No. 10-188

IN THE

Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, ex rel. DANIEL KIRK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief urges reversal of the decision below and thus supports the position of Petitioner Schindler Elevator Corporation.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

In addition, EEAC's members employ many veterans of the country's armed forces including active members of the Guard and Reserve. EEAC's members often go well beyond the letter of the nation's laws promoting and protecting the employment of veterans to support their employees who have served, or are serving, in the armed forces. Many provide supplemental pay to fill the gap between reservists' military pay and their regular salary. Some continue employee benefits during the reservists' absence and/or provide financial and emotional support for reservists' families. And a number have been awarded the Employer Support of the Guard and Reserve's (ESGR) Secretary of Defense "Employer Support Freedom Award," the highest recognition the U.S. government gives to employers for their support of

their employees who serve in the National Guard and Reserve.[2]

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, Titles I and V of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-17, 12201-13, as amended, and other employment-related statutes and regulations. Most also are federal government contractors subject to various federal recordkeeping and reporting requirements, including the obligation under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. §§ 4211 *et seq.*, as amended, and its implementing regulations to file annually with the U.S. Department of Labor "VETS-100" and "VETS-100A" Reports on the number of covered veterans employed by them.

Thus, the issue presented in this case is extremely important to the nationwide constituency that EEAC represents. The district court below properly dismissed this action based in part on the public disclosure bar to jurisdiction under the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq*., which precludes actions based on the "public disclosure" of allegations or transactions in an administrative report or investigation under section 3730(e)(4)(A) of the FCA. Pet. App. 52a. The Court of Appeals, however, vacated the district court's opinion and remanded, holding that the responses provided by the U.S. Department of Labor to requests under the Freedom

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[2] http://esgr.org/site/Programs/FreedomAward/tabid/125/Default.aspx (last visited Dec. 1, 2010).

of Information Act (FOIA), 5 U.S.C. § 552, for VETS-100 Reports filed by Petitioner did not qualify as an "enumerated source" that would trigger the FCA's jurisdictional bar. Pet. App. 33a.

Each year, EEAC's member companies comply with a host of federal government reporting requirements under a variety of complex and sometimes competing regulations. Many of those reports are subject to disclosure under FOIA. Accordingly, EEAC's members are extremely concerned about the ability of private citizens to seek the substantial monetary rewards offered by the FCA based solely on mandatory reports that these individuals obtain upon request from federal agencies under FOIA.

EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its experience in these matters, EEAC is well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Schindler Elevator Corporation (Schindler) manufactures, installs, and maintains elevators. Pet. App. 49a-50a. Since some of these elevators are in federal buildings, Schindler is a federal government contractor subject to the recordkeeping and reporting requirements of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. §§ 4211 *et seq.*, as amended, including the obligation to annually file VETS-100 Reports listing the number of covered veterans employed by the company during the reporting period. Pet. App. 50a.

Respondent Daniel Kirk worked for Schindler from 1978 until his voluntary resignation in August 2003. Pet. App. 4a. In November 2004, January 2005, and April 2007, Kirk's wife filed requests with the U.S. Department of Labor (DOL) under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, for copies of VETS-100 Reports filed by Schindler in various years from 1998 through 2006. Pet. App. 8a. Each time, DOL's Office of the Assistant Secretary for Veterans Employment and Training responded by letter. In response to the various requests, the DOL supplied copies of the company's VETS-100 Reports for 2002, 2004, 2005 and 2006, but responded that it had not located reports for the other years. *Id*. at 8a-9a.

Kirk sued Schindler under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq*. Pet. App. 5a. The FCA prohibits the presentation of false claims for payment by the federal government. 31 U.S.C. § 3729(a)(1). It allows an individual, called a "relator," to bring a *qui tam* suit on behalf of the federal government for a violation of the FCA. 31 U.S.C. § 3730(b). If the government declines its option to participate in the suit and the relator's suit succeeds, the relator can be awarded an amount between 25% and 30% of the proceeds, plus expenses, attorney's fees, and costs. 31 U.S.C. § 3730(d)(2).

