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 OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues, including governmental transparency and corporate accountability. Since its inception, Public Citizen has promoted accountability in government by requesting agency records under the Freedom of Information Act (FOIA) and using records obtained through FOIA to provide the public with information on the inner workings of government. In addition, Public Citizen has provided legal assistance to many public interest organizations, academics, journalists, and others seeking access to information under FOIA and other open-government laws. Public Citizen attorneys have represented parties in scores of FOIA cases in the lower federal courts and have represented parties or filed amicus briefs on FOIA issues in cases before this Court, including *FCC v. AT&T*, No. 09-1279, *cert. granted*, 131 S. Ct. 61 (2010); *Milner v. Department of the Navy*, No. 09-1163, *cert. granted*, 130 S. Ct. 3505 (2010); *Taylor v. Sturgell*, 553 U.S. 880 (2008); *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *U.S. Department of Justice v. Julian*, 486 U.S. 1 (1988); and *CIA v. Sims*, 471 U.S. 159 (1985).

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[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Both petitioner and respondent have filed blanket consents to the filing of amicus curiae briefs in support of either party; those consents are reflected on the Court's docket.

Because it regularly requests records and litigates cases under FOIA, Public Citizen has significant experience in how FOIA works in practice. Drawing on its experience, Public Citizen files this amicus brief to explain the process of accessing records under FOIA and to show that, in light of this process, not all records released by the government in response to a FOIA request are "administrative reports" or the products of an "administrative investigation."

BACKGROUND

Daniel Kirk brought this *qui tam* action on behalf of the United States under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, alleging that his former employer, Schindler Elevator Corp., entered into government contracts while in violation of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). Specifically, Kirk alleged that, for a number of years, Schindler failed to file documents known as VETS-100 reports, as required by the VEVRAA, or filed false reports, resulting in what Kirk charged were false claims for payment within the terms of the FCA.

Kirk based his allegations in part on his comparison of the information contained in Schindler's VETS-100 reports, which Kirk's wife had obtained from the Department of Labor (DOL) through a series of FOIA requests, with his personal knowledge of Schindler's operations from his time with the company.

The district court dismissed the case, holding in relevant part that the FCA's public disclosure bar, *id.* § 3730(e)(4)(A), barred claims based on documents released by an agency in response to a FOIA request. At that time, the public disclosure bar stripped courts of jurisdiction over FCA claims that were "based upon

the public disclosure of allegations or transactions . . . in a congressional, administrative, or Governmental Accounting Office report, hearing, audit, or investigation . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." *Id.* The district court held that a release of documents under FOIA—even where, as here, the documents are not themselves "administrative reports" or the products of "administrative investigations"—"entail[s] an 'investigation' and produce[s] a 'report' as those words are commonly used and defined." Pet. App. 82a.

The Second Circuit reversed. Explaining that the word "report" as used in § 3730(e)(4)(A) "most readily bears a narrower meaning than simply 'something that gives information,'" the court held that the word does not cover all records released in response to a FOIA request because the word "connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government." Pet. App. 24a. These characteristics, the court reasoned, are notably missing from an agency's release of records in response to a FOIA request, which—because "FOIA is simply a mechanism for granting the public access to information in the possession of an agency," *id.* at 26a—involves little more than the "mechanistic production of documents." *Id.* at 24a.

The court further held that the word "investigation" bears a narrower meaning "than simply a 'detailed examination' or 'search.' Instead, an 'investigation' here implies a more focused and sustained inquiry directed toward a government end." *Id.* (citation omitted). Using this definition, the court held that the

word "investigation" does not describe an agency's release of records in response to a FOIA request, because, in the FOIA context, an agency is not "uncovering possible noncompliance or assembling information relevant to a problem of particular concern to the government," *id.*, but is only "review[ing], manually or by automated means, [its] records for the purpose of locating those records which are responsive to a request," 5 U.S.C. § 552(a)(3)(D). As a result, the court concluded, "whether a document obtained through a FOIA request is an enumerated source within the meaning of [the FCA's public disclosure bar] depends on the nature of the document itself," not on how it was disclosed. Pet. App. 23a.

SUMMARY OF ARGUMENT

This case presents the question whether an agency's release of records under FOIA changes the nature of the records, such that a non-report becomes a report, or a non-investigation becomes an investigation, merely by being disclosed by the government. The Second Circuit correctly answered this question in the negative, and its judgment should be affirmed.

FOIA requires government agencies to disclose agency records to the public, including in response to requests for records. 5 U.S.C. § 552(a)(3). On request, an agency must release all non-exempt responsive records and provide a basis for withholding exempt records. But FOIA does not require agencies, when releasing records to a requester, to make any statement regarding the content of the released records, such as whether the records reflect agency policy or whether they are authentic or accurate, and agencies do not do so.

