

## Under the False Claims Act's Public Disclosure Bar, Does the Nature of the Documents Matter?

### CASE AT A GLANCE

Kirk filed a False Claims Act suit against his employer, Schindler Elevator Corporation, alleging violations of the Vietnam Era Veterans' Readjustment Act. Kirk's claims were based in part on information obtained from Freedom of Information Act responses. Schindler claims that the district court lacks jurisdiction to hear Kirk's claims based on the False Claims Act's public information disclosure bar.

### *Schindler Elevator Corporation v. U.S. Ex Rel. Daniel Kirk* Docket No. 10-188

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From: The Second Circuit

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#### ISSUE

Does a federal agency's response to a Freedom of Information Act request constitute a "report, hearing, audit, or investigation" precluding a court from exercising jurisdiction within the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)?

#### FACTS

Respondent Daniel A. Kirk ("Kirk" or "Respondent"), both a Vietnam veteran and a long-standing and now former employee of Petitioner Schindler Elevator Corporation ("Schindler" or "Petitioner"), filed a whistleblower lawsuit under the federal False Claims Act, (FCA), 31 U.S.C. § 3729 et seq, on behalf of the United States government in March 2005. Kirk claimed that Schindler entered into numerous contracts with the federal government that were subject to the Vietnam Era Veterans' Readjustment Act (VEVRAA). The crux of Kirk's claim is that VEVRAA requires contractors to annually certify, through a written report to the Department of Labor (DOL) the number of qualified covered veterans it employs. 38 U.S.C. § 4212(d); 48 C.F.R. §§ 22.1310(b), and 52.222.37(c). Kirk alleged that Schindler had either not filed some of the required reports and/or that some of the reports filed were false. A significant portion of Kirk's claim was based on several freedom of Information Act (FOIA) requests submitted to DOL requesting copies of Schindler's annual VEVRAA reports.

The United States District Court for the Southern District of New York dismissed the case. The district court found that all of the material information Kirk based his claim on was received in the DOL's response to the FOIA request. The court therefore concluded "... that many of Kirk's allegations failed to state a claim under the FCA and that Kirk's remaining claims were barred as 'publicly disclosed' pursuant to 31 U.S.C. §§ 3730(e)(4)(A). ..." FCA public

disclosure jurisdictional bar is the primary provision utilized to screen out unqualified whistle blowers. This provision allows courts to stop whistle blower claims that are based on certain types of public information.

On appeal the United States Court of Appeals for the Second Circuit reversed and remanded the case. In so doing, the court noted it was a case of first impression in that district, and the circuits were split on the necessary requirements to trigger a FCA public disclosure jurisdictional bar within the specific meaning of 31 U.S.C. § 3730(e)(4)(A). The Second Circuit found that mere dissemination of FOIA materials, once received by the requester, constituted a public disclosure. It then examined the language of the statute, as a whole, focusing on the specific "enumerated source" categories designated for the jurisdictional bar to apply. The Second Circuit decision is aligned with the Ninth Circuit's reasoning in *U.S. Ex Rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006), holding that mere public disclosure is insufficient to trigger a jurisdictional bar unless the material at issue also falls within one of the statute's enumerated sources. Therefore, a court must undertake a case-by-case analysis, looking at whether the enumerated source materials involve additional governmental work product or government involvement beyond the mere duplication of records in its possession. The Fourth Circuit, in an unpublished opinion, also adopted this approach.

Four additional circuits have not adopted this view. The Courts of Appeals for the First, Third, Fifth, and Tenth Circuits have held that a FOIA request is by definition an administrative action and therefore subject to the FCA's jurisdictional bar.

The circuit courts are currently split four/three on this issue, and on August 5, 2010 Schindler filed its petition for a writ of certiorari.

## CASE ANALYSIS

The public disclosure bar and its original exception have been the subject of a great deal of litigation and attention from Congress. No fewer than six United States Circuit Courts of Appeals have addressed these doctrines, and they are split on their application to cases filed under the FCA. The United States Court of Appeals for the Second Circuit is the most recent court to address this issue.

The issue is one of jurisdiction—in its simplest form: does a United States district court have jurisdiction to determine if allegations support a violation of the federal False Claims Act? Before so deciding, a court must first determine if the allegations underlying a False Claims Act case have been publicly disclosed. If they have been, the court must then determine if the relator is an original source of the information supporting the allegations. It has long been recognized that “the jurisdictional bar provisions must be analyzed in the context of the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.” *U.S. Ex Rel. Haight*.

The relevant statute reads as follows:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transaction in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4)(A)&(B)

(Congress amended this section of the False Claims Act on March 23, 2010, as part of the Patient Protection and Affordable Care Act. However, it did not make the amendment retroactive. The previous version of the statute, applicable at the time, is at issue in this litigation. The new statutory language is not before the Supreme Court and as such, is not addressed in this article.)