Kirk contends that Schindler failed to file VETS-100 Reports as required by VEVRAA for the years 1998 through 2001, and 2003, filed false VETS-100 Reports in 2004, 2005, and 2006, and filed a late, and false, VETS-100 Report in 2002. Pet. App. 10a. According to Kirk, Schindler's allegedly non-existent or deficient VETS-100 Reports rendered each request for payment submitted by the company to the federal

government under the company's federal contracts a "false or fraudulent claim" in violation of the FCA. Pet. App. 11a.

The district court dismissed the case, concluding that Kirk's action was barred under the provision in the FCA that deprives courts of jurisdiction over lawsuits based on allegations or transactions that have been publicly disclosed in an administrative report or investigation. Pet. App. 87a. The Second Circuit vacated and remanded, holding that the FCA's jurisdictional bar did not apply to the Department of Labor FOIA responses that formed the basis for Kirk's suit. Pet. App. 47a-48a. Schindler petitioned this Court for a writ of certiorari, which was granted on September 28, 2010.

SUMMARY OF ARGUMENT

The federal False Claims Act (FCA) prohibits fraud against the government by federal contractors. 31 U.S.C. §§ 3729 *et seq*. Although it generally allows a private citizen to bring a lawsuit on behalf of the United States against a contractor for alleged practices that defraud the government, it specifically bars claims that are based on transactions that previously were publicly disclosed in an administrative investigation or report. 31 U.S.C. § 3730(e)(4)(A).

Federal contractors are subject not only to the confusing, sometimes conflicting VETS-100 requirements involved in this lawsuit, but also to a plethora of other federal reporting requirements. Congress enacted the FCA bar on claims based on public disclosures of these reports in order to protect federal contractors from opportunistic, parasitic lawsuits. If this Court excludes from the FCA's bar the response of a federal government agency to a request under

the Freedom of Information Act (FOIA), 5 U.S.C. § 552, American businesses will shoulder the costs of the many exploitative claims that are guaranteed to follow.

A response to a FOIA request falls within the FCA's ban on public disclosures, as several courts of appeals correctly have held. *See United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49 (1st Cir. 2009); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376 (3d Cir. 1999). A federal agency must expend significant effort in order to respond to a request in a way that complies with FOIA, and such a response goes well beyond what the court below described as the "mechanistic production of documents." Pet. App. 24a.

ARGUMENT

I. BY BARRING ACTIONS BASED ON INFORMATION OBTAINED THROUGH FOIA REQUESTS, THE FCA PROTECTS FROM PARASITIC LAWSUITS THOSE AMERICAN COMPANIES THAT DO BUSINESS WITH THE GOVERNMENT, ALL OF WHICH ARE REQUIRED TO SUBMIT A PLETHORA OF REPORTS

A. Federal Contractors Must Submit Numerous VETS-100 Reports Every Year Under Complex And Confusing Regulations

Allowing private individuals to sue under the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, for fraud based on purported errors or omissions in the content

of mandatory reports to a government agency that the agency has then publicly disclosed pursuant to a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, would adversely affect the efficiency and economy with which the federal government purchases goods and services from its contractors. In fiscal year 2010, the federal government reported that nearly 60,000 companies had government contracts worth $100,000 or more,[3] the statutory threshold for triggering the VETS-100 reporting requirement.[4] If the decision below were allowed to stand, any of these companies could be the target of an opportunistic FCA *qui tam* suit based solely on an allegation that the information in one of its VETS-100 Reports was incorrect or inadequate. Such an outcome would increase substantially the risk to employers of having to defend many more frivolous lawsuits, and in turn would raise considerably the cost to federal contractors of doing business with the government.

Further complicating matters, Congress has revised the statutory requirements underlying the VETS-100 Report multiple times over the past several years. The U.S. Department of Labor (DOL), which enforces these requirements, in turn has revised its regulations to implement the changes, although those revisions often have not become final until after the effective date of the amendments

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[3] USAspending.gov, http://www.usaspending.gov/explore?&carryfilters=on&tab=By%20Prime%20Awardee&fiscal_year=2010&tab=By+Prime+Awardee&fromfiscal=yes&trendreport=top_cont (last visited Dec. 1, 2010).

[4] The Jobs for Veterans Act of 2002 raised the monetary threshold for government contracts from $25,000 to $100,000 to trigger the VETS-100 filing. 38 U.S.C. § 4212(a)(1).

already has passed. As a result, compliance with the VETS-100 filing requirements has been a moving target for some time.