Accordingly, documents released in response to a FOIA request do not "bear[] the imprimatur of the government," Petr.'s Br. at 14—and thus do not become "administrative reports," even under Schindler's definition, *see also id.* (defining "[administrative] report" as "an official notification of findings or conclusions by the government")—upon being released. This is particularly true where, as here, the records were originally generated not by the agency releasing them but by a private party. Likewise, an agency's response to a FOIA request is not an "administrative investigation." Although Schindler (at 14, 20) equates "investigation" with "search," and agencies "search" their files in response to a FOIA request, not every "search" is an "investigation." And reviewing responsive records before releasing them does not turn released records into the products of an "investigation."

In light of the manner in which FOIA operates, this Court should hold that, for purposes of the FCA, documents disclosed by the government in response to a FOIA request are to be treated the same as documents disclosed by the government in some other manner: whether a document is an "administrative report" or the product of an "administrative investigation" under the FCA depends not on whether or how the document was disclosed but on what type of document it is. In other words, "[i]f . . . the document obtained via FOIA does not *itself* qualify as an enumerated source [e.g., an administrative report or investigation], its disclosure in response to the FOIA request does not make it so." Pet. App. at 22a-23a.

ARGUMENT

FOIA was enacted in 1966 "to facilitate public access to Government documents." *U.S. Dep't of State v.*

Ray, 502 U.S. 164, 173 (1991). Its basic purpose is "to open agency action to the light of public scrutiny," *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), so that citizens can know "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

To this end, FOIA provides that any person has a right to obtain access to any agency record, subject to certain exemptions. *See* 5 U.S.C. § 552(b). A person can exercise this right by submitting a request for "reasonably describe[d]" records to the federal agency that possesses or controls the records. *Id.* § 552(a)(3)(A). Upon receiving such a request, the agency must "make the records promptly available" by releasing them to the requester. *Id.* [2]

In response to a FOIA request, the agency must first "review, manually or by automated means, [its] records for the purpose of locating those records which are responsive to a request." *Id.* § 552(a)(3)(D). After the agency has conducted an adequate search and retrieved all responsive records, the agency must disclose the records to the requester, *id.* § 552(a)(3)(A), unless the records fall within one of nine exemptions. *Id.* § 552(b). If an exemption applies,

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[2] FOIA also provides for agency records to be disclosed to the public in two other ways, neither of which involves an agency response or is at issue here. First, FOIA requires agencies to publish certain information in the Federal Register. *See* 5 U.S.C. § 552(a)(1). Second, FOIA requires agencies to make some types of documents available to the public in a physical or online reading room, *id.* § 552(a)(2), including documents previously disclosed in response to a FOIA request that the agency thinks are likely to be requested again.

the agency may redact the exempted material from the document before disclosing it to the requester or, if the exemption covers the entire document, withhold the document altogether.

Schindler contends that this process of releasing records automatically produces an "administrative report" and constitutes an "administrative investigation." It does not. Releasing records under FOIA does not transform the records into something new.

I. An Agency's Release of Records in Response to a FOIA Request Is Not Itself an Administrative "Report" or "Investigation."

FOIA is a disclosure statute whose "sole concern is with what must be made public or not made public." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 (citation omitted). Because FOIA focuses only on disclosure—and not on adding to or changing the nature of the records disclosed—records released in response to a FOIA request do not constitute administrative "reports" or "investigations" if they were not so prior to being released.

A. To begin with, an agency's release of records in response to a FOIA request does not come within the ordinary meaning of the term "administrative report." However one defines the word "report"—short of the hopelessly vague "something that gives information," Petr.'s Br. at 19, a definition so broad that it would render the words "hearing," "audit," and "investigation" in the FCA's public disclosure bar surplusage—the definition must include, at a minimum, the requirement that the drafter of the document stands behind its content. *See, e.g.*, *Black's Law Dictionary* 1169 (5th ed. 1979) (defining "report" as "[a]n

official or formal statement of facts of proceedings"). Indeed, even Schindler appears to acknowledge this necessary (although perhaps not sufficient) condition when it suggests that a record cannot be an "administrative report" unless it "bears the government's imprimatur." Petr.'s Br. at 14; *see also id.* (defining "[administrative] report" as "an official notification of findings or conclusions by the government"). But a proper understanding of FOIA shows that records released in response to a FOIA request do not bear the government's imprimatur, and thus do not become "administrative reports," even under Schindler's definition, simply by being released by the government.[3]

FOIA imposes on agencies a vital but limited obligation to release agency records—including records submitted to the agency by private parties—to any person who requests them, except to the extent that an exemption applies. In response to a request, an agency need only release responsive, non-exempt records and provide a basis for withholding exempt records. It need not—and agencies do not—do anything more. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.").

