

## COMMENTS

### **Reducing Fraud against the Government: Using FOIA Disclosures in Qui Tam Litigation**

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#### INTRODUCTION

Recipients of federal funds defraud the government of billions of dollars each year. While defrauding the government is of course illegal, asymmetric information and limited resources prevent the government from detecting and prosecuting all fraud.

To increase the fraud detection rate, the government allows private citizens to serve as whistleblowers or private prosecutors in return for part of the recovery. Even given this financial incentive, however, private whistleblowers' interests do not always align with those of the government.<sup>1</sup> This disconnect causes two problems: the whistleblowers need an incentive to act, but may act even when their actions are unnecessary. To solve these problems, Congress tried three times over the past century and a half to set the right incentives such that private citizens with information act when needed, but only when needed. Some courts' interpretations of two federal statutes, the False Claims Act<sup>2</sup> and the Freedom of Information Act<sup>3</sup> (FOIA) threaten to

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<sup>1</sup> Whistleblowers' interests span the range from civic-mindedness to greed for the reward, from "narcissism moralized" to revenge against competitors or other enemies. See, for example, *United States v Griswold*, 24 F 361, 366 (D Or 1885) (explaining that the original False Claims Act provided a "strong stimulus of personal ill will or the hope of gain" to a relator); Jonathan Macey, *Getting the Word Out about Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 Mich L Rev 1899, 1907–10 (2007) (contrasting "pure" motivators from self-interested behavior); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum L Rev 949, 961–63 (2007) (summarizing a set of arguments that characterize whistleblowers as being primarily motivated by honesty or greed); C. Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* 63 (Cornell 2001) (coining the term "narcissism moralized" and describing it as a whistleblower motivator); David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 Annals Health L 127, 127 (1995) (characterizing a False Claims relator as a "bounty hunter" to describe greed as a motivator).

<sup>2</sup> The current version of the Act is codified at 31 USC §§ 3729–33 (2000).

<sup>3</sup> Pub L No 89-554, 80 Stat 383 (1966), codified as amended at 5 USC § 552 (2000 & Supp 2002).

undermine the carefully constructed system. These decisions eliminate the incentives for some whistleblowers to investigate, report, and litigate fraud against the government, leading to reduced recovery and underdeterrence.

The False Claims Act, the first of these two statutes, establishes liability for submitting fraudulent claims to the federal government. As a result of the Act, the government has recovered billions of dollars in the past two decades alone and has deterred hundreds of billions of dollars of fraud.<sup>4</sup> A variety of forces, however, prevent the government from effectively enforcing the False Claims Act itself.

To address those forces, the “qui tam”<sup>5</sup> provision of the False Claims Act establishes a private cause of action that allows private citizens to sue on behalf of the government.<sup>6</sup> The government has recovered billions of dollars from suits initiated by private citizens under the qui tam provision. In fact, over 60 percent of total False Claims Act collections over the past two decades came from private qui tam actions.<sup>7</sup> To prevent unnecessary private actions, the qui tam provision includes a public disclosure bar,<sup>8</sup> which precludes actions based on, among other things, information that has been publicly disclosed in specific types of documents, including administrative reports and ad-

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<sup>4</sup> See False Claims Act, 107th Cong, 1st Sess, in 147 Cong Rec S 1008 (Feb 1, 2001) (Sen Grassley) (describing collections under the False Claims Act); DOJ, *Fraud Statistics—Overview* (“DOJ Statistics”) (2006), online at <http://www.taf.org/stats-fy2006.pdf> (visited Jan 12, 2008) (listing over \$18 billion in collections from fiscal year 1987 to 2006). For a comprehensive economic analysis of the False Claims Act’s impact as of 1996, see generally William L. Stringer, *The 1986 False Claims Amendments: An Assessment of Economic Impact* (Taxpayers against Fraud 1996).

<sup>5</sup> “Qui tam” is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who brings the action for the king as well as for himself.” *Stinson, Lyons, Gerlin & Bustamante, PA v Prudential Insurance Co*, 944 F2d 1149, 1152 n 2 (3d Cir 1991) (providing translation). Compare the Latin translation to the qui tam provision of the False Claims Act: “A person may bring a civil action . . . for the person and for the United States Government.” 31 USC § 3730 (emphasis added). See also William Blackstone, 3 *Commentaries on the Laws of England* \*160 (Chicago 1979).

<sup>6</sup> See 31 USC § 3730.

<sup>7</sup> See DOJ Statistics (cited in note 4).

<sup>8</sup> Note that the public disclosure bar is also known as a “jurisdictional bar” or “statutory bar.” Compare *United States v Catholic Healthcare West*, 445 F3d 1147, 1153 (9th Cir 2006) (jurisdictional bar), with *Yannacopoulos v General Dynamics*, 315 F Supp 2d 939, 946–47 (ND Ill 2004) (substantive statutory bar). This distinction affects whether the claim would be considered under FRCP 12(b)(1) (jurisdictional) or 12(b)(6) (substantive). See *United States v Solinger*, 457 F Supp 2d 743, 750 n 5 (WD Ky 2006) (explaining different treatments).

This Comment uses the term “public disclosure bar” when referring to the modern False Claims Act because it is more descriptive than the other terms and is applicable to courts that use either the jurisdictional or statutory bar language. Additionally, the sponsors of the modern False Claims Act referred to it as the “public disclosure bar.” See, for example, False Claims Act, 106th Cong, 1st Sess, in 145 Cong Rec E 1546 (July 14, 1999) (Rep Berman). This Comment uses the term “jurisdictional bar” in the 1943 amendment context. See note 30 and accompanying text.

ministrative investigations.<sup>9</sup> The False Claims Act and its specific qui tam and public disclosure bar provisions form the first statutory scheme for this Comment.

The second relevant statute, FOIA, requires disclosure of certain government documents.<sup>10</sup> Based on the type of document, FOIA defines a particular disclosure method—traditional publishing, availability and indexing, or availability on request. This Comment argues that costs dictate the disclosure scheme, which becomes relevant when considering how parties use FOIA in qui tam litigation.

Federal courts are split over whether documents disclosed under FOIA constitute administrative reports or investigations, thereby triggering the public disclosure bar. But holding that FOIA disclosures trigger the public disclosure bar ignores the statutory language and the long history of the statute. Moreover, that interpretation limits future qui tam suits even though such suits have already led to the recovery of billions of dollars of government money. This Comment argues that courts must consider FOIA-disclosed documents like any other document because the categorical determination required by the statute must be based not on the type of disclosure (the “disclosure level”), but on the type of document (the “document level”)—that is, the relevant question in each case should be whether the *document* in question satisfies the public disclosure bar. Even the sponsors of the modern False Claims Act support the position that not all FOIA disclosures should trigger the public disclosure bar.<sup>11</sup>

Part I explains the background of the False Claims Act and FOIA. In particular, it describes how, from the beginning, Congress

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<sup>9</sup> See 31 USC § 3730(e)(4)(A). Note that the public disclosure bar is subject to some important exceptions, such as the original source exception, which are not relevant to this Comment and therefore will not be discussed. The original source exception allows a relator to bring an action even when the information has been publicly disclosed if the relator is an original source of the information. See, for example, Susan G. Fentin, Note, *The False Claims Act—Finding Middle Ground between Opportunity and Opportunism: The “Original Source” Provision of 31 U.S.C. § 3730(e)(4)*, 17 W New Eng L Rev 255, 256 (1995).

<sup>10</sup> See 5 USC § 552.

<sup>11</sup> See False Claims Act, 145 Cong Rec at E 1547 (cited in note 8) (Rep Berman). Representative Berman, on behalf of himself and Sen Grassley, noted:

[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. . . . If, absent the relator’s ability to understand a fraudulent scheme, the fraud would go undetected, then we should reward relators who with their talent and energy come forward with allegations and file a qui tam suit. This is especially true where a relator must piece together facts exposing a fraud from separate documents.

Id.

designed the False Claims Act as an incentives system. Part II explains the circuit split and the arguments used on both sides. Part III analyzes the statutory language, legislative history, and statute-created incentives system to conclude that FOIA-disclosed documents do not trigger the public disclosure bar unless they contain synthesis or analysis. That is, FOIA-disclosed documents trigger the public disclosure bar if and only if the documents themselves trigger the enumerated sources requirement of the public disclosure bar.

The solution in Part III adopts a framework based on secrecy and the efficient market hypothesis. This framework confirms that the government is on alert for fraud based on information in some types of documents—those enumerated in the statute—so a *qui tam* relator should not have a cause of action. But the framework suggests that the government is not on alert for fraud contained in other types of documents—those containing raw, nonsynthesized information. These types of documents contain deep secrets. That is, the secrets are not obvious and may be uncovered only by investing human capital to analyze the information. The capital markets face the same kinds of information issues; the strong tests of the efficient markets hypothesis examine information that is not presynthesized and easily accessible. The Grossman-Stiglitz paradox confirms that information will only become public if incentives exist to analyze and act on that information.

