BNA

Federal Contracts Report™

False Claims Act

Supreme Court Holds FOIA Response Falls Within FCA Public Disclosure Bar

BY MARK R. TROY AND MANA ELIHU LOMBARDO

The Freedom of Information Act (''FOIA''), 5 U.S.C. § 552, is intended to uphold the principles of transparency and open government, so that citizens can assess government accountability and actions. Since its enactment in 1966, FOIA has also been used by companies to obtain information about their competitors' prices and contract performance, as well as by watchdog organizations, *qui tam* plaintiffs and others who have used the fruits of FOIA requests to support their litigation goals. Kirk Schindler, the relator in a *qui tam* suit recently heard by the United States Supreme Court, is an example of someone who worked for a company, suspected that the company violated certain laws, and before proceeding with allegations against his employer, used FOIA as a tool to obtain documentation to support his case. As discussed below, the use of a response to a FOIA request to support *qui tam* allegations may bar one's ability to maintain the suit.

In May of this year, the Supreme Court held that a federal agency's written response to a FOIA request for records constitutes a ''report'' within the meaning of the public disclosure bar in the False Claims Act, 31 U.S.C. § 3729 *et seq*. *Schindler Elevator Corp. v. United States ex rel Kirk*, 131 S. Ct. 1885 (2011). Reversing a decision of the Second Circuit, and resolving some discord between various circuit courts of appeal, the Court's decision strengthened the public disclosure bar and characterized the case as ''a classic example of the 'opportunistic' litigation that the public disclosure bar is

 ISSN 0014-9063

designed to discourage.'' In its 5-3 decision,[1] the Court found that the words ''congressional, administrative or GAO,'' which precede the word ''report,'' ''tell us nothing more than that a 'report' must be governmental.'' *Id*. at 1892.

The FCA's public disclosure bar requires the court to dismiss an action or claim to recover falsely or fraudulently obtained federal payments

. . .unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:

(i) in a Federal criminal, civil or administrative hearing in which the Government or its agent is a party;

(ii) in a Congressional, Government Accountability Office, or other Federal report, hearing, audit or investigation; or

(iii) 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. 31 U.S.C. § 3730(e)(4)(A).[2]

The circuit courts of appeal have laid out various iterations of a test for determining whether § 3730(e)(4)(A) has been met. *See, e.g*., *United States ex rel Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F. 3d 168, 173 (5th Cir. 2004), stating that the court (under the pre-2010 FCA) must consider three questions: ''(1) whether there has been a 'public disclosure' of allegations or transactions, (2) whether the qui tam action is 'based upon' such publicly disclosed allegations, and (3) if so, whether the relator is the 'original source' of the information.'' Even if the first two questions are answered in the affirmative, a relator can still proceed with his *qui tam* suit if he qualifies for the ''original source'' exception.[3]

A. The Schindler Facts. In *Schindler*, the relator brought a *qui tam* suit alleging that his former employer had submitted hundreds of false claims for payments to the federal government. *Schindler,* 131 S. Ct. at 1890. The relator alleged that the company's claims for payment were false because the company had falsely certified its compliance with the Vietnam Era Veteran's Readjustment Assistance Act of 1972 (VEVRAA). *Id*. VEVRAA requires the company to submit to the government certain information, including how many of its employees are ''qualified covered veterans,'' on ''VETS-100'' forms on a yearly basis. *Id*. at 1889. In support of his allegations, the relator relied on information regarding the company's VETS-100 submissions that he obtained via three records requests his wife filed under FOIA. *Id*. at 1890.

The district court granted the company's motion to dismiss, concluding that the FCA's public disclosure bar barred relators' allegations that were based on information disclosed in a Government ''report'' or ''investigation.'' *Id*. The Second Circuit vacated and remanded the district court's decision, effectively holding that an agency's response to a FOIA request is neither a ''report'' nor an ''investigation.'' *Id*. The Supreme Court then reversed and remanded the Second Circuit's decision, holding that a response to a FOIA request is a report for purposes of the FCA's public disclosure bar. *Id*. The Court reasoned that the word ''report'' in this context carries its ordinary, dictionary-defined meaning, and there is no textual basis for adopting a narrower definition of ''report.'' *Id*. at 1891.

B. The View of the Circuits. This Supreme Court decision resolves some discrepancy within the circuit courts of appeal with regard to this issue. Although most circuits addressing the issue already had come to the conclusion that a response to a FOIA request constitutes a public disclosure, that conclusion was not uniform. The majority view espoused the rationale that a FOIA response constitutes an administrative report, *i.e*., one of the enumerated sources listed in 31 U.S.C. § 3730(e)(4)(A). For instance, in *United States ex rel. Mistick PBT v. Housing Auth*., 186 F.3d 376, 383-84 (3d Cir. 1999), the Third Circuit reasoned that the review and compilation of records that the government must complete in order to respond to a FOIA request was sufficient analysis, notification, and examination in order to render the resulting document production both a ''report'' and an ''investigation.'' The *Mistick* court affirmed dismissal of the *qui tam* action because the information that appellant obtained under FOIA was ''based upon'' the public disclosure. *Id*. at 388 (holding that a qui tam action is ''based upon'' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims'').

In *U.S. ex rel Grynberg v. Praxair, Inc*., 389 F.32d 1038, 1049 (10th Cir. 2004), the Tenth Circuit decided that FOIA responses fall under the purview of the public disclosure test, and it laid out the policy underlying the jurisdictional bar: ''The point of the public disclosure test is to determine whether the qui tam lawsuit is a parasitic one. . .a parasitic law suit occurs when the relator uses information already in the public domain rather than information personally obtained.'' The *Grynberg* court found that a two-page excerpt of a government letter submitted in response to a FOIA request

---

[1] Justice Kagan took no part in the consideration or decision of the case.

[2] The above-quoted language contains the current language of the FCA. The Patient Protection and Affordable Care Act of 2010 (''PPACA'') amended certain aspects of the False Claims Act, including the language of the public disclosure bar in section 3730(e)(4)(A). The previous statute read as follows:

No court shall have jurisdiction over an action under this section 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.

Most significantly, the language ''*based upon* the public disclosure of allegations or transactions'' has been changed to ''*substantially the same* allegations or transactions as alleged in the action or claim were publicly disclosed.'' The *Schindler* case arose prior to the 2010 amendments. Accordingly, the Supreme Court's analysis in *Schindler* references the ''based upon'' language of the prior statute.

[3] The 2010 amendments to the FCA also changed the definition of ''original source'' by eliminating the requirement that the relator's information be ''direct.'' Under the new statutory language, ''original source'' means ''an individual who either (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an action under this section.'' 31 U.S.C. § 3730(e)(4)(B).

  FCR ISSN 0014-9063

constituted an administrative report. *Id*. Therefore, the court reasoned that because an administrative report is one of the enumerated sources in 31 U.S.C. § 3730(e)(4)(A), the response was a public disclosure, and because relator's allegations were based upon (*i.e.* ''supported by'') this public disclosure, the *qui tam* action was barred. *Id* at 1051.

Similarly, the Fifth Circuit in *Reagan*, 384 F. 3d 168, affirmed dismissal of a *qui tam* suit, finding that relator's FOIA request was an administrative report constituting a public disclosure and that relator's *qui tam* action was based upon that disclosure. *Id.* at 176 (''An FCA qui tam action even partly based upon public allegations or transactions is nonetheless 'based upon' such allegations or transactions.'') (Citations omitted). *See also United States ex rel Ondis v. City of Woonsocket,* 587 F. 3d 49, 57 (1st Cir. 2009) (adopting the majority view and holding that a FOIA response is an administrative report within the purview of the FCA).

On the other hand, the minority view asserted that a response to a FOIA request does not categorically constitute a public disclosure. For instance, in *United States v. Cath. Healthcare W.*, 445 F.3d 1147 (9th Cir. 2006), the Ninth Circuit suggested that whether a response to a FOIA request triggers the public disclosure bar depends on the nature of the document retrieved by means of the request. Specifically, the court found that a response to a FOIA request does not trigger the public disclosure bar unless the underlying document itself emanates from an enumerated source in section 3730(e)(4)(A)). *Id*. at 1153. The court reasoned that a FOIA response could not categorically qualify as an administrative report because such a characterization ''denotes a document that includes an analysis of findings,'' whereas a response to a FOIA request ''requires little more than duplication'' of an agency's files. *Id*. The Ninth Circuit also articulated its concern that automatically deeming a FOIA response a ''report'' or ''investigation'' would ''deter individuals who suspect fraud from investigating it.'' *Id*. at 1155, n.5. The court characterized FOIA requests as ''one of the simplest vehicles by which interested citizens can uncover possible fraud against the government'' and reasoned that ''[i]f information obtained pursuant to FOIA requests could never form the basis of a qui tam action, prospective relators would have to invest substantially more energy into uncovering the suspected fraud through other means.'' *Id*. The Ninth Circuit's reasoning, however, disregards a primary policy rationale and the design underlying the public disclosure bar: ''to foreclose qui tam actions in which a relator, instead of plowing new ground, attempts to free-ride by merely repastinating previously disclosed badges of fraud.'' *Ondis,* 587 F. 3d at 57, *citing United States ex rel. Duxbury v. Ortho Biotech Prods*., L.P., 579 F. 3d 13, 26-27 (1st Cir. 2009).

Earlier decisions made in circuit courts of appeal also limited the circumstances in which responses to FOIA requests were prohibited by the public disclosure bar. *See, e.g., United States ex rel Siller v. Becton Dickinson & Co*., 21 F.3d 1339, 1347-48 (4th Cir. 1994) (requiring proof that relator's allegations were actually derived from the publicly disclosed information).

C. Effects of the Decision. Notwithstanding the Supreme Court's determination of this matter, the scope and applicability of the public disclosure bar may not be a closed issue. The majority issued a strongly-worded opinion that derided the relator's conduct as the very type of ''opportunistic'' conduct ''that the public disclosure bar is designed to discourage.'' It further reasoned that a different interpretation of the public disclosure bar would allow anyone to ''identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA.'' *Schindler*, 131 S. Ct. at 1894. The dissent, on the other hand, lamented that the Court ''weaken[ed] the force of the FCA as a weapon against fraud on the part of Government contractors'' by ''severely limit[ing] whistleblowers' ability to substantiate their allegations before commencing suit.'' *Id*. at 1898. Accordingly, the dissent effectively invited Congress to turn its attention to the matter. *Id*. Of late, there has been much Congressional attention to strengthening anti-fraud laws, including recent amendments to the FCA through the Fraud Enforcement and Recovery of 2009, as well as the Patient Protection and Affordable Care Act. Following this trend, it appears that further amendments to the FCA are likely.

In the meantime, the Supreme Court's decision in *Schindler* may have several practical effects. Contractors can take some relief in knowing that the law has become more clear-cut: if a *qui tam* relator brings an FCA action, the allegations of which are substantially the same as the content of documents obtained in response to a FOIA request, the action will be subject to dismissal, unless the relator can prove that he or she was actually an *original source* of that information, or unless the Department of Justice (''DOJ'') opposes dismissal. DOJ has not issued any policies yet on how it intends to exercise this new right to oppose dismissal of the relator. Accordingly, we can expect that more FCA suits will be subject to dismissal under the public disclosure provision and thereby trigger either the ''original source'' exception or the government rescuing the relator from dismissal.

Cynics of the Supreme Court's decision may suggest that any contractor could now submit a FOIA request regarding documents that pertain to its own contract in an effort to thwart future potential FCA actions. This fear, however, is not one to which the Supreme Court gave much credence: ''We also are not concerned that potential defendants will now insulate themselves from liability by making a FOIA request for incriminating documents.'' *Schindler,* 131 S. Ct. at 1895. The Court cautioned that it is not correct to assume that ''a written FOIA response forever taints that information for purposes of the public disclosure bar.'' *Id*. Rather, ''it may be that a relator who comes by that information from a different source has a legitimate argument that his lawsuit'' should not be subject to the public disclosure bar. *Id*. This can be shown in either of two ways. One, such a relator can avoid dismissal if the allegations or transactions alleged in the action are not ''substantially the same'' as those made public through the FOIA response, or under the language of the prior statute, the allegations are not ''based upon'' the information obtained via the FOIA response. Notably, under the 2010 amended language of the new statute, ''substantially the same'' creates an easier standard for a *defendant* to establish that the public disclosure bar applies – a defendant will no longer need to show that relator's allegations were ''supported by'' or ''derived from'' the in-

formation disclosed in the FOIA response.[4] Alternatively, a relator can avoid dismissal by establishing that he is an original source of that information. Interestingly, the language of the new statute makes it easier for a *relator* to establish that he is an original source. Specifically, the new statute eliminates the prior statute's requirement that an original source have ''direct and independent knowledge of the information on which the allegations are based.'' Indeed, the new statute parses out the requirement laden in this phrase, splitting it into an either/or standard that defines an original source to be an individual who *either*: (1) discloses to the government ''the information on which allegations or transactions are based'' prior to receiving a FOIA response; *or* (2) ''has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions'' and provides that information to the government before filing a *qui tam* action. Although this new language creates a less stringent standard for the relator to meet, as under the prior statute, the burden to establish oneself as an original source shifts to the relator, and the relator will find himself in the unenviable position of defending the viability of his own suit from the outset.

In any case, under either the new statute or the prior statute, *Schindler* makes it clear that a would-be plaintiff seeking to file a *qui tam* lawsuit may be ill-advised to seek support for false claims allegations through a FOIA request. The Supreme Court unequivocally defines a written response to a FOIA request as an administrative report and therefore a public disclosure, and condemns those individuals who exploit our nation's ideals of government transparency and accountability in pursuit of parasitic lawsuits. If an individual is a professional *qui tam* plaintiff and uses FOIA as a vehicle to mine federal repositories in search of information with which to bring a False Claims action, this decision will tee up the public disclosure defense and subject the suit to dismissal.

[4] The Supreme Court acknowledged that the definition of ''based upon'' is a question that has created a split in authority within the courts of appeal but declined to address it in *Schindler*. *Id*. Hence, under the prior statute, the legal battle of defining whether a *qui tam* suit is ''based upon'' information obtained through a FOIA request remains an open issue that may continue to impact contractors' ability to defend themselves from parasitic suits brought under the FCA.

  FCR ISSN 0014-9063

FCR ISSN 0014-9063