Federal contractors are required annually to report aggregate workforce demographic data on certain specified categories of covered veterans on a VETS-100 Report. 38 U.S.C. § 4212(d). The statute initially covered two categories of veterans: (1) Veterans of the Vietnam Era; and (2) Special Disabled Veterans. Since 1998, however, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. §§ 4211 *et seq.*, has been amended three times. Each amendment has made changes to the categories of covered veterans for reporting purposes.

In 1998, the Veterans Employment Opportunities Act (VEOA) added "Other Protected Veterans" to the list of covered veterans categories for reporting purposes, and defined this new category as those veterans "'who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.'" Pub. L. No. 105-339, 112 Stat. 3182, 3187 (1998).

In 2000, the Veterans Benefits and Health Care Improvement Act (VBHCIA) added "Recently Separated Veterans" to the list of categories of covered veterans for reporting purposes, and defined this new category to include "any veteran during the one-year period beginning on the date of such veteran's discharge or release from active duty." Pub. L. No. 106-419, 114 Stat. 1822, 1855 (2000).

In 2002, the Jobs for Veterans Act (JVA) added "Armed Forces service medal" veterans to the list of categories of covered veterans for reporting purposes,

expanded the definition of "Recently Separated Veterans" to include "any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty," replaced the "Special Disabled Veterans" category with a newly defined "Disabled Veterans" category, and eliminated the category for Vietnam Era Veterans. Pub. L. No. 107-288, 116 Stat. 2033 (2002). The 2002 JVA changes applied only to federal contracts or subcontracts of $100,000 entered into or modified on or after December 1, 2003. 41 C.F.R. § 61-250.1(a).

DOL regulations at 41 C.F.R. pt. 61-250 establish the VETS-100 reporting requirements under VEVRAA for federal contracts entered into prior to the December 1, 2003 effective date of the JVA. Because the JVA did not repeal or replace the VETS-100 reporting requirements that had been in effect prior to its enactment, DOL issued separate regulations, 41 C.F.R. pt. 61-300, and instituted a *new* and separate annual reporting form, the VETS-100A, that reflected the JVA's higher dollar threshold and new covered veteran categories. Thus, federal contractors must apply two sets of partially overlapping regulations in order to comply with VEVRAA's reporting requirements.

As a result of these cumulative changes, federal contractors have been in a constant state of flux for the past several years over how to comply with their VETS-100 and VETS-100A reporting requirements. Just this year, for example, if a company currently was performing on – or at any point in calendar year 2009 completed performance on – any "older" covered contracts of $25,000 or more entered into prior to December 1, 2003 and which were not modified since that date, then the regulations at 41 C.F.R. pt. 61-

250 apply, and the company had an obligation to file VETS-100 Reports this year. If the company currently was performing on – or at any point in calendar year 2009 completed performance on – any "newer" covered contracts of $100,000 or more entered into or modified on or after December 1, 2003, then the regulations at 41 C.F.R. pt. 61-300 apply, and the company had an obligation to file VETS-100A Reports. If the company currently was performing on – or at any point in calendar year 2009 completed performance on – both "older" covered contracts and "newer" covered contracts, then both sets of regulations apply, and the company had an obligation to file both the "older" VETS-100 Report and the "newer" VETS-100A Report this year.

Moreover, a federal contractor's VETS-100 and VETS-100A reporting obligations comprise more than just submitting a single report. Rather, covered employers having multiple establishments – as most large employers do – must file a VETS-100 and/or VETS-100A form for each establishment (or "hiring location") employing 50 or more persons. 41 C.F.R. 61-250.11(a). Establishments with fewer than 50 employees may submit their own separate VETS-100/VETS-100A forms or may be consolidated with other under-50 locations in the same state.[5] *Id.*

Many federal contractors have tens of thousands, or hundreds of thousands, of employees, including numerous veterans in various categories. Given the constant shifting of statutory and regulatory require-

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[5] U.S. Dep't of Labor, VETS-100 Federal Contractor Report on Veterans Employment, http://www.dol.gov/vets/programs/fcp/VETS-100.pdf, and Federal Contractor Veterans Employment Report VETS-100A, http://www.dol.gov/vets/programs/fcp/VETS-100a.pdf (last visited Dec. 1, 2010).

ments, these employers have faced substantial confusion in complying with the VETS-100 requirements over the past several years.