Prior to 1943, a relator could file a FCA suit and prosecute claims based on information disclosed in newspapers, court proceedings, and Congressional hearings. The Supreme Court sustained this practice in *United States Ex Rel. Marcus v. Hess*, 317 U.S. 537 (1943). Following *Hess*, Congress amended the FCA to prohibit any and all qui tam suits in which the Government “possessed prior knowledge” of the fraud underlying the suit (Government Knowledge Bar). Congress later amended the FCA to prohibit actions in which the suit was based upon information in the Government’s possession.

In 1986, Congress again amended the FCA hoping to encourage the filing of cases under the statute. In so doing, Congress repealed the “Government Knowledge Bar.” The 1986 amendments preclude the

filing of FCA cases in which the information was “based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.” Thus, the amendments permitted the filing of suits in certain instances in which the Government had knowledge of the alleged fraud underlying the allegations.

As stated above, the current issues have been the subject of a great deal of litigation. The United States District Court for the Southern District of New York held that respondent’s amended complaint was precluded by the public disclosure bar. Specifically, the district court held that the government’s FOIA response in and of itself amounted to a “public disclosure” of the allegations on which respondent based his complaint, and therefore the court lacked jurisdiction to hear the FCA case based on those allegations.

In reversing the district court’s decision, the United States Court of Appeals for the Second Circuit reasoned that “for the FCA’s jurisdictional bar to apply there must be a ‘public disclosure’ of the information on which the allegation of fraud rests, and this ‘public disclosure’ must occur through one of the sources enumerated in the statute.” In addition, the public disclosure (via an enumerated source) must be of the material elements of the “allegations or transactions on which the claim is based.”

The court recognized that “whether a document obtained through a FOIA request is an enumerated source within the meaning of the [FCA] depends on the nature of the document itself.” The Court determined that “it strains the natural meaning of the statute to construe the terms ‘report’ and ‘investigation’ broadly ... so that they include any and all materials produced in response to a FOIA request.” Here a “‘report’ most readily bears a narrower meaning than simply ‘something that gives information’ ... [and] an ‘investigation’ implies a more focused and sustained inquiry directed toward a government end—for example, uncovering possible noncompliance or assembling information relevant to a problem of particular concern to the government.”

The Second Circuit reasoned that “a document obtained in response to a FOIA request qualifies as an enumerated source under 31 U.S.C. § 3730(e)(4)(A), only when the document itself is a ‘congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation,’ reflecting the government’s efforts to compile or synthesize information to serve its own investigative or analytic ends.” A government agency that merely assembles and duplicates records, or notes the absence of records, in response to a FOIA request “does not itself render the material produced an ‘administrative ... report ... or investigation’ within the meaning of § 3730(e)(4)(A).” As such, the Second Circuit concluded that the documents obtained by the respondent through a FOIA request did not fall within any of the enumerated categories and therefore the lower court was incorrect in holding that it lacked jurisdiction.

Here, petitioner argues that FOIA responses amount to a public disclosure and bar district court jurisdiction to hear FCA claims that are based on those responses. Petitioner asserts that once a

governmental agency receives a FOIA request, it is incumbent on the agency to conduct an investigation, review and identify responsive documents, analyze them to determine whether they are subject to disclosure or an enumerated privilege, and report its findings. Thus, FOIA responses fall within the ordinary meanings of the terms “report” and “investigation.”

Petitioner contends that the ordinary meanings of “report” and “investigation” dictate that a FOIA response triggers the FCA public disclosure bar. Petitioner believes that interpreting “report” and “investigation” under their ordinary meanings affords a “simpler and clearer” jurisdictional test for district courts to apply than the highly fact-dependent inquiries required by the Second Circuit’s opinion. Petitioner believes that interpreting “report” and “investigation” under their ordinary meanings is the only true way to give effect to the congressional intent behind the statute.

Petitioner argues that a “report” is “something that gives ‘information’ or a ‘notification.’” An “investigation” includes a “detailed examination.” As such, searches performed in response to FOIA requests are FOIA investigations. Moreover, petitioner asserts that responses to FOIA requests, by their nature, require more than a ministerial function. When requests are received, an agency must designate employees to review and identify documents responsive to the request. In so doing, the agency must determine whether responsive material is exempt from disclosure. This process itself requires a detailed investigation and analysis.

Petitioner believes that the Second Circuit’s statutory interpretation encourages and permits opportunistic suits and vitiates congressional intent to preclude such suits. These relators, petitioner contends, are not the whistle-blowing insiders that Congress wished to encourage. This interpretation allows for suits in which one knows that the defendant is subject to regulatory requirements and may be in violation of those requirements. However, information to confirm these suppositions can only be conformed through FOIA requests. Petitioner argues that if the decision by the Second Circuit is not reversed, FOIA responses would give rise to FCA actions. In allowing this case to go forward, petitioner believes that the Second Circuit “underestimates the mercenary incentives that often drive litigation—especially litigation with payoffs as large as those potentially available in qui tam actions.”