Thus, FOIA does not "require agencies to do research for [requesters], to analyze data, to answer

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[3] Schindler makes much of the fact that DOL provided a cover letter along with the released records. *See, e.g.*, Petr.'s Br. at 32-33. But it never explains how this fact has any bearing on whether the released records are administrative "reports" or "investigations" under the FCA's public disclosure bar.

questions, or to create records in order to respond to a request." U.S. Dep't of Labor, The Freedom of Information Act Guide (DOL Guide), http://www.dol.gov/dol/foia/guide6.htm. It does not require agencies to organize the records they release or to explain the content of the released records—even if doing so would make the records more understandable in light of redactions and withholdings. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (holding that FOIA does not require agencies "to produce or create explanatory material"). It does not require agencies to comment on whether the released records reflect agency policy or to confirm or deny the records' authenticity or accuracy. In fact, FOIA neither requires agencies to make, encourages agencies to make, nor reflects any expectation that agencies will make *any statement whatsoever* regarding the substance of the released records.

To be sure, many requesters might prefer that agencies provide additional information that might aid the requester in interpreting the records, particularly given that many records, like the records at issue here, contain unsynthesized information. But FOIA simply does not work that way. Under FOIA, the requester is left with the task of deciphering what the released records mean and analyzing their contents.

Thus, when an agency releases records in response to a FOIA request, it does not endorse or approve (or give its "imprimatur" to) the information contained within the released records. Indeed, many records released under FOIA, including those at issue here, were not created by the government but instead were submitted to the government by a third party. These records surely are not transformed into "administra-

tive reports" solely because an agency fulfills its statutory obligation to disclose those records upon request. And although an agency must review records in responding to a FOIA request to see if any part of the records is subject to an exemption from disclosure, this process does not change the nature of the released records: an administrative report with redactions is still an administrative report; a non-administrative-report with redactions is still a non-administrative-report. Accordingly, Schindler's proposed categorical rule—that all records released by an agency in response to a FOIA request are "administrative reports"—should be rejected.

Moreover, that an agency's release of records in response to a FOIA request is not itself an "administrative report" is supported by the text of FOIA, which uses the words "response" and "release" to refer to an agency's disclosure of records in response to a FOIA request, *see, e.g.*, 5 U.S.C. § 552(a)(6)(E)(iv) ("response"); *id.* § 552(a)(2)(D) ("release"), but saves the word "report" for a different context, *id.* § 552(e)(1) (describing each agency's obligation to submit to the Attorney General an annual "report" containing certain FOIA-related information). And it accords with the common sense notion that when an individual submits a FOIA request, he or she is generally not asking the agency to "report" on the requested documents, but only to release them.

B. For similar reasons, an agency's release of records in response to a FOIA request is not an "administrative investigation." As an initial matter, it is well settled that agencies are not required to "investigate" potential misconduct or other information contained in the records when responding to a FOIA request.

See Kissinger, 445 U.S. at 152 (FOIA "only obligates [agencies] to provide access to [records] which it in fact has created and retained"); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003) ("[A]n agency is not required to answer questions disguised as a FOIA request . . . [or to] conduct research in response to a FOIA request.") (internal quotation marks and citations omitted). Therefore, FOIA requesters cannot use FOIA to force the government to conduct an investigation into wrongdoing or otherwise research an issue that the requester deems important.

Nonetheless, Schindler relies on the word "investigation" in the FCA's public disclosure bar, claiming that an agency's gathering of records in response to a FOIA request is in itself an "administrative investigation." Nothing in the process of releasing records in response to a FOIA request, however, involves what one would ordinarily call an "administrative investigation." Certainly, an agency must search its files to locate records that are responsive to the request. *See* 5 U.S.C. § 552(a)(3)(C) ("In responding . . . to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format . . . ."). But nowhere—not even in the definition of the term "search"—does FOIA use the word "investigation" to refer to an agency's retrieval of responsive records. *See id.* § 552(a)(3)(D) ("[S]earch' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."). And contrary to Schindler's argument (at 14, 20), the words "search" and "investigation" are not synonyms. For example, no one would refer to a "Google search" as a "Google investigation," or a "Westlaw search" as a "Westlaw

investigation." Yet this is exactly what Schindler would have this Court do because a search for agency records—many of which are stored in searchable electronic databases—comes much closer to a search on Google or Westlaw than it does, for example, to a government investigation into potential wrongdoing. Moreover, such a broad definition of "investigation" would rob another enumerated term—"audit"—of independent significance.