B. Federal Law Obligates Federal Contractors To Submit Many Other Reports As Well

In addition to submitting annual VETS-100 and VETS-100A Reports, federal contractors must comply with many other reporting requirements as a condition of doing business with the government, which, if excluded from the FCA's jurisdictional bar, also potentially would expose them to a flood of costly and time-consuming parasitic litigation. The Federal Acquisition Regulations (FAR) require contractors subject to the Davis-Bacon Act, for example, to submit to the contracting officer, on a weekly basis, copies of their payrolls containing the weekly wages and hours worked by laborers and mechanics. 48 C.F.R. § 52.222-8(b)(1). The payroll records must set out "accurately and completely all of the information required to be maintained," *id.*, and must be accompanied by a "Statement of Compliance" signed by the contractor that certifies that the information "is correct and complete." 48 C.F.R. § 52.222-8(b)(2)(i).

Similarly, the Service Contract Act (SCA), 41 U.S.C. §§ 351 *et seq.*, requires federal government contractors performing service on covered contracts to pay employees no less than the applicable wage rates and fringe benefits for their work. Contractors must submit to the contracting officer a Standard Form 1444, Request for Authorization of Additional Classification and Rate, if they have an unlisted class of employees that is to perform any contract work. 48 C.F.R. § 52.222-41(c)(2)(ii).

Further, under the government's new transparency efforts, a new interim rule, which the issuing federal agencies describe as "sweeping" in its breadth, will require most federal contractors to report to the government key information on all first-tier subcontracts of $25,000 or more, including the names and addresses of all first-tier subcontractors and the dates and amounts of all subcontracts; and, if certain thresholds are met, (1) disclose and report the names and total compensation of each subcontractor's five most highly compensated executives; and (2) disclose and report the names and total compensation of each of their own five most highly compensated executives. Reporting Executive Compensation and First-Tier Subcontract Awards, 75 Fed. Reg. 39,414, 39,416 (July 8, 2010) (to be codified at 48 C.F.R. pts. 4, 12, 42 & 52). The rule expands upon and makes permanent a pilot program tested in 2007 to implement the Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186 (2006), as amended by section 6202 of the Government Funding Transparency Act of 2008, Pub. L. No. 110-252, 122 Stat. 2323 (2008), which required the federal government to create a single, easily accessible, searchable and cost-free database that allows the public to see how its tax dollars are being spent on federal awards. *Id.*

In addition, federal contractors also must comply with various federal recordkeeping and reporting requirements that apply to employers generally. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, requires all employers with 100 or more employees to file annually with the government the "Employer Information Report" (EEO-1), which contains statistical data on the race and ethnicity of the employer's workforce

at each establishment, broken down into various job categories. 42 U.S.C. § 2000e-8(c).[6] Covered employers with multiple establishments must file an EEO-1 form for each establishment employing 50 or more persons, as well as a headquarters report and a consolidated report.[7] In 2008, the government reported that over 68,300 employers, collectively employing more than 62.2 million workers, filed EEO-1 Reports.[8]

All of these, of course, are in addition to the myriad other reports that businesses are required to file with the federal government. The Internal Revenue Service requires that employers prepare and submit, among others, Form 940 (Employer's Annual Federal Unemployment (FUTA) Tax Return), 26 C.F.R. § 31.6011(a)-3, Form 941 (Employer's Quarterly Federal Tax Return), 26 C.F.R. § 31.6011(a)-1T, and Form 945 (Annual Return of Withheld Federal Income Tax), 26 C.F.R. § 31.6011(a)-4, in addition to their own federal tax returns. There are incident-based required reports, such as the Occupational Safety and Health Administration's requirement for a verbal report of the death of any employee from a work-related incident or the in-patient hospitaliza-

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[6] The FAR provides that federal contractors "shall also file Standard Form 100 (EEO-1), or any successor form, as prescribed in 41 C.F.R. part 60-1." 48 C.F.R. § 52.222-26(c)(7).

[7] Equal Employment Opportunity Commission, *Standard Form 100 Instruction Booklet*, at 1-2, http://www.eeoc.gov/employers/eeo1survey/upload/instructions_form.pdf (last visited Dec. 1, 2010).