Respondent, on the other hand, argues that “the ‘statutory touchstone’ of the public disclosure bar is whether the ‘allegations of fraud have been publicly disclosed.’” However, the respondent claims, this bar is only triggered by allegations of fraud that are publicly disclosed in an “administrative . . . report, hearing, audit or investigation” or other enumerated source. A categorical rule that every response to a FOIA request violates the public disclosure bar is a misapplication of the FCA, respondent argues.

Narrower definitions of “report” and “investigation,” respondent contends, avoid redundancy and are consistent with the purpose of the FCA. Respondent advocates that the rules of interpretation provide guidance for a court to determine the most appropriate definitions of “report” and “investigation.” First, where, as here, Congress uses “different words in the same sentence, it does not intend those words to have the same meaning.” Second, a court must give effect, if at all

possible, to every word Congress utilizes in a statute. Third, when a statute contains words with potentially broad meanings, the court has a duty to restrict the meanings of general words, when necessary, to carry out the legislature’s intent. Based on this analysis, respondent argues that narrow definitions of “report” and “investigation” are warranted. This analysis preserves the meaning of each word and ensures that these words maintain the effectiveness Congress intended.

Respondent argues that the petitioner’s definitions fail to differentiate among “report,” “hearing,” “audit,” and “investigation.” In essence, these words would mean the same thing. According to respondent, petitioner’s interpretation also fails to consider the narrow definitions afforded these terms, which preserve their distinct meanings. Such a reading, respondent contends, is inconsistent “with one of the most basic interpretive canons, that a statute should be construed so that no part will be inoperative or superfluous, void, or insignificant.”

A “report,” according to respondent, is “usually [a] formal account of the results of an investigation given by a person or group authorized or delegated to make the investigation.” As such, it is substantive. Respondent believes that this definition is in harmony with congressional intent.

An “investigation,” according to respondent, is an “official probe.” It is the “action or process of investigating.” This definition, contends respondent, is consistent with the enumerated sources identified under the public disclosure bar.

As such, an agency’s search for records and subsequent response to a FOIA request, are not themselves “reports” or “investigations.” Compiling a response to a FOIA request is ministerial in nature and does nothing to address allegations of fraud. Moreover, as respondent points out, a FOIA response is not found in the enumerated sources outlined in the public disclosure bar.

Respondent contends that the case-by-case approach adopted by the Second Circuit is correct. This form of statutory interpretation, respondent argues, is frequently used to determine the precise meaning of common words. Moreover, it affords a court the opportunity to review each FOIA response to discern if it is a “report” or “investigation” that sets forth the process of discovering and analyzing information. In so doing, a court should not be constrained by the characterization an agency affixes to a FOIA response.

Respondent concludes by arguing that a broad reading is inconsistent with congressional intent. The public disclosure bar is only triggered by a disclosure from an enumerated source. Respondent argues that Congress included the enumerated list to limit the public disclosure bar, not to expand it to include every statement to or by a government employee. Only those forms of public disclosure that indicate the government has “turned its attention” to the potential fraud, such as a “hearing, audit reports, or investigation” implicate the public disclosure bar and preclude a court from exercising jurisdiction over a matter.

## SIGNIFICANCE

The Supreme Court’s determination of whether a FOIA response is a “report” or “investigation,” when applying the FCA public disclosure



bar, has significant and immediate ramifications for whistle blower/relator FCA cases.

At bottom, the FCA's public disclosure bar and its application to FOIA responses perform a gate-keeping function. The bar is there to preclude opportunistic lawsuits based on public information while allowing cases brought by parties with first-hand knowledge of conduct underlying the allegations to proceed.

The FCA is one of the federal government's primary weapons to redress fraud against government programs. Successful FCA cases filed by whistle blowers have and continue to represent a significant segment of the government's anti-fraud efforts and result in significant recoveries. The government receives the majority of the recovery, and the FCA whistle blower receives an approximately 20 percent share of the government's recovery. The United States Department of Justice recently reported that recoveries from FCA cases for the two-year period beginning January 2009 through January 2011 totaled more than \$6.8 billion. The government further credits whistle blowers with filing more than 80 percent of the recently opened FCA cases. On January 26, 2011, Assistant Attorney General Tony West testified before the Senate Judiciary Committee on the Department of Justice's enforcement of the FCA. West reported, "... Most of the cases resulting in recoveries were brought to the government by whistle blowers under the FCA."

Should the court adopt petitioner's position, whistle blowers will be limited in filing FCA cases because they cannot seek FOIA materials prior to filing. This will curtail their ability to substantiate their allegations prior to commencing suit. However, should the court adopt respondent's position, whistle blowers will be precluded from filing suit only where the allegations are discovered as a result of specifically enumerated material constituting a public disclosure invoking the FCA jurisdictional bar, if they are not an original source.

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*PREVIEW of United States Supreme Court Cases*, pages 199–202.  
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