many more records that would have shown how the SEC failed properly to investigate the company. *See id.* at 56-57.

Amici themselves have made recent FOIA requests resulting in the release of records that, if the Third Circuit ruling had been implemented, might not have ever have come to light or might have been much harder to obtain. For example, after reports that Environmental Protection Agency regional administrator Mary Gade was asked to resign as a result of her strong stance concerning a Dow Chemical plant polluting the Saginaw Bay and Lake Huron,¹⁰ Citizens for Responsibility and Ethics in Washington (CREW) made a FOIA request for records assessing or evaluating Dow Chemical’s responsi-

¹⁰ *See* Stephen Power & Ana Campoy, *EPA Regional Chief Resigns After Dispute*, *The Wall Street Journal* A4 (May 3, 2008).

bility for dioxin, a pollutant, flowing into those bodies of water. CREW received voluminous records that shed light on EPA's response to Dow's actions, and some cast a negative light on Dow.¹¹ If exemption 7(C) covered corporations' "personal privacy," the agency likely would have withheld many of these important records.

The volume of records that are now publicly available that might be the subject of a corporate privacy claim under the Third Circuit decision demonstrates the impact that the decision could have if it is allowed to stand. Certainly, as to each of these examples, if the agencies withheld records under exemption 7(C), they would have to demonstrate that these records were compiled for law enforcement purposes, and requesters, if they challenged the denials in court, might be able to demonstrate that the public interest in disclosure outweighs the privacy interest in the records. *See* 5 U.S.C. § 552(b)(7)(C). But claims of privacy under exemption 7(C) can be particularly difficult to overcome, thereby potentially diminishing requesters' ability to access such records. *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("[T]he citizen must show that the public interest sought to be advanced is a significant one.").

Moreover, even if a court victory might eventually give the public access to these types of records, an agency's denial decreases access to public records. Often, requesters do not have the resources to litigate an agency's initial denial. In addition, because many records would no longer be useful if obtained only after years of litigation, requesters frequently do not pursue

¹¹ CREW posted the released records on its website. *See* CREW Files FOIA Requests with EPA, www.citizensforethics.org/node/31586.

what would otherwise be meritorious FOIA cases. And even if a requester successfully litigates the claim, the agency's initial denial still results in greater expense for both the agency and requester and delay of the release of important records that Congress never meant to protect.

Accordingly, the public's interest in the disclosure of records that are at the heart of the purpose of FOIA—informing the public about the operations of government—is threatened by the Third Circuit's decision. Whether exemption 7(C) should be expanded to potentially include vast swaths of records not previously considered exempt is of utmost importance to the public.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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