[8] Equal Employment Opportunity Commission, *Job Patterns for Minorities and Women in Private Industry (EEO-1)*, http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm (last visited Dec. 1, 2010).

tion of three or more employees as a result of a work-related incident within eight hours of the occurrence. 29 C.F.R. § 1904.39. And there are countless other specific reporting requirements imposed by agencies with oversight authority over particular industries. *See, e.g.*, DHS Chemical Facility Anti-Terrorism Standards, 6 C.F.R. pt. 27; FTC Model Forms and Disclosures, 16 C.F.R. pt. 1698.

C. The FCA's Jurisdictional Bar Properly Protects American Businesses From Opportunistic Lawsuits Based On Required Federal Reports

Every VETS-100, VETS-100A, EEO-1 or other report that a federal contractor submits to the federal government thus produces a record that potentially is subject to public disclosure pursuant to a FOIA request. Absent the FCA's jurisdictional bar, each one of those documents, once disclosed in a FOIA response, could lead to a *qui tam* lawsuit against a company, thus exponentially increasing the exposure of employers to parasitic lawsuits filed by bounty-hunting plaintiffs seeking to capitalize on publicly disclosed information.

> [I]t must be the case that information obtained pursuant to an [sic] FOIA request has been made public through the administrative process and cannot form the basis of a qui tam action. If that were not the case then . . . public agency records would be flooded with citizens requesting information in order to bring qui tam suits. Congress did not intend the qui tam provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.

United States ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376, 385 (3d Cir. 1999) (quoting *United*

States ex rel. Herbert v. Nat'l Academy of Sciences, 1992 U.S. Dist. LEXIS 14063, at *16, 1992 WL 247587, at *6 (D.D.C. Sept. 15, 1992)). If this Court excludes responses to FOIA requests from the FCA's jurisdictional bar, American businesses will shoulder the exorbitant costs of the many pot-of-gold searches that are guaranteed to ensue. This Court therefore should reverse the decision below and hold that a government agency's response to a FOIA request is a public disclosure of an administrative investigation and report that precludes an FCA action.

II. A GOVERNMENT AGENCY'S RESPONSE TO A FOIA REQUEST IS A PUBLIC DISCLOSURE OF AN ADMINISTRATIVE INVESTIGATION AND REPORT THAT PRECLUDES AN FCA ACTION

A. The False Claims Act Bars Suits Based On Public Disclosure Of Information In An Administrative Investigation Or Report

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, prohibits fraud against the government by federal contractors. It also allows a private citizen, known as "the relator," to bring a lawsuit on behalf of the United States against a contractor for alleged practices that defraud the government. *Id.* Indeed, Congress amended the FCA in 1986 to expand the ability of private citizens to sue a federal contractor for submitting false claims to the federal government. 31 U.S.C. § 3730.

In so doing, however, Congress was careful not to create a vehicle by which fortune hunters could seize on information already in the public domain to gain a quick cash reward. "[I]n an effort to strike a balance between encouraging private persons to root out

fraud and stifling parasitic lawsuits . . . ," *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. ___ , 130 S. Ct. 1396, 1407 (2010), Congress specifically excluded from the subject matter jurisdiction of courts "an action or claim 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. 31 U.S.C. § 3730(e)(4)(A).[9] Accordingly, federal courts lack jurisdiction under the FCA over cases based on the public disclosure of information contained in a federal agency's administrative report or investigation.

B. A Federal Agency's Response To A FOIA Request Constitutes An Investigation And Report Under The FCA's Jurisdictional Bar

1. FOIA requires a government agency to conduct an investigation and prepare a report in response to a request

Responding to a request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires a government agency to expend a significant amount of effort. As the government itself explains, an agency

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[9] As this Court noted in *Graham County*, 130 S. Ct. at 1400 n.1, Section 10104(j)(2) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), signed into law on March 23, 2010, replaced the prior version of 31 U.S.C. § 3730(e)(4) with new language, but is not retroactive. In this brief, we use the present tense in discussing § 3730(e)(4) as it existed at the time this case arose. In any event, the new version still includes the "report . . . or investigation" language which is at issue in this case.

that receives a FOIA request must "find the records, examine them, possibly consult with other agencies or components within the same agency, decide whether to disclose all of the information requested, and prepare the records for release. . . ."[10]