Schindler points to two unreported district court decisions to claim that "searches performed in response to FOIA requests are referred to in ordinary usage as 'FOIA investigations.'" Petr.'s Br. at 20-21. Schindler is wrong, as demonstrated by its inability to cite any other cases that use that phrase, despite the thousands of FOIA cases that have been decided in FOIA's 45-year history. In addition, FOIA itself does not use this language, *see, e.g.*, 5 U.S.C. § 552(a)(4)(A)(ii)(I) (discussing fees for "document search" not "document investigation"); and the Department of Justice's nearly 900-page Guide to the Freedom of Information Act does not use the word "investigation" even once to refer to an agency's search for responsive records. *See* http://www.justice.gov/oip/foia_guide09.htm (2009 ed.). In short, the phrase "FOIA investigation" is as foreign to those familiar with FOIA as are the phrases "FOIA probe" or "FOIA pursuit"—each of which contains a "synonym" of the word "search."

Schindler additionally argues that an agency's review of "responsive records to determine whether any of FOIA's nine exemptions to disclosure applies . . . comes within the ordinary meaning of 'investigation.'" Petr.'s Br. at 20. Schindler is correct that

agencies must look over the responsive records before releasing them to the requester, and this process often "require[s] a line-by-line review." DOL Guide. But even if this process could be called an "investigation"—which would be an unusual word to use for such a review—the records that are ultimately released, and the information they contain, are not the *products* of that "investigation." They exist independently of whether the "investigation" takes place. Reading records in the course of "investigating" does not automatically transform the records into investigatory records.

C. Rather than adopt Schindler's categorical rule, this Court should hold that, in the context of the FCA, FOIA disclosures are to be treated like other disclosures made by the government. That is, whether a record released by an agency in response to a FOIA request is an "administrative report" or the product of an "administrative investigation" should be determined by looking at the record itself. Otherwise, a record that is not itself an administrative report or the product of an administrative investigation would become one solely as a result of being disclosed to a requester. But the FCA's public disclosure bar includes *both* a requirement that the "allegations or transactions" be publicly disclosed *and* a requirement that they be contained in one of the enumerated sources. Releasing a record under FOIA may satisfy the "public disclosure" requirement. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) (holding that a disclosure under FOIA is a "public disclosure" within the meaning of the Consumer Product Safety Act). To hold, however, that disclosure under FOIA necessarily satisfies the requirement that the record fall within one of the enu-

merated sources would be to collapse these two separate requirements—each of which must be met in order to trigger the public disclosure bar—into one.

Indeed, Schindler repeatedly melds the FCA's public-disclosure and enumerated-source requirements into one. For example, Schindler states (at 1) that Congress enacted the public disclosure bar "to prohibit parasitic suits brought by persons whose claims were based on publicly disclosed information." But this statement is only partly true: *qui tam* claims that are based on "publicly disclosed information" will be barred only if that "information" is an "allegation[] or transaction[]" contained within an enumerated source (e.g., an "administrative report" or "administrative investigation"). *See* 31 U.S.C. § 3730(e)(4)(A). Congress could have created a public disclosure bar that was triggered whenever a *qui tam* action was based on information that had been publicly disclosed. It did not do so. Instead, Congress chose a public disclosure bar that included both a public disclosure requirement and an enumerated source requirement. This Court should not disturb that choice.

II. Schindler's Construction of Administrative "Report" and "Investigation" Is in Tension With the Purposes of FOIA.

By mandating efficient, prompt, and full disclosure of agency records, FOIA aims "to check against corruption," *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and to "promote honesty and reduce waste in government." *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 764 (D.C. Cir. 2000). Similarly, by prohibiting false or fraudulent claims for payment to the federal government, the FCA intends to "combat[] 'fraud against the Government.'" *Allison Engine*

Co., Inc. v. United States ex rel. Sanders, 553 U.S. 662, 669 (2008) (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). In this respect, FOIA and the FCA are complementary: both statutes seek to promote a better and more efficient government.

Schindler's construction of the FCA would undermine the complementary purposes of FOIA and the FCA. It would set up a scheme under which the public would be able to gain access to government records that reveal waste, fraud, and corruption, but then—as a consequence of such access—would not be allowed to bring an FCA action to remedy that wrongdoing. To avoid such a result, the principal congressional sponsors of the 1986 amendment to the FCA, which added the public disclosure bar, have expressly rejected, albeit in a post-enactment statement, the notion that the public disclosure bar categorically prohibits *qui tam* actions based in part or in whole on information contained in records released by an agency in response to a FOIA request.[4] This Court should do so as well.

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[4] *See* 145 Cong. Rec. 16032 (July 14, 1999) (statement of Rep. Howard Berman and Sen. Charles Grassley) ("[W]e want forcefully to disagree with cases holding that qui tam suits are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents, such as those obtained through a Freedom of Information Act (FOIA) request . . . . We believe that a [relator] who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a qui tam action.").

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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