

Docs Obtained through FOIA Can't Be Used for Qui Tam Actions

By Greg T. Rinckey

Prospective whistleblowers intent on taking legal actions against contractors who fraudulently bill the U.S. government will have to compile evidence for their cases without documents they requested from federal agencies because of a recent ruling by the nation's top court.

In a 5-3 decision, the U.S. Supreme Court ruled

that information obtained from government entities through the Freedom of Information ACT (FOIA) qualifies as a barred report under the False Claims Act. The ruling in *Schindler Elevator Corp. v. U.S. ex Kirk*

throws a wrench in a Vietnam veteran's attempt to sue a New Jersey elevator repair company that allegedly made hundreds of false claims when billing under its federal contract.

Case Basics

Through a FOIA request, Daniel Kirk's wife obtained a series of documents from the U.S. Department of Labor (DOL) to support her husband's so-called "qui tam

" lawsuit in which a private citizen sues a fraudster on behalf of the government. If the government does not intervene in the case, the whistleblower, known as a qui tam

relator, stands to reap 25 percent to 30 percent of the action's proceeds. Kirk had planned to use the DOL documents to allege his former employer, the Morristown, N.J.-based Schindler Elevator Corp., failed to meet reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). He also alleged false information was included in reports the company did file.

At issue in this case was whether the DOL-supplied information qualified as a "report" under the False Claims Act's public disclosure bar. In 1986, Congress amended the Civil War-era False Claims Act to prohibit qui tam

relators from basing their suits on the public disclosure of allegations or transactions in various criminal, civil or administrative hearings or government reports, hearings, audits or investigations or from the news media.

The problem addressed by Kirk

is that the False Claims Act did not define "report." While the U.S. Court of Appeals for the Second Circuit sided with Kirk in ruling "report" should be interpreted narrowly so not to include certain documents obtained through FOIA, the Supreme Court instead went with a

more broad interpretation and reversed and remanded the lower court ruling.

What private citizen whistleblowers need to know:

The False Claims Act prohibits private citizens from bringing legal action against federal contractors on the government's behalf when the lawsuit is "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative or General Accounting Office report, hearing, audit, or investigation, or from the news media."

The purpose of this public disclosure bar is to discourage "opportunistic" litigation in which individuals search public documents for out-of-compliance federal contractors so they can "reap the windfall in a qui tam action."

Written responses by a federal agency to a FOIA request for record qualifies as a "report" under the False Claims Act's public disclosure bar.

A document obtained through FOIA does not have to be disseminated or evaluated to be considered a "record" subject to the public disclosure bar.

The court did not decide on whether a document that could be obtained through a FOIA request but is obtained through other means could be used in a qui tam suit, though it cautioned the information in this document might already be subject to the public disclosure bar.

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