The *qui tam* provision was enacted to provide incentives for just this kind of information. If government auditors have not uncovered, and will likely never uncover, specific fraudulent activity, private parties should step in and expose the fraud. The *qui tam* provision specifically considers when to reward that private intervention. The express statutory language and the statutory history support the position that while some FOIA disclosures trigger the bar, allowing all FOIA disclosures to trigger the bar is overinclusive and thereby provides inadequate incentives for private investigations. Under that interpretation, the government would recover less and fraud would revert to being underdeterred at roughly the same levels as between 1943 and 1986. To avoid this perverse result, courts considering the public disclosure bar should consider the document itself, not the disclosure method.

## I. INCENTIVES OF THE FALSE CLAIMS ACT AND PUBLICATION REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT

### A. History of the False Claims Act: An Incentives Story

#### 1. 1863: the original False Claims Act.

The background of the False Claims Act reveals its incentives-based history.<sup>12</sup> In 1863, President Abraham Lincoln signed the original False Claims Act into law.<sup>13</sup> It was initially designed to combat fraud in Civil War spending,<sup>14</sup> such as supplying defective weapons or filling shells with sawdust rather than explosive material.<sup>15</sup> This original False Claims Act contained a qui tam provision allowing suits by private citizens.<sup>16</sup> The qui tam provision was not strictly necessary to combat fraud—the government could use civil or criminal procedures itself.<sup>17</sup> Nor was this 1863 legislation the first time Congress had passed qui tam legislation.<sup>18</sup> The original False Claims Act, however, marked the first time that qui tam ideas had been applied to fraud against the United States government.

Senator Jacob M. Howard, the Michigan senator who introduced the bill,<sup>19</sup> explained that the qui tam provision was based “upon the

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<sup>12</sup> For additional background material, see generally James Roy Moncus III, Note, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 Vand L Rev 1549 (2002); Robert L. Vogel, *The Public Disclosure Bar against Qui Tam Suits*, 24 Pub Cont L J 477 (1995); Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Bar to Qui Tam Actions under the False Claims Act*, 24 Pub Cont L J 237 (1995).

<sup>13</sup> Act of March 2, 1863, ch 67, 12 Stat 696, codified at Rev Stat §§ 3490–94 (1878). See also False Claims Amendments Act of 1986, S Rep No 99-345, 99th Cong, 2d Sess 8 (1986), reprinted in 1986 USCCAN 5266 (providing a brief history of the False Claims Act); *Stinson, Lyons, Gerlin & Bustamante, PA v Prudential Insurance Co*, 944 F2d 1149, 1153 (3d Cir 1991) (adding additional background information).

<sup>14</sup> See S Rep No 99-345 at 8 (cited in note 13); *Stinson*, 944 F2d at 1153.

<sup>15</sup> See Cong Globe, 37th Cong, 3d Sess 955 (Feb 14, 1863) (Sen Howard) (providing examples of wartime fraud).

<sup>16</sup> Act of March 2, 1863, ch 67, § 4, 12 Stat at 698, Rev Stat § 3491 (“Such suit may be brought and carried on by any person, as well for himself as for the United States.”).

<sup>17</sup> See Cong Globe, 37th Cong, 3d Sess 955 (Feb 14, 1863) (Sen Howard).

<sup>18</sup> Qui tam legislation had been used for centuries in England and since the First Congress in the United States. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 NC L Rev 539, 553–54 n 54 (2000) (listing and explaining early qui tam legislation); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L Rev 163, 175 (1992) (same); Blackstone, 3 *Commentaries* at \*160–62 (cited in note 5). See, for example, Act of July 31, 1789, ch 5, § 29, 1 Stat 29, 44–45, repealed by Act of August 4, 1790, ch 35, § 74, 1 Stat 145, 178 (repealing a law providing compensation to persons exposing corruption of customs officers).

<sup>19</sup> See Cong Globe, 37th Cong, 3d Sess 952 (Feb 14, 1863). For more on Senator Howard, see generally Earl M. Maltz, *Radical Politics and Constitutional Theory: Senator Jacob M. Howard of Michigan and the Problem of Reconstruction*, 32 Mich Hist Rev 19 (2006).

old-fashioned idea of holding out a temptation, . . . which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.”<sup>20</sup> The Supreme Court subsequently reiterated the incentives story of the original False Claims Act: “[O]ne of the chief purposes of the Act . . . was to stimulate action . . . . [L]arge rewards were offered to stimulate actions by private parties.”<sup>21</sup>

Another court explained that the original False Claims Act, and specifically the qui tam provision,

was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.<sup>22</sup>

Accordingly, as an incentive to bring private suits under the False Claims Act, a successful relator<sup>23</sup> is entitled to a portion of the recovery.<sup>24</sup>

## 2. 1943 amendments: restrictive qui tam provision.

As government spending increased leading up to World War II, several relators brought qui tam suits based on information that overlapped with criminal indictments.<sup>25</sup> In *Marcus v Hess*,<sup>26</sup> the Court held that the text of the qui tam provision permits such duplicative actions.<sup>27</sup> Fearing a flood of litigation that would leech off government

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<sup>20</sup> Cong Globe, 37th Cong, 3d Sess 955–56 (Feb 14, 1863).

<sup>21</sup> *Marcus v Hess*, 317 US 537, 547 (1943) (rejecting the government’s contention that the qui tam provision would harm war efforts by creating “unseemly races” to profit from the government’s investigations).

<sup>22</sup> *United States v Griswold*, 24 F 361, 366 (D Or 1885).

<sup>23</sup> A private party who brings a qui tam suit is called a relator. See *Black’s Law Dictionary* 1315 (West 8th ed 2004).

<sup>24</sup> The original False Claims Act provided that the successful relator could recover 50 percent of the total recovery, plus costs. See Act of March 2, 1863, ch 67, § 6, 12 Stat at 698. The 1943 amendments reduced the relator’s recovery to a maximum of 25 percent, plus costs. See Act of December 23, 1943, Pub L No 78-213, 57 Stat 608. Under the modern False Claims Act, the successful relator recovers, with some exceptions, between 15 percent and 25 percent of the total recovery, plus costs. See 31 USC § 3730(d).

<sup>25</sup> See, for example, *Marcus*, 317 US at 545 (noting that the defendants had previously been indicted for fraud, but not reaching whether the relator had conducted an independent investigation or had merely copied the indictment).

<sup>26</sup> 317 US 537 (1943).

<sup>27</sup> See *id* at 548 (“Under the circumstances here, we could not, without materially detracting from [the False Claims Act’s] clear scope, decline to recognize the petitioner’s right to sue under the Act.”).

indictments and add no value, the Attorney General advocated repealing the qui tam provisions of the False Claims Act.<sup>28</sup>

In response to these fears of parasitic litigation, Congress amended the False Claims Act in 1943.<sup>29</sup> The amendments added a broad jurisdictional bar<sup>30</sup> mandating that “[a] court shall have no jurisdiction to proceed with any such suit . . . based upon evidence or information in the possession of the United States.”<sup>31</sup>

The 1943 amendments rested on the assumption that when the government knows of fraud, no additional incentive to litigate is necessary.<sup>32</sup> Therefore, private citizens should have no cause of action when the government has information proving fraud, even if that information is not public and the government will never act because it does not know that the information proves fraud. This approach, however, diminishes relators’ incentives too much. A potential relator does not know *ex ante* what the government knows; the possibility that the government possesses similar evidence reduces the relator’s expected payout from investigating or even litigating based on current information. Additionally, even with perfect information, the government will not detect all fraud because limited resources prevent full investigations of all government spending.

### 3. 1986 amendments: restoring balance to the qui tam provision to create the modern public disclosure bar.

In 1986, Congress recognized these problems and sought to enhance the government’s ability to combat fraud.<sup>33</sup> It responded by passing legislation<sup>34</sup> designed “to encourage any individual knowing of Government fraud to bring that information forward” by “increas[ing] incentives, financial and otherwise, for private individuals to bring

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<sup>28</sup> See Elimination of Private Suits Arising Out of Frauds against the United States, 78th Cong, 1st Sess, in 89 Cong Rec 7571 (Sept 15, 1943) (Sen Van Nuys) (reading a letter by the Attorney General suggesting prohibiting relators from bringing qui tam actions based on indictments). The Attorney General suggested several options, but listed repealing the qui tam provision first. *Id.*

<sup>29</sup> See Act of December 23, 1943, Pub L No 78-213, 57 Stat at 608.