Under FOIA, when an agency receives a request, it must first conduct a search to determine if it has any relevant documents in its possession. *See* 5 U.S.C. § 552(a)(3)(C). The search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

If and when the agency locates documents that may be responsive to the FOIA request, it still cannot simply provide copies to the requester. Instead, the agency must conduct a thorough analysis of the records to determine if one or more of the nine exemptions (including multiple subparts) set forth in 5 U.S.C. § 552(b) would apply to bar the agency from disclosing the documents. In addition, the agency must review the documents in light of three statutory exclusions that pertain to especially sensitive law enforcement and national security matters. 5 U.S.C. § 552(c). Moreover, even if the agency's analysis leads it to conclude that a particular record is subject to a FOIA exemption, the FOIA requires it to further analyze the record to determine whether there is any portion of it which is "reasonably segregable" so as to allow for its disclosure. 5 U.S.C. § 552(b).

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[10] Gen. Servs. Admin., Ofc. of Citizen Servs. and Communs., Fed. Citizen Info. Ctr., *Your Right to Federal Records: Questions and Answers on the Freedom of Information Act and the Privacy Act* 7 (Nov. 2009), *available at* http://www.pueblo.gsa.gov/cictext/fed_prog/foia/foia.pdf (last visited Dec. 1, 2010).

In its own FOIA Guide, the Department of Labor describes the labor-intensive investigation that agency officials must conduct to respond to FOIA requests: "Some components of the Labor Department, [sic] receive thousands of requests each year. *Many of these requests require a line-by-line review of hundreds or even thousands of pages of documents*." U.S. Dep't of Labor, *The Freedom of Information Act Guide*.[11]

As the DOL points out in its FOIA Guide, the agency must analyze the relevant documents carefully to determine whether any of the FOIA exemptions apply. If it concludes that information should not be disclosed, then it must identify the specific exemption that applies.

The agency thus must create a written record to report the relevant exemption(s) to the requester: "There are statutory exemptions that authorize the withholding of information of an appropriately sensitive nature. When the Labor Department withholds information, it ordinarily must specify which exemption of the FOIA permits the withholding." *Id.* Accordingly, DOL's guide says, "[t]he determination letter will advise you of any information that is being withheld pursuant to one or more of the exemptions. When pages are being withheld in their entirety, the component will specify the volume of the materials denied and/or, if feasible, the location of excluded material." *Id.*

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[11] *Available at* http://www.dol.gov/dol/foia/guide6.htm (last visited Dec. 1, 2010) (emphasis added).

In fiscal year 2008, DOL reported processing nearly 17,000 FOIA requests.[12] Of those FOIA requests, the agency granted only 28% in full. DOL denied 32% in full – 11% based on one or more of the statutory exemptions, and 22% based on grounds other than the FOIA exemptions. *Id.* Another 40% were granted in part and denied in part. That the agency granted in full only 28% of the FOIA requests it processed that year shows that merely duplicating documents accounts for, if anything, only a small portion of the FOIA responses conducted by agencies every year. *Id.*

Thus, a government agency's actions in response to a FOIA request necessarily extend well beyond a routine, rubber-stamp operation. Rather, the agency must conduct an investigation by reviewing documents in its possession, locating those that may be responsive to the request, identifying among those the ones that indeed are responsive, and analyzing them to determine which if any exemptions apply, and if so, to what degree. Then, and only then, the agency responds with a report to the requester.

2. As the First, Third and Fifth Circuits have held correctly, a government agency's response to a FOIA request is a public disclosure of an administrative investigation and report that precludes an FCA action

The First, Third and Fifth Circuits all have addressed the issue before this Court and concluded that a government agency's response to a FOIA

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[12] U.S. Dep't of Labor, *Freedom of Information Act Annual Report for Fiscal Year 2009*, http://www.dol.gov/sol/foia/2010anrpt.htm (last visited Dec. 1, 2010).

request constitutes a public disclosure of an administrative investigation and report that triggers the FCA's jurisdictional bar. The Third Circuit so held in *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), in an opinion written by then Judge Alito. As in this case, the FCA claims in *Mistick* stemmed directly from information the relator received from a federal agency in response to its FOIA request. *Id.*

