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In *Schindler Elevator Corp. v. United States ex. rel. Kirk*, the U.S. Supreme Court held that documents obtained through Freedom of Information Act requests cannot form the basis of a whistleblower's False Claims Act action.

## Whistleblowers Cannot Rely on Documents Received in Response to FOIA Requests to Maintain a *Qui Tam* Action

By Edward Ellis and Jacqueline Barrett

The U.S. Supreme Court issued a significant decision on May 16, 2011, in *Schindler Elevator Corp. v. United States ex. rel. Kirk*, holding that whistleblowers cannot rely on documents obtained in response to a Freedom of Information Act (FOIA) request in bringing a *qui tam* action under the federal False Claims Act (FCA). Interpreting the "public disclosure" bar in the False Claims Act, the Court determined that the government's responses to FOIA requests were "reports" under the FCA, thus disqualifying the relator's claim to the extent it relied on those documents. A whistleblower, the Court held, must have some other independent basis for his claim beyond publicly disclosed materials.

### Background Facts

In *Schindler*, an employee filed a *qui tam* suit alleging that his former employer had submitted hundreds of false claims for payment under contracts with the federal government. In a *qui tam* action, an individual citizen sues in the name of the government to recover money paid by the government to a wrongdoer based on false or fraudulent claims. The False Claims Act, which imposes civil penalties and treble damages on persons who submit false or fraudulent claims for payment to the United States, permits individuals, called "relators," to bring private actions to enforce its provisions. If the action is successful, relators can recover between 25% and 35% of the proceeds. The employee in *Schindler* alleged that the company, for the better part of a decade, fraudulently sought payments on contracts exceeding \$100 million.

To support his claim, the employee relied upon information that his wife had received from the U.S. Department of Labor (DOL) in response to three requests for records she had filed under the Freedom of Information Act. Specifically, the wife sought reports filed with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) for the years 1998-2006. The DOL provided 99 reports in response to the requests. Based on those reports, the employee claimed that the company had obtained government contracts through false statements of compliance with OFCCP reporting requirements.

The False Claims Act, however, generally prohibits private parties from bringing *qui tam* actions to recover falsely or fraudulently obtained federal payments where the

case is 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.” 31 U.S.C. § 3730(e)(4)(A). The company moved to dismiss the employee’s claim, arguing in part that his allegations were based on public disclosure of transactions in an administrative “report” or “investigation,” such that he was ineligible to recover any award of “proceeds” as a whistleblower.

## The Supreme Court’s Opinion

Resolving a circuit split, the United States Supreme Court held that documents obtained through Freedom of Information Act requests are government “reports” and “public disclosures” and therefore cannot form the basis of a whistleblower’s False Claims Act action.

Specifically, the Court found that a “written agency response to a FOIA request falls within the ordinary meaning of ‘report’ . . . [as] FOIA requires each agency receiving a request to ‘notify the person making such request of [its] determination and the reasons therefore.’”

Although the employee’s suspicions about his employer’s compliance with OFCCP obligations arose out of observations he made during his employment, the Supreme Court majority was more impressed with the possibility that “anyone could have filed the same FOIA requests and then filed the same lawsuit.” Thus, the Court used this case to expand the FCA bar on relators relying on facts already publicly disclosed.

## Practical Implications

The Court’s decision makes clear that relators who obtain information contained within FOIA requests can still make the argument that the lawsuit is not based solely upon the initial public disclosure if the relator can establish direct and independent knowledge of the alleged fraudulent conduct – separate from the information contained in the FOIA response.

In light of the *Schindler* decision, however, employers subject to qui tam actions should in all cases determine the evidentiary basis for a potential whistleblower’s complaint. If the relator bases the complaint on information obtained under FOIA, the employer may be successful in moving to dismiss the complaint.

In this particular case, the Court did not decide whether the suit was “based upon . . . allegations or transactions” described in the OFFCP reports. That issue was remanded to the U.S. Court of Appeals for the Second Circuit for further proceedings.

Congress has amended the FCA twice in the past two years, strengthening the hand of whistleblowers with each amendment. It is not far-fetched to foresee Congress responding to the outcry from the whistleblower community by addressing this decision legislatively.

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