<sup>30</sup> In contrast to the text of the modern False Claims Act, see note 8, the 1943 amendment does not limit the bar to public disclosures, so the more general jurisdictional bar language is used here.

<sup>31</sup> 31 USC § 232(C) (1976).

<sup>32</sup> At least one senator at the time resisted this assumption. See, for example, Elimination of Private Suits Arising Out of Frauds against the United States, 89 Cong Rec at 7575 (cited in note 28) (Sen Murray) (questioning Senator Van Nuys’s rhetorical assertion that the Attorney General acts in “the best interests of the public”).

<sup>33</sup> See S Rep No 99-345 at 1 (cited in note 13).

<sup>34</sup> See False Claims Amendments Act of 1986, Pub L No 99-562, 100 Stat 3153.

suits on behalf of the Government.”<sup>35</sup> Congress specifically amended the qui tam provision in order “to encourage more private enforcement suits.”<sup>36</sup>

The 1986 amendments sought to address not only increasing evidence of fraud,<sup>37</sup> but also the fact that “most fraud goes undetected . . . due to weak internal controls and the fact that government auditors do not pay adequate attention to possible fraud.”<sup>38</sup> Because “the Government may not know of a fraud, but for a qui tam suit[], it is felt that a qui tam plaintiff should have some additional incentives for bringing these actions.”<sup>39</sup> Additionally, even if the government detects fraud, limited resources prevent effective enforcement.<sup>40</sup> Congress recognized that providing private incentives yields increased governmental recovery.<sup>41</sup>

As a result of these concerns, the modern False Claims Act strikes a balance between the original False Claims Act, which allowed even purely duplicative qui tam actions, and the 1943 amendments, which imposed a restrictive bar to qui tam actions based on even non-disclosed, unanalyzed government documents. To reach this balance, the 1986 public disclosure bar expands the range of potential qui tam actions beyond those allowed under the 1943 amendments. The modern public disclosure bar reads:

No court shall have jurisdiction over an action under this section 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, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.<sup>42</sup>

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<sup>35</sup> S Rep No 99-345 at 2 (cited in note 13). See also False Claims Amendments Act of 1986, HR Rep No 99-660, 99th Cong, 2d Sess 23 (1986) (using similar language).

<sup>36</sup> S Rep No 99-345 at 23–24 (cited in note 13).

<sup>37</sup> See *id.* at 2; HR Rep No 99-660 at 18 (cited in note 35).

<sup>38</sup> HR Rep No 99-660 at 18 (cited in note 35) (summarizing the findings of a 1981 GAO report on fraud in government programs).

<sup>39</sup> *Id.* at 23 (emphasis omitted).

<sup>40</sup> See S Rep No 99-345 at 4, 7 (cited in note 13) (listing “detection, investigative and litigative problems” as well as “a lack of resources on the part of Federal enforcement agencies” as reasons fraud goes unaddressed).

<sup>41</sup> See *id.* at 8.

<sup>42</sup> 31 USC § 3730(e)(4)(A). The original text referred to the “Government Accounting Office,” but a footnote in the US Code suggests it should have been “General Accounting Office.” See *id.* at n 2 (emphasis added). In 2004, the GAO became the Government Accountability Office. See GAO Human Capital Reform Act of 2004 § 8, Pub L No 108-271, 118 Stat 811, 814, codified at 31 USC § 702 (2000 & Supp 2004).



In relevant part, triggering the public disclosure bar requires satisfying two prongs: the disclosure must (1) be public and (2) come from one of the enumerated sources.

## B. Brief Overview of the Freedom of Information Act

The theory of open government spawned FOIA, which enables individuals to access government information.<sup>43</sup> FOIA requires government agencies to make certain information “available to the public.”<sup>44</sup> In relevant part, FOIA requires government agencies, upon proper request, to “make [ ] records promptly available to any person,”<sup>45</sup> unless the requested records fall into one of nine exempted categories.<sup>46</sup>

FOIA also includes three other provisions that are relevant to its interaction with the False Claims Act. First, FOIA requires a government agency to “make reasonable efforts to search for the records in electronic form or format.”<sup>47</sup> Second, FOIA suggests that the records should be reproduced or made available for duplication.<sup>48</sup> Third, FOIA requires that government agencies “shall make available for public inspection and copying” records that have been released on request to individuals “and which, because of the nature of their subject matter, . . . have become or are likely to become the subject of subsequent requests for substantially the same records.”<sup>49</sup>

## II. INTERACTION BETWEEN THE FALSE CLAIMS ACT AND THE FREEDOM OF INFORMATION ACT: CIRCUIT SPLIT

### A. First Attempts: All FOIA Requests Trigger the Public Disclosure Bar

The Third Circuit case *Mistick PBT v Housing Authority of the City of Pittsburgh*<sup>50</sup> was the first reported case to decide whether information obtained from a FOIA request triggers the False Claims Act’s public disclosure bar.<sup>51</sup> In *Mistick*, the defendant allegedly made false

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<sup>43</sup> Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* 44 (Greenwood 1999).

<sup>44</sup> 5 USC § 552(a).

<sup>45</sup> 5 USC § 552(a)(3)(A).

<sup>46</sup> 5 USC § 552(b). See also Foerstel, *Freedom* at 61–64 (cited in note 43).

<sup>47</sup> 5 USC § 552(a)(3)(C).

<sup>48</sup> See 5 USC § 552(a)(3)(B) (reproduced); § 552(a)(2) (duplicated); § 552(a)(4)(A)(ii) (duplicated).

<sup>49</sup> 5 USC § 552(a)(2).

<sup>50</sup> 186 F3d 376 (3d Cir 1999).

<sup>51</sup> While earlier in the same year the Sixth and Seventh Circuits addressed the public disclosure bar in the face of a FOIA request, neither court completely answered the question. The

claims about the costs of lead-based paint abatement to the Department of Housing and Urban Development.<sup>52</sup> A relator based a qui tam suit on the defendant's letters to HUD obtained via a FOIA request.<sup>53</sup>

The *Mistick* court addressed both prongs of the public disclosure bar. For the first prong, the court used three lines of reasoning to hold that a FOIA disclosure is "public." First, the text of FOIA specifies that agencies must make information "available to the public."<sup>54</sup> Second, the Supreme Court had explained that FOIA's "central purpose" was "ensur[ing] that government activities are 'opened to the sharp eye of public scrutiny.'"<sup>55</sup> Third, the court noted another Supreme Court decision<sup>56</sup> that held that for the purposes of the Consumer Product Safety Act,<sup>57</sup> a FOIA disclosure is considered a "public disclosure" on the grounds that "as a matter of common usage the term 'public' is properly understood as including persons who are FOIA requesters."<sup>58</sup>

For the second prong, *Mistick* held that a FOIA disclosure is both an administrative report and an administrative investigation.<sup>59</sup> The disclosure was supposedly administrative merely because it originated from the federal government;<sup>60</sup> it was a report because it fits broad dictionary definitions of "report."<sup>61</sup> Similarly, the disclosure was also an administrative investigation because the relevant administrative body had to conduct a search to find the appropriate records.<sup>62</sup> *Mistick* also cited support from other cases, although it mischaracterized at

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Sixth Circuit vacated a public disclosure bar dismissal, even though it agreed that the product of a relator's FOIA request is a public disclosure (prong one), because the court below failed to consider whether the disclosure came in the form of one of the enumerated sources. See *Burns v A.D. Roe Co*, 186 F3d 717, 723–24, 726 (6th Cir 1999). While the Seventh Circuit affirmed a dismissal under the public disclosure bar when some of the relator's information came from a FOIA request, it did not specifically hold that those FOIA-related disclosures themselves triggered the bar. See *Lamers v City of Green Bay*, 168 F3d 1013, 1017 (7th Cir 1999).

<sup>52</sup> See 186 F3d at 379.

<sup>53</sup> See *id* at 381.

<sup>54</sup> *Id* at 383, citing 5 USC § 552(a).

<sup>55</sup> *Mistick*, 186 F3d at 383, quoting *DOJ v Reporters Committee for Freedom of the Press*, 489 US 749, 774 (1989).

<sup>56</sup> *Consumer Product Safety Commission v GTE Sylvania, Inc*, 447 US 102 (1980).

<sup>57</sup> Pub L No 92-573, 86 Stat 1207, codified in relevant part at 15 USC § 2055(b)(1) (1976).

<sup>58</sup> *GTE Sylvania*, 447 US at 108–09.

<sup>59</sup> 186 F3d at 383–84.

<sup>60</sup> *Id* at 383, quoting *Dunleavy v County of Delaware*, 123 F3d 734, 745 (3d Cir 1997). But see Part III.C.1.

<sup>61</sup> *Mistick*, 186 F3d at 383, citing *Webster's Third New International Dictionary* 1925 (1971) (defining a "report" as "something that gives information" or a "notification") and *Black's Law Dictionary* 1300 (West 6th ed 1990) (defining a report as an "official or formal statement of facts or proceedings").

<sup>62</sup> The court used a dictionary definition to equate "investigation" to "making of a search," see *Mistick*, 186 F3d at 384, quoting 1 *The Compact Edition of the Oxford English Dictionary* 457 (Clarendon 1971), and then noted that to respond to a FOIA request, an agency must conduct a search. See *Mistick*, 186 F3d at 384.

least one of those, as well.<sup>63</sup> Subsequently, the Fifth and Tenth Circuits reached conclusions similar to the *Mistick* holding that FOIA disclosures trigger the public disclosure bar.<sup>64</sup>

#### B. A Different Approach: FOIA Requests Do Not Necessarily Trigger the Public Disclosure Bar

Not all courts follow *Mistick*.<sup>65</sup> In *United States v Catholic Healthcare West*,<sup>66</sup> the Ninth Circuit expressly rejected the *Mistick* holding, instead holding that FOIA disclosures do not necessarily trigger the public disclosure bar.<sup>67</sup>

In *Catholic Healthcare*, the National Institutes of Health (NIH) awarded Phoenix-based Barrow Neurological Institute over \$700,000

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<sup>63</sup> For example, *Mistick* cited the Ninth Circuit's decision in *Schumer v Hughes Aircraft Co.*, 63 F3d 1512, 1520 (9th Cir 1995), vacated on other grounds, 520 US 939 (1997), for the proposition that "documents actually produced in response to FOIA requests are publicly disclosed for purposes of the qui tam statute." 186 F3d at 384.

*Mistick* mischaracterized the *Schumer* holding, however. In *Schumer*, the relevant documents had been neither requested nor disclosed before the relator filed suit. See 63 F3d at 1519–20. The defendant claimed that the mere availability of documents through FOIA requests triggered the public disclosure bar. See *id.* at 1519. *Schumer* rejected this argument and distinguished documents that are actually available from those that are merely theoretically or potentially available to the public, narrowly holding that "there was no public disclosure of the government audits," *id.* at 1520, thereby avoiding addressing the issue of whether documents that have been actually disclosed under FOIA are publicly disclosed.

*Mistick* also cited district court cases on both sides of the issue. See 186 F3d at 384–85.

<sup>64</sup> See *Grynberg v Praxair, Inc.*, 389 F3d 1038, 1051 (10th Cir 2004) ("It is generally accepted that a response to a request under the FOIA is a public disclosure."); *Reagan v East Texas Medical Center Regional Healthcare System*, 384 F3d 168, 175–76 (5th Cir 2004) ("[We] hold that the response to Reagan's FOIA request is an administrative report constituting a public disclosure.").

<sup>65</sup> See *United States v Catholic Healthcare West*, 445 F3d 1147, 1156 (9th Cir 2006) ("If, as was the case here, the document obtained via FOIA does not *itself* qualify as an enumerated source, its disclosure in response to the FOIA request does not make it so."), cert denied 127 S Ct 725 (2006), 127 S Ct 730 (2006). On remand, the district court held that the plaintiff had failed "to produce sufficient evidence from which a reasonable jury could find that the challenged statements . . . [were] actionable under the False Claims Act." *Haight v Catholic Healthcare West*, 2007 WL 2330790, \*6 (D Ariz). See also *United States v Solinger*, 457 F Supp 2d 743, 751–52 & n 6 (WD Ky 2006) (finding the *Catholic Healthcare* approach "more persuasive" than the *Mistick* approach and applying the state Open Records Act (ORA) instead of FOIA, but noting that "ORA requests are analogous to FOIA requests and should be treated the same [as FOIA requests] for purposes of the public disclosure bar"); *Yannacopolous v General Dynamics*, 315 F Supp 2d 939, 951–52 (ND Ill 2004) (holding, based primarily on legislative intent, that "[m]ere disclosure to the [FOIA] requesting party is not disclosure to the public"); *Bondy v Consumer Health Foundation*, 28 Fed Appx 178, 181 n 2 (4th Cir 2001) (determining that a FOIA disclosure "is not among the items listed in § 3730(3)(4)(A) as 'public disclosures' and therefore does not operate as a jurisdictional bar").

<sup>66</sup> 445 F3d 1147 (9th Cir 2006).

<sup>67</sup> See 445 F3d at 1153 ("We disagree [with *Mistick*]: a response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute.").

to study a form of brain tumor using dogs.<sup>68</sup> Patricia Haight, a psychologist for an animal rights group, had been investigating Barrow's research for animal research protestors. As part of this animal rights research, Haight made a FOIA request for the NIH grant application and research abstract.<sup>69</sup> Haight was directed to obtain the documents directly from Barrow and Arizona State University (ASU).<sup>70</sup> After obtaining those documents, Haight toured laboratories and interviewed several people affiliated with the research; she discovered that the Barrow research had been largely unsuccessful. Haight and others publicized these findings in *The State Press*, Arizona State University's student newspaper; the *Phoenix New Times*, a free weekly newspaper; and several press releases.<sup>71</sup> Barrow's grant application, however, claimed that the research was successful. Haight and In Defense of Animals<sup>72</sup> filed a qui tam action against Barrow based on this inconsistency.<sup>73</sup>

The Ninth Circuit reversed the district court's dismissal under the public disclosure bar and held that the NIH grant application Haight requested through FOIA did not trigger the public disclosure bar.<sup>74</sup> While the court briefly considered the statutory history and legislative intent of the False Claims Act, quoting Congress's intent "to encourage more private enforcement suits,"<sup>75</sup> it immediately proceeded to the second prong, the enumerated sources requirement.<sup>76</sup> In holding that this FOIA request did not trigger the public disclosure bar, the court distinguished administrative reports and investigations from FOIA requests. The court noted that while FOIA requires agencies to "search" for relevant records, it is essentially a "mechanism for duplicating records."<sup>77</sup> "In contrast, reports and investigations generally involve

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<sup>68</sup> Id at 1148.

<sup>69</sup> Id at 1149.

<sup>70</sup> At one time, the research took place at ASU. Id.

<sup>71</sup> See note 98 and accompanying text for an argument that even these local publications satisfy the public disclosure bar. Note, however, that these publications disclosed only the true state of facts, not the false facts or the allegation of fraud. In other words, that this information was publicly disclosed is necessary but not sufficient to trigger the public disclosure bar.

<sup>72</sup> In Defense of Animals (IDA) is an international animal rights organization that seeks to raise the status of animals from mere property.

<sup>73</sup> See *Catholic Healthcare*, 445 F3d at 1148–50.

<sup>74</sup> Id at 1153.

<sup>75</sup> Id at 1151, quoting S Rep No 99-345 at 23–24 (cited in note 13).

<sup>76</sup> *Catholic Healthcare*, 445 F3d at 1151. *Catholic Healthcare* did not consider the first prong, the public disclosure prong, separately from the enumerated sources prong. In fact, *Catholic Healthcare* adopted different divisions, with prong one inquiring whether the allegations were publicly disclosed via a source enumerated in § 3730(e)(4)(A) and prong two inquiring whether the relator was the original source of those allegations. Because the court considered that the specific FOIA disclosure in question did not satisfy the enumerated sources requirement, it did not have to specifically consider whether the disclosure was public.

<sup>77</sup> Id at 1153, quoting *Mistick*, 186 F3d at 393 (Becker dissenting).

independent work product.”<sup>78</sup> Therefore, calling all FOIA disclosures reports or investigations stretches the meanings of those terms.<sup>79</sup>

*Catholic Healthcare* reinforced this holding by considering the statutory history and legislative intent. Specifically, the court traced the three historical versions of the statute and noted that the current version represents a specific attempt to balance promoting fraud detection with preventing relators from profiting from public domain knowledge.<sup>80</sup>

### III. RESOLUTION: CONSIDER THE DOCUMENT

This Part argues that FOIA disclosures should not trigger the public disclosure bar, a position supported by the sponsors of the modern False Claims Act.<sup>81</sup> Part III.B concedes that FOIA disclosures are “public disclosures” (prong one), but Part III.C argues that such disclosures do not themselves satisfy the enumerated sources requirement (prong two). Specifically, the categorical determination required by the second prong must occur at the document level, not the disclosure level.

#### A. Structural Limits

Recall from Part I.A that the 1943 jurisdictional bar came in response to directly parasitic litigation. It is important to point out that even if some FOIA disclosures do not trigger the modern public disclosure bar, the structures of the False Claims Act and FOIA impose limits that prevent purely duplicative or parasitic suits.

First, the *qui tam* provision specifically bars private actions that are based on existing enforcement actions, even if not completed.<sup>82</sup> Second, FOIA expressly allows the government to prevent disclosure of some documents that are not the subject of an enforcement action but may become so later, preventing relators from accessing the information.<sup>83</sup> These structural limits resolve, to a large extent, the issue

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<sup>78</sup> *Catholic Healthcare*, 445 F3d at 1153.

<sup>79</sup> See *id.* (“Because responding to a FOIA request requires little more than duplication, labeling any response to a FOIA request a ‘report’ or ‘investigation’ would ignore the way in which each of the enumerated sources involves governmental work product.”).

<sup>80</sup> See *id.* at 1153–54, citing *Mistick*, 186 F3d at 391 (Becker dissenting).

<sup>81</sup> See note 11.

<sup>82</sup> See 31 USC § 3730(e)(3) (“In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.”). This bar is distinct from the public disclosure bar.

<sup>83</sup> See 5 USC § 552(b)(7) (excluding from FOIA disclosures “records or information compiled for law enforcement purposes” but with several limitations).

of private actions that largely duplicate government investigations or enforcement actions.

## B. FOIA Disclosures Are Public Disclosures<sup>84</sup>

### 1. FOIA requires publication and is limited only by cost.

FOIA is structured and designed to make public disclosures of government records, so documents disclosed through FOIA should be considered public disclosures for the purposes of the public disclosure bar.

The express purpose of the modern FOIA is to “ensur[e] public access to agency records and information.”<sup>85</sup> The text of the statute reads, “[e]ach agency shall make available *to the public . . .*”<sup>86</sup> As noted above, the Supreme Court held that FOIA disclosures constitute a “public disclosure” when interpreting the Consumer Product Safety Act.<sup>87</sup> Even though specific disclosures are made to individuals, FOIA is designed to make disclosures to the public.

Requiring government agencies to publish all information would be wasteful and impractical, so FOIA adopts a three-tiered publication system based on cost to the agency and benefit to the public.<sup>88</sup> For some types of documents, FOIA requires actual, traditional publication.<sup>89</sup> For documents that are not formally published but that are frequently requested, FOIA requires availability and indexing.<sup>90</sup> For all other applicable documents, FOIA essentially requires on-demand

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<sup>84</sup> Note that the public disclosure requirement is not the subject of a formal circuit split. *Catholic Healthcare* held that prong two, the enumerated sources requirement, had not been met, so it did not address prong one. See 445 F3d at 1156. See also note 76.

<sup>85</sup> Electronic Freedom of Information Act Amendments of 1996 § 2(b)(1), Pub L No 104-231, 110 Stat 3048, 3048, codified at 5 USC § 552 (2000 & Supp 2002).

<sup>86</sup> 5 USC § 552(a) (emphasis added).

<sup>87</sup> See notes 57–58 and accompanying text. But see Moncus, Note, 55 Vand L Rev at 1578 (cited in note 12) (questioning the comparison of the Consumer Product Safety Act to the False Claims Act because the former “stresses a need for broad disclosure,” while the latter should be interpreted broadly to increase fraud detection).

<sup>88</sup> Note that this explanation suggests that FOIA contemplates costs when determining *how* to disclose documents, not whether to disclose them at all. For the position that courts should not use a “cost-based analysis” when determining whether to disclose information at all, see S. Elizabeth Wilborn, Note, *Developments under the Freedom of Information Act*, 1990 Duke L J 1113, 1120–21.

<sup>89</sup> See 5 USC § 552(a)(1) (“Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . .”). The list of types of documents that FOIA specifies for publication in the Federal Register includes: “descriptions of [each agency’s] central and field organization” and how to request information from the agency; “statements of the general course and method by which [the agency’s] functions are channeled and determined”; “rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations”; “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability”; and any revisions of those. *Id.*

<sup>90</sup> See 5 USC § 552(a)(2)(D)–(E).

publication, commonly through photocopying or electronic copying.<sup>91</sup> The phrase “FOIA request” typically refers to this last category. This framework reveals why some FOIA disclosures are made only to individuals: full publication is unnecessary, wasteful, and impractical for documents that interest only a few.

The 1996 FOIA amendments illustrate this point. The 1996 amendments expanded the types of documents that agencies must publish or make available. These expanded availability requirements accompanied requirements to make the documents available electronically.<sup>92</sup> In other words, as electronic “publication” reduced publication costs, FOIA required more publication.

Consider FOIA requests made by third parties who are not relators. The 1996 amendments require agencies to electronically disclose those requests that are likely to be frequent.<sup>93</sup> For example, the FDA publishes on its website a monthly list of all FOIA requests;<sup>94</sup> interested parties may review these lists and resubmit previous requests. While the requested documents are initially disclosed only to the requestor, this publication of the requests themselves makes the disclosures less private and more public. These changes to the statute and agency practice indicate that as technology drives down the costs of publication, FOIA disclosures become more public.

## 2. A broad reading of “public disclosure” is appropriate.

While costs prevent the government from broadly publishing all information, or the results of every FOIA request, the information disclosed via a FOIA request is equally available to any potential relator. This equal availability alone may be enough to satisfy the “public disclosure” requirement.<sup>95</sup> Equal availability is not necessary, however. Courts read “public disclosure” broadly enough to include informa-

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<sup>91</sup> 5 USC § 552(a)(3).

<sup>92</sup> Electronic FOIA Amendments §§ 4–5, 110 Stat at 3049–50. See also Foerstel, *Freedom* at 57–58 (cited in note 43).

<sup>93</sup> 5 USC § 552(a)(2)(D).

<sup>94</sup> See, for example, Department of Agriculture, Food Safety, and Inspection Service, *FOIA Requests* (“November FDA Requests”) (Nov 2006), online at [http://www.fsis.usda.gov/PDF/FOIA\\_Requests\\_1106.pdf](http://www.fsis.usda.gov/PDF/FOIA_Requests_1106.pdf) (visited Jan 12, 2008) (listing FOIA requests received during November 2006). See also Foerstel, *Freedom* at 88 (cited in note 43) (describing requests for a list of previous requests). Contrast this with the *Mistick* dissent, which, to make the point that FOIA disclosures are not public disclosures because the disclosure is made to an individual, argues that records are turned over only to the requestor and that the requestor need not share them with others. See 186 F3d at 392–93 (Becker dissenting).

<sup>95</sup> See *Stinson, Lyons, Gerlin & Bustamante, PA v Prudential Insurance Co*, 944 F2d 1149, 1155–56 (3d Cir 1991) (“We read section 3730(e)(4) as designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator.”).

tion disclosed to some employees of a company, even when neither other employees nor nonemployees have access to that information.<sup>96</sup>

This broad reading of “public disclosure” is consistent with the other parts of the statute and other areas of law. In addition to the government-centered restrictions in the enumerated sources prong, the public disclosure bar also precludes private enforcement actions that are based on certain information that has been publicly disclosed by the news media.<sup>97</sup> For public disclosure bar purposes, the news media include not only widely circulated newspapers, but also small and community newspapers like the *Lansing State Journal* and the *Mariposa Gazette*.<sup>98</sup> But qui tam relators are probably not on notice if information has been disclosed in a small, local newspaper. The fact that courts count those newspapers suggests that they are not making a probabilistic assessment of the likelihood that a relator has seen the disclosure, or even that she would discover it. Rather, the courts are reading “public disclosure” broadly.

The courts construe a similar provision in patent law broadly. The statutory bar in the patent context bars patents for inventions that were publicly used or “described in a printed publication . . . more than one year prior to the [patent] application.”<sup>99</sup> The patent statutory bar operates similarly to the qui tam public disclosure bar. While the patent statutory bar language, “described in a printed publication,” is different from the qui tam language, “public disclosure,” courts have held that the touchstones of the patent statutory bar are “public accessibility”<sup>100</sup> and “disclosure.”<sup>101</sup> The similar functions of the two bars sug-

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<sup>96</sup> See, for example, *Doe v John Doe Corp*, 960 F2d 318, 322–23 (2d Cir 1992) (holding that limited disclosure to employees is a public disclosure and noting that “requiring that allegations of fraud be widespread before they are deemed publicly disclosed would cut against the essential purpose of the 1986 amendments”). But see *Ramseyer v Century Healthcare Corp*, 90 F3d 1514, 1521 n 4 (10th Cir 1996) (holding that disclosure to employees is not a public disclosure). The “selective disclosure” concept in capital markets literature addresses investors’ lack of access to information. For an explanation of and investigation into selective disclosure in the securities context, see generally Stephen J. Choi, *Selective Disclosures in the Public Capital Markets*, 35 UC Davis L Rev 533 (2002). Also consider generally the “limited privacy” notion in Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U Chi L Rev 919 (2005), which suggests that limited disclosures within a social group may not be public disclosures to the world at large.

<sup>97</sup> See 31 USC § 3730(e)(4)(A) (“No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . [by] the news media.”).

<sup>98</sup> See, for example, *Dingle v BioPort Corp*, 388 F3d 209, 213–15 (6th Cir 2004) (holding that disclosures of the alleged transactions in the *Lansing State Journal*, in a House report, and in congressional testimony of witnesses implicated the public disclosure bar); *Devlin v California*, 84 F3d 358, 360 (9th Cir 1996) (upholding the district court’s dismissal of a qui tam action due to disclosures in the *Mariposa Gazette*).

<sup>99</sup> 35 USC § 102(b) (2000 & Supp 2002) (stipulating the novelty requirements for patentability).

<sup>100</sup> *In re Bayer*, 568 F2d 1357, 1359, 1362 (CCPA 1978).

<sup>101</sup> *Pickering v Holman*, 459 F2d 403, 407 (9th Cir 1972).



gest that how courts interpret one may have implications for how courts should interpret the other.

Courts have held that even obscure publications trigger the patent statutory bar. For example, courts have triggered the bar for: a single thesis in a German university library;<sup>102</sup> reports distributed to only six companies and various government agencies in Great Britain;<sup>103</sup> copies of a paper presented at a conference and distributed “to as many as six persons”;<sup>104</sup> copies of a presentation temporarily displayed on poster boards;<sup>105</sup> and microfilm copies in a foreign patent office.<sup>106</sup> These examples illustrate that in the patent statutory bar context, the question of public accessibility or public disclosure turns not on whether the disclosure is widely available, but only on whether it has actually been disclosed.

Other areas of law reveal similar interpretations. For example, to qualify for republisher immunity in privacy tort law, the information in question need not have been previously published in a mainstream national publication. If information has been published in local or specialized publications, a subsequent publisher may not be liable for public disclosure of private facts.<sup>107</sup> Accordingly, the Restatement (Second) of Torts clarifies that “publicity” can include, among other things, “any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons.”<sup>108</sup>

Given that courts allow even small, local newspapers without broad circulation to trigger the public disclosure bar and that courts interpreting similar rules in other areas of law count obscure publications, a broad reading of the public disclosure bar is appropriate and FOIA disclosures should trigger the first prong of the bar.<sup>109</sup>

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<sup>102</sup> *In re Hall*, 781 F2d 897, 900 (Fed Cir 1986). See also Patent and Trademark Office, *Manual of Patent Examining Procedure* § 2128.01(1) (8th ed 2006). But see *Bayer*, 568 F2d at 1362 (holding that a thesis that was submitted to the library but not yet shelved is not a publication).

<sup>103</sup> *Garrett Corp v United States*, 422 F2d 874, 878 (Ct Cl 1970).

<sup>104</sup> *MIT v AB Fortia*, 774 F2d 1104, 1108–09 (Fed Cir 1985).

<sup>105</sup> *In re Klopfenstein*, 380 F3d 1345, 1347, 1352 (Fed Cir 2004).

<sup>106</sup> *In re Wyer*, 655 F2d 221, 224, 227 (CCPA 1981).

<sup>107</sup> See *Sipple v Chronicle Publishing Co*, 201 Cal Rptr 665, 669 (1984) (“It is, of course, axiomatic that no right of privacy attaches to a matter of general interest that has already been publicly released in a periodical or in a newspaper of local or regional circulation.”), citing *Sperry Rand Corp v Hill*, 356 F2d 181, 185 (1st Cir 1966).

<sup>108</sup> Restatement (Second) of Torts § 652D, comment a (1977). A comment explains that “publication” in defamation law “is a word of art, which includes any communication by the defendant to a third person.” *Id.*, citing Restatement (Second) of Torts § 577.

<sup>109</sup> It is important to emphasize that an actual disclosure is required to trigger the public disclosure bar; mere availability is not enough. See note 63.

### C. FOIA Disclosures Do Not Satisfy the Enumerated Sources Requirement

#### 1. Consider the statutory language.

To correctly align relators' incentives to investigate, Congress created a two-pronged system. As described in Part B, documents made available by FOIA satisfy the public disclosure prong of the public disclosure bar because FOIA is essentially a publication statute. While the statute requires different levels of publication depending on the expected frequency of use, at its heart it makes government documents available to the public. But disclosing these documents through FOIA does not necessarily satisfy the second prong, which specifies not the method of request or the method of disclosure, but rather the triggering document types.

The statute requires that courts make a categorical determination: does the document at issue fit into one of the enumerated categories? This categorical determination must be made at the document level. Making a categorical determination at a more abstract level such as the disclosure method is tempting, but it folds the enumerated sources prong into the disclosure prong. The two prongs require independent determinations.<sup>110</sup>

The statutory language part of this solution demonstrates that the statute requires making a narrow categorical determination at the document level. First, courts that interpret the terms broadly do so by mischaracterizing precedent and not reading the two words of each term together. Second, interpretive canons suggest a narrow interpretation of the terms. Third, examples demonstrate that this construction is the only workable solution because allowing some actually requested documents to trigger the bar requires an absurd reading of the statute. Neither *Mistick* nor *Catholic Healthcare* considered the interpretive canons or specific examples of FOIA disclosures that force a particular reading.

*a) A broad reading of "report" or "investigation" is incorrect.* Cases that hold that FOIA documents trigger the bar shoehorn FOIA documents into the terms "administrative report" or "administrative investigation."<sup>111</sup> These courts use dictionary definitions for the terms to construe them broadly (and therefore construe the qui tam provision narrowly).<sup>112</sup>

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<sup>110</sup> See *Fine v Advanced Sciences, Inc.*, 99 F3d 1000, 1004 (10th Cir 1996) (distinguishing between sources of information and means of disclosure).

<sup>111</sup> See Part II.A.

<sup>112</sup> See notes 61 and 62 and accompanying text.

The broad construction is incorrect, however. As a first consideration, while this Comment will avoid descending into a battle of dictionaries, it is important to note that alternative definitions suggest narrower meanings for the terms.<sup>113</sup> Yet even without the alternative definitions, the *Mistick* court's interpretation is wrong. *Mistick* relied on *Dunleavy v County of Delaware*<sup>114</sup> for the proposition that all documents that originate from the federal government satisfy the "administrative" requirement.<sup>115</sup> *Dunleavy* does not stand for such a broad proposition.

*Dunleavy* relied on the federal element only to exclude, not to include. *Dunleavy* considered whether a report that was prepared by a county government, rather than the federal government, triggered the public disclosure bar. It held that "'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government."<sup>116</sup> Based on the facts of *Dunleavy*, the implied holding is that "administrative report" refers to the products of the federal government, not those of a county government. *Mistick* omitted the next sentence, which clarifies the narrow implied holding: "Since the 1992 [county report] was prepared by or at the behest of Delaware County, it is not a source of public disclosure contemplated by Congress."<sup>117</sup>

The case did not resolve the issue of whether administrative reports represent a subset of all federal reports or span all federal reports. Rather, the *Dunleavy* court expressly called its interpretation a "narrow reading."<sup>118</sup> Such a narrow exclusionary holding does not support the broad *Mistick* holding, which effectively replaces the word "administrative" with the word "federal."<sup>119</sup>

Moreover, pairing "administrative," even under the broad *Mistick* definition, with *Mistick*'s own "report" definitions suggests that FOIA disclosures may not be administrative reports. The definitions given are, "among other things, 'something that gives information' or a 'notification,' and an 'official or formal statement of facts of proceed-

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<sup>113</sup> See, for example, 8 *The Oxford English Dictionary* 47 (Clarendon 2d ed 1989) (defining "investigation" as "careful and minute research"); *Webster's New International Dictionary* 1306, 2113 (Merriam 2d ed unabridged 1954) (defining "investigation" as a "thorough inquiry," and "report" as "[a]n account or relation, esp. of some matter specially investigated").

<sup>114</sup> 123 F3d 734 (3d Cir 1997).

<sup>115</sup> Id at 745. See also note 60 and accompanying text.

<sup>116</sup> *Dunleavy*, 123 F3d at 745 (emphasis added).

<sup>117</sup> Id at 746.

<sup>118</sup> Id at 745-46.

<sup>119</sup> See *Mistick*, 186 F3d at 383 ("[The] response to the FOIA request originated with a department of the federal government and constituted official federal government action, and therefore this response plainly satisfied *Dunleavy*'s definition of 'administrative.'").

ing.”<sup>120</sup> But “administrative” modifies “report.” Taking *Mistick*’s definitions together, “administrative report” suggests that the “something,” the “notification” itself, or the “official or formal statement,” must be *administrative*. That is, given *Mistick*’s own definition of administrative, those documents must be the products of the federal government. Yet sometimes, as in the case of *Catholic Healthcare*, the disclosed documents are not the product of the federal government—or any government—but are instead the products of private parties.<sup>121</sup> *Mistick*’s holding, then, requires the leap that documents that are prepared by private parties constitute an “official or formal statement” (or any of the alternative definitions) that “originate[ed] with the federal government.”

Perhaps this questionable interpretation is a result of the *Mistick* court’s express finding that the statute is ambiguous. The court specifically noted that the public disclosure bar “does not reflect careful drafting or a precise use of language,”<sup>122</sup> and that “[i]n light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax.”<sup>123</sup> However, sloppy drafting is not an excuse to use sloppy interpretation, thereby ignoring the context of the language, its history, and the effects of the interpretations.

b) *A narrow reading of “report” or “investigation” is correct.* That two circuits reach conflicting interpretations of the same language indicates that the terms are ambiguous. But, as always, “[t]he meaning of particular phrases must be determined in context.”<sup>124</sup> Here, the statute lists several terms: “a criminal, civil, or administrative hearing, [ ] a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation.”<sup>125</sup> The interpretive canon *expressio unius*<sup>126</sup> suggests that in such a list, items that are not included should not trigger the bar.<sup>127</sup> The list of qualifying document types does

<sup>120</sup> Id (citations omitted). See also note 61.

<sup>121</sup> See notes 136–39.

<sup>122</sup> *Mistick*, 186 F3d at 387 (citing various grammatical, typographical, and drafting mistakes in the statute).

<sup>123</sup> Id at 388.

<sup>124</sup> *SEC v National Securities, Inc*, 393 US 453, 466 (1969) (determining the contextual meaning of the words “purchase or sale” in the Securities Exchange Act of 1934 § 10(b), 48 Stat 881, 891, codified at 15 USC § 78j(b) (2000)).

<sup>125</sup> 31 USC § 3730(e)(4)(A).

<sup>126</sup> The full expression is *expressio unius est exclusio alterius*. See *Chevron U.S.A. Inc v Echazabal*, 536 US 73, 80 (2002) (explaining the term as “expressing one item of [an] associated group or series excludes another left unmentioned”) (alteration in original), citing *United States v Vonn*, 535 US 55, 65 (2002). See also *Black’s Law Dictionary* 620 (West 8th ed 2004) (defining *expressio unius est exclusio alterius* as “[a] canon of construction holding that to express or include one thing implies the exclusion of the other”).

<sup>127</sup> Consider: “[T]he canon . . . does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying

not expressly include FOIA disclosures, so the documents must satisfy one of the enumerated sources to trigger the bar. Courts use the interpretive canon *noscitur a sociis*<sup>128</sup> to determine how to interpret one term in a list of terms. Applying the canon suggests that the terms “report” or “investigation” should be interpreted narrowly.

*Noscitur a sociis* “dictates that words grouped in a list should be given related meaning,”<sup>129</sup> so as to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.”<sup>130</sup> As described in Part III.C.3, all of the enumerated sources involve synthesis or analysis. Therefore, the terms “report” and “investigation” should be interpreted in the same way, to require synthesis or analysis.

In contrast, FOIA disclosures may be raw, non-synthesized data because FOIA requests may only be for “‘records,’ not ‘information.’”<sup>131</sup> In a FOIA request, the requestor is the one making the initial selection of which documents to request, as well as performing any subsequent synthesis or analysis. The government agent merely fetches and makes available or duplicates the relevant documents, exercising little choice or analysis other than that required to sort through documents to uncover the documents relevant to the request.

FOIA’s definition of “search” makes this distinction clear: “[T]o review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.”<sup>132</sup> That definition even allows automated means, which add no synthesis or analysis to the process.<sup>133</sup> When responding to a FOIA request, “an agency is not required to research or analyze data for a requester. It is required only to look for an existing record or document as described in

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the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v Peabody Coal Co*, 537 US 149, 168 (2003), quoting *Vonn*, 535 US at 65. The terms in the public disclosure bar are “members of a group or series,” so *expressio unius* should apply.

While not explicitly using the *expressio unius* canon, other courts agree. See, for example, *Eberhardt v Integrated Design & Construction, Inc*, 167 F3d 861, 870 (4th Cir 1999) (“[T]he methods of ‘public disclosure’ . . . are exclusive . . . . The list of methods of ‘public disclosure’ is specific and is not qualified by words that would indicate that they are only examples.”).

<sup>128</sup> Literally, “it is known by its associates.” *Black’s Law Dictionary* 1087 (cited in note 23).

<sup>129</sup> *Dole v United Steelworkers of America*, 494 US 26, 36 (1990) (quotation marks omitted) (looking to the words surrounding “reporting or recordkeeping requirements” to hold that data sheets consisting of advisory material on health and safety do not fall within the normal meaning of “records”).

<sup>130</sup> *Gustafson v Alloyd Co*, 513 US 561, 574–75 (1995) (quotation marks omitted) (“If ‘communication’ included every written communication, it would render ‘notice, circular, advertisement, [and] letter’ redundant, since each of these are forms of written communication as well.”).

<sup>131</sup> Foerstel, *Freedom* at 124 (cited in note 43) (noting that because FOIA only authorizes requests for records, agencies are not required to research or analyze data).

<sup>132</sup> 5 USC § 552(a)(3)(D).

<sup>133</sup> See *id.*

a[] FOIA request.”<sup>134</sup> In other words, the FOIA disclosure process does not entail adding synthesis or analysis to the disclosed documents.

c) *Examples of actual FOIA requests illuminate this distinction.* The FOIA request for “[a] listing of establishments that slaughter hogs in the United States,”<sup>135</sup> for example, is not an investigation or report; it certainly contains no analysis, but rather asks for a simple copy of a comprehensive list. Some documents available via FOIA are not even written by the government: for example, agencies have fulfilled FOIA requests for copies of a consumer complaint,<sup>136</sup> letters submitted from a private architectural firm,<sup>137</sup> and a grant proposal written by a private scientist.<sup>138</sup> In fact, sometimes a government agent does not even fetch the document himself, but merely directs the requestor to a private person to fulfill the request.<sup>139</sup> Characterizing these raw lists and privately produced and privately disclosed documents as “administrative reports” or “administrative investigations” would require an absurd reading of those terms.

As previously discussed, *Dunleavy*, on which *Mistick* relied, held that an official report prepared by a Pennsylvania county does not trigger the bar because a county document is not an administrative report. *Mistick*’s broad holding that all FOIA disclosures trigger the bar effectively means that while county documents are not administrative reports or administrative investigations, privately prepared documents are. Furthermore, the broad *Mistick* holding would lead to the ridiculous result that if the *Dunleavy* relator had requested the same county report via FOIA,<sup>140</sup> that action would have triggered the document-type restriction of the public disclosure bar.

To be sure, some FOIA requests do fall into one of the enumerated source categories, and would trigger the public disclosure bar. For example, “[c]opies of all reports, investigative files, inspection records, and correspondence relating to Ilyssa Manufacturing Corp.,”<sup>141</sup> or “USDA/FSIS directives, notices, memoranda, opinions, or interpreta-

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<sup>134</sup> Foerstel, *Freedom* at 124 (cited in note 43).

<sup>135</sup> November FDA Requests at 1 (cited in note 94).

<sup>136</sup> See *id.* at 3.

<sup>137</sup> See *Mistick*, 186 F3d at 379, 381.

<sup>138</sup> See *Catholic Healthcare*, 445 F3d at 1149.

<sup>139</sup> *Id.* (describing how NIH directed a FOIA requestor to use the FOIA request to obtain documents directly from a private scientist). See also Tiffany A. Stedman, Note, *Outsourcing Openness: Problems with the Private Processing of Freedom of Information Act Requests*, 35 Pub Cont L J 133, 136–39 (2005) (describing how government agencies outsource FOIA request processing).

<sup>140</sup> The county had submitted the report to the federal Department of Housing and Urban Development, so the document is presumably available via FOIA. It had been made public through discovery in civil litigation. See *Dunleavy*, 123 F3d at 735, 744.

<sup>141</sup> November FDA Requests at 3 (cited in note 94).

tions [of a particular statute]”<sup>142</sup> directly trigger the bar because the underlying documents themselves fall into the enumerated categories. The fact that the documents are the result of a FOIA request is relevant to the first prong, whether the documents were in fact publicly disclosed, but is irrelevant to the second prong, which examines the type of document. In short, with a FOIA request, the second prong of the public disclosure bar should be determined based on the underlying document.

As these examples illustrate, FOIA aids disclosure of a wide variety of document types. Some document types fit one of the public disclosure bar’s enumerated categories; others do not. But the fact that some document types are available via FOIA but do not fit into one of the enumerated categories forces the result that the documents themselves, FOIA-disclosed or not, must be considered. Shoehorning a privately prepared and privately delivered grant proposal into the phrases “administrative report” or “administrative investigation” is an absurd result, and the Supreme Court holds that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”<sup>143</sup> The interpretation this Comment proposes, that the document type be determined by the document and not the disclosure method, does not lead to such absurd results; rather, it works from one end of the spectrum, documents that clearly trigger the bar, to the other, documents that clearly cannot trigger the bar, as well as everything in between. Consistent with the Supreme Court’s position against absurd results, Part III.C.2 illustrates that this interpretation is not only consistent with, but is in fact compelled by FOIA’s legislative purpose.

## 2. Consider the history.

Recall the progression of the False Claims Act: the original 1863 False Claims Act allowed all private claims, even those based directly on criminal actions;<sup>144</sup> the 1943 amendments barred private actions if even nondisclosed government documents contained the information that formed the basis of the private action;<sup>145</sup> and the 1986 amendments allowed private actions even if the government had such information, so long as that information was not publicly disclosed in a particular type of document.<sup>146</sup> This history represents Congress’s “Goldi-

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<sup>142</sup> *Id.* at 2.

<sup>143</sup> *Griffin v Oceanic Contractors, Inc.*, 458 US 564, 575 (1982). See generally Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am U L Rev 127 (1994).

<sup>144</sup> See notes 25–27 and accompanying text.

<sup>145</sup> See note 31 and accompanying text.

<sup>146</sup> See note 42 and accompanying text.

locks” progression.<sup>147</sup> The original qui tam provision was too permissive, then the second too restrictive. To get the 1986 amendments “just right,” Congress carefully crafted a set of incentives “to restore some balance between these two extreme regimes.”<sup>148</sup>

The legislative history demonstrates that Congress sought to prohibit purely duplicative qui tam actions while allowing actions based on new information. But most relevant government documents are available via FOIA. Triggering the public disclosure bar for any FOIA disclosure, therefore, effectively triggers the bar for almost any government document. This interpretation ignores the careful progression of the statute and renders the 1986 False Claims Act amendments largely meaningless. This result reverts back to 1943, when all government documents triggered the bar.

Under this broad interpretation, the only differences between 1943 and now would be (1) FOIA-exempt documents or (2) documents that have not actually been requested. The first category does not change relators’ incentives because theoretically relators are unaware of the content of exempted documents. The second category actually creates perverse incentives. Under this interpretation, anyone receiving government funds should request a flood of documents through FOIA. This way, any subsequent relator would be unable to bring a suit based on that information.<sup>149</sup> One might think that a party

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<sup>147</sup> Compare Deborah L. Collins, *The Qui Tam Relator: A Modern Day Goldilocks Searching for the Just Right Circuit*, 2001 Army Law 1, 1 (June 2001) (describing, in Goldilocks terms, the circuit splits over the “based upon” language in the public disclosure bar).

<sup>148</sup> False Claims Act, 145 Cong Rec at E 1546 (Rep Berman) (cited in note 8). See also *Springfield Terminal Railway Co v Quinn*, 14 F3d 645, 649 (DC Cir 1994) (describing the sequence of amendments as Congress “[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own”); J. Morgan Phelps, Comment, *The False Claims Act’s Public Disclosure Bar: Defining the Line between Parasitic and Beneficial*, 49 Cath U L Rev 247, 272–78 (1999) (arguing that the qui tam provision should be interpreted consistent with the “twin goals” of Congress).

<sup>149</sup> See *Yannacopolous v General Dynamics*, 315 F Supp 2d 939, 951 (ND Ill 2004) (explaining this perverse incentive situation and concluding that “the FCA was not intended to insulate corporations in this manner”).

Recall, however, that the public disclosure bar is triggered only when an action is “based on” the document that otherwise triggers the public disclosure bar. 31 USC § 3730(e)(4)(A). This perverse incentive, therefore, depends on whether a court would consider an action that is supported by a document requested by a third party but not disclosed to the relator to be “based on” that document or not. This issue is the subject of another circuit split. Compare *Biddle v Board of Trustees of Leland Stanford Junior University*, 161 F3d 533, 537, 539–40 (9th Cir 1998) (holding that a relator need not actually have consulted the document for the suit to be “based on” the document on the grounds that “based on” means “supported by”), with *Siller v Becton Dickinson and Co*, 21 F3d 1339, 1348 (4th Cir 1994) (holding that to be “based on” a document, a suit must actually be “derived from” the document). The majority of circuits hold that “based on” essentially means “supported by,” thus supporting the perverse incentive argument. See Collins, 2001



requesting its own documents would trigger suspicion. But if many recipients of government funds are each requesting a flood of documents, the limited resources of federal prosecutors will prevent prosecutors from examining each of the requested documents for potential fraud. Moreover, the parties would not request only fraudulent documents; they would request many documents as a preventative measure, mostly documents that they did not expect would contain fraud. This volume of requests would bury the fraudulent needle in a haystack of nonfraudulent documents.

To give meaning to the 1986 amendments and avoid creating perverse incentives when considering the enumerated sources prong, courts must use a categorical approach at the document level. Congress added more than just a public disclosure prong between 1943 and 1986; it also added an enumerated sources prong. Triggering the bar for any document disclosed via FOIA folds the latter into the former and eliminates most of the distinction between the 1943 and 1986 amendments.

While both *Mistick* and *Catholic Healthcare* considered legislative history, both courts' interpretations were inadequate. *Mistick* mechanically recited the history but did not rely on it when making its enumerated sources determination. Neither court recognized that the broad *Mistick* holding reverses the qui tam provision's history and essentially restores the 1943 version of the statute.

### 3. Therefore, consider the document itself.

The government faces two primary problems in detecting fraud. The first problem is limited resources—even with perfect information, the government could not investigate and prosecute all fraud.<sup>150</sup> But the government does not have perfect information, which leads to the second problem: asymmetric information. By definition, when fraud has been committed, the government has at least one piece of incorrect information: the fraudster's fraudulent claim.

*Springfield Terminal Railway Co v Quinn*<sup>151</sup> introduced the often cited equation  $X + Y = Z$ , where  $X$  is the set of misrepresented facts,  $Y$  is the set of true facts, and  $Z$  is the allegation of fraud.<sup>152</sup> To trigger the public disclosure bar, either  $Z$  or both  $X$  and  $Y$  must be present.<sup>153</sup> Again relying on the history of the qui tam provision, the *Springfield*

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Army Law at 8–11 (cited in note 147) (explaining majority, minority, and third views). Consider also that the action may survive if the relator satisfies the original source exception. See note 9.

<sup>150</sup> See note 40.

<sup>151</sup> 14 F3d 645 (DC Cir 1994).

<sup>152</sup> Id at 654.

<sup>153</sup> Id.

court recognized that Congress tried to strike a balance with the 1986 amendments.<sup>154</sup> Obviously if the government knows *Z*, the allegation of fraud, there is no need for *qui tam* litigation. On the other hand, if the government only knows *X*, the misrepresented facts, the government suffers if a potential relator has no incentive to litigate. In the first situation, a relator adds little value, while in the second situation the relator may add significant value by coming forward.

This Part adopts two parallel and complementary frameworks to solve the asymmetric information problem by considering the value a relator may add to solve the problem.<sup>155</sup> The first is Kim Lane Scheppele's secrecy framework, which differentiates between shallow secrets and deep secrets.<sup>156</sup> Essentially, if a person knows that a secret set of facts might exist, she faces a shallow secret.<sup>157</sup> Conversely, if she is wholly unaware of the possibility of a secret, she faces a deep secret.<sup>158</sup> As a secret becomes deeper, the probability of discovery decreases and the incentive required to induce a potential relator to discover and publicize the secret increases.<sup>159</sup>

The second framework is Eugene F. Fama's efficient markets trichotomy, which has become an integral part of the efficient markets hypothesis (also known as the efficient capital markets hypothesis or efficient markets theorem).<sup>160</sup> Few modern economic ideas have im-

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<sup>154</sup> See *id.* ("Congress . . . navigated between the two extremes.")

<sup>155</sup> Secretary of Defense Donald Rumsfeld succinctly described a third framework that parallels the two adopted in this Comment:

[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is [those in] the latter category that tend to be the difficult ones.

Department of Defense, News Transcript (Feb 12, 2002), online at [http://www.defenselink.mil/transcripts/2002/t02122002\\_t212sdv2.html](http://www.defenselink.mil/transcripts/2002/t02122002_t212sdv2.html) (visited Jan 12, 2008).

While either framework can on its own help delineate the boundaries of the statute, two work better than one. Each framework clarifies the confusing aspects of the other. And even though two frameworks are sufficient, Secretary Rumsfeld's pithy comment may be helpful as a guide in navigating this solution if only because of its mnemonic properties. To