The Third Circuit pointed first to the plain text of the FOIA, which provides that "'each agency shall make available *to the public*' certain specified categories of information." *Id.* at 383 (citation omitted). Relying on this Court's decision in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), which held that the disclosure of information in response to a FOIA request constituted a public disclosure under the Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq.*, the Third Circuit concluded that documents released in response to the FOIA request were the product of an administrative investigation that triggered the public disclosure bar under the FCA. *Id.*

The Third Circuit next determined that a FOIA response constitutes a "report" and "investigation" for the purpose of invoking the FCA's jurisdictional bar. Noting the dictionary definition of the word "report," the Third Circuit concluded that "[a] response to a FOIA request falls within these definitions. Such a response provides information and notification regarding the results of the agency's search for the requested documents and constitutes an official and formal statement concerning those results." *Id.* at 383-84.

In so doing, the Third Circuit took notice of the obligations that FOIA places on an agency that receives a request, and the actions that agency must perform in response. It observed:

> HUD's search for the documents sought under the FOIA and its decision to disclose them clearly satisfied our court's interpretation of the term 'administrative,' and we believe that these processes should be viewed as constituting an 'investigation' within the meaning of 31 U.S.C. § 3730(e)(4)(A). Accepted definitions of the term 'investigation' include 'a detailed examination,' . . . and the 'making of a search.' . . . When an agency receives a FOIA request, it is obligated to conduct a search that is reasonably calculated to uncover all relevant documents. . . . Such a search falls within the common understanding of the term 'investigation.'

186 F.3d at 384 (citations and footnotes omitted).

It thus ruled that a response to a FOIA request is a "public disclosure" that triggers the jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A). *Id.* at 389.

The First and Fifth Circuits agree with the Third Circuit's rationale in *Mistick*. *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) ("the response to [the relator's] FOIA request is an administrative report constituting a public disclosure under § 3730(e)(4)(A)") (footnote omitted); *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 55 (1st Cir. 2009) ("a response to a FOIA request is an act of public disclosure because the response disseminates (and, thus, discloses) information to members of the public (and, thus, outside the government's

bailiwick)"). In *City of Woonsocket*, the First Circuit concluded that "a FOIA response is a report, at least in the sense that it constitutes an official statement concerning the results of the agency's search of its files." *Id.* at 56. Like the Third Circuit in *Mistick*, it examined the dictionary definition of "report" and concluded that "[t]he result of an agency's search of its files in response to a FOIA request fits comfortably within this broad definition." *Id.* Acknowledging the work involved in an agency's response to a FOIA request, the First Circuit found that "[j]ust as transmittal of the FOIA response to the relator constitutes an act of public disclosure, the end product of the government's search (locating and compiling the requested documents) independently constitutes an administrative report – and this is so regardless of the character of the underlying documents."[13] *Id.*

3. The Second and Ninth Circuits' conclusions that a government agency's response to a FOIA request is "little more than duplication" and does not activate the jurisdictional bar is incorrect and should not be adopted by this Court

The court below concluded that a federal administrative agency's response to a FOIA request is not always a public disclosure that triggers the FCA's jurisdictional bar. Pet. App. 47a-48a. Relying largely on the Ninth Circuit's decision in *United States v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir.

[13] The Tenth Circuit also has stated that "[i]t is generally accepted that a response to a request under the FOIA is a public disclosure." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) (citations omitted).

2006) ruled that "whether a document obtained through a FOIA request is an enumerated source within the meaning of § 3730(e)(4)(A) depends on the nature of the document itself." Pet. App. 23a.

Disagreeing specifically with *Mistick*, the court below read into the language of the jurisdictional bar a number of restrictions leading to a much narrower interpretation, stating that a "report," in this context, "connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a 'hearing' or 'audit.'" Pet. App. 24a. Contrary to the Third Circuit's recognition of the extensive effort an agency must put forth in responding to a FOIA request, the Second Circuit dismissed those labors as a "mechanistic production of documents," *id.*, as did the Ninth Circuit in *Catholic Healthcare*, 445 F.3d at 1153 (quoting *Mistick*, 186 F.3d at 393) (Becker, C.J., dissenting). *See also Catholic Healthcare* at 1153 (describing a response to a FOIA request as "little more than duplication").

The Second and Ninth Circuits have underrated significantly, and erroneously, the extent of the investigation that FOIA demands each agency perform in response to a request as well as the nature of the report that is issued. EEAC respectfully submits that the decision below should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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