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Whistleblowers' FOIA Info: Going Down

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Recently, the U.S. Supreme Court decided in a 5-3 ruling that whistleblowers cannot rely on documents obtained through the Freedom of Information Act when bringing *qui tam* actions under the False Claims Act.

The court decided in *Schindler Elevator Corp. v. United States ex rel.* Kirk that documents obtained through FOIA requests are government "report[s]," which are "public disclosures" under 31 U.S.C. § 3730(e)(4)(A) and therefore are an improper basis for a whistleblower's FCA action. The decision resolved a circuit split regarding the type of documents that give rise to the public disclosure bar.

The *Schindler Elevator* decision is helpful for those doing business with the government, as it limits the extent to which employees and other individuals with only limited knowledge or partial understanding of company practices can base FCA claims off of information gleaned through FOIA requests. The decision may also limit the incentive for private individuals to go on "fishing expeditions" in search of information about billing practices and other common sources of FCA complaints.

Nonetheless, those doing business with the government should be cognizant of the disclosures that the government may still make in response to FOIA requests. Companies should still be prepared to assert all appropriate protections, including confidentiality, business and proprietary protections, and other possible evidentiary protections, when submitting documents to the government or if the government notifies them of a FOIA request from a third party.

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Even if a whistleblower cannot base his suit on information gathered through FOIA, no limit has been imposed on using FOIA documents to bolster a FCA claim based on other information. In addition, appropriately marking documents submitted in response to a FOIA request may also be a tool a company can subsequently use in its defense. If a defendant can demonstrate that the "who, what, when" or "where" of the whistleblower's allegations of fraud are based entirely on information culled from FOIA documents, the defendant may succeed in getting a whistleblower's suit dismissed in the early stages of litigation.

Despite the favorable decision in *Schindler Elevator*, government contractors should be cautious about changing their business practices. Congress has demonstrated a strong propensity to amend the FCA in response to Supreme Court decisions that limit it.

Case Background

The *Schindler Elevator* case arose when a whistleblower obtained information about his former employer pursuant to a FOIA request to the U.S. Department of Labor in connection with an employment matter. The whistleblower then used a combination of information from the FOIA response and his personal knowledge to conclude that his former employer had violated the FCA, and filed suit.

The Second Circuit decided that the FOIA documents on which the whistleblower based his suit were not "reports" triggering the public disclosure bar, which would have been grounds for dismissal, because they involved the mere "mechanistic reproduction of documents."

Thus, the Second Circuit held that the whistleblower's reliance on the documents to advance his claim was not grounds for dismissal. This decision created a 4-3 circuit split among courts regarding whether FOIA disclosures trigger the public disclosure bar, and the Supreme Court granted certiorari to resolve this disagreement.

The Supreme Court Decision

Reversing and remanding the Second Circuit decision, the Supreme Court not only held that responses to FOIA requests constitute reports, it also reaffirmed the "generally broad scope of the FCA's public disclosure bar."

The court adopted the ordinary definition of "report" in its holding, concluding that because the DOL had adopted policies mandating written responses to FOIA requests and because such responses are meant to give information, they constitute government reports.

The court also noted that the type of information that could constitute a public disclosure was broad, stating there was "no merit" to any suggestion that a claim was parasitic only if it "[rode] the investigatory coattails of the government's own processes."

The court was not troubled by the suggestion that defendants would make FOIA requests for their own harmful documents, thus triggering the disclosure bar for claims arising from those documents and insulating themselves from liability.

Rather, it left open the possibility for a whistleblower who bases a suit on information separately disclosed by a written FOIA response to be in good standing to bring a FCA action. Specifically, the court suggested that a whistleblower in such a scenario might not bring allegations "based on" a public disclosure or that the whistleblower might qualify as an "original source" with direct and independent knowledge of the information.

Potential Impact of the Supreme Court Decision

Schindler Elevator is the most recent decision in a line of cases that demonstrates that the Supreme Court rejects the view that the FCA is boundless, and the court is willing to limit the reach of the FCA based upon a plain reading of the statute.

Schindler Elevator and the Supreme Court's decisions in *Graham County Soil and Water Conservation District v. United States ex rel. Wilson, and Allison Engine Co. v. United States ex rel.* Sanders, have all sought to limit the circumstances giving rise to FCA violations.

In Graham County, the Supreme Court also limited the type of information off of which whistleblowers can base their cases, ruling that disclosures made in a state or local report, audit or investigation were "public disclosures" under the FCA. See 130 S.Ct. 1396 (2010).

Similarly, in *Allison Engine*, the Supreme Court limited the scenarios in which a party could be held liable for false claims that were not submitted directly to the government. See 128 S.Ct 2123 (2008).

Yet, Congress has in the past directly undercut the Supreme Court's attempts to limit the FCA. Indeed, the Fraud Enforcement and Recovery Act of 2009, which expanded the FCA in numerous ways, was passed less than a year after *Allison Engine* in response to the Supreme Court's decision.

Similarly, Congress passed an FCA amendment only days before the *Graham County* decision, limiting the decision's applicability. There, Congress amended the FCA to expand whistleblowers' ability to bring suits based on secondhand information or allegations that had already been partially publicly disclosed, and gave the government greater control over whether courts dismiss whistleblowers from lawsuits.

Thus, it is not clear how the *Schindler Elevator* decision will affect the landscape of *qui tam* law in the long term.

Regardless of how Congress reacts to the *Schindler Elevator* decision, though, those doing business with the government that face an allegation of fraud should make determining the source of any potential whistleblowers' allegations a first step in defending themselves.

In doing so, companies may need to consider past disclosures they have made to the government to uncover the root of the FCA allegations against them. If a company can determine that a whistleblower's allegations are based on documents procured through a FOIA request, the company may have grounds to argue that a suit brought by the whistleblower should be dismissed based on *Schindler Elevator*.

Even if a company cannot get a whistleblower's claims thrown out based on the whistleblower's reliance on FOIA, the company will benefit from its awareness of any publicly available information that may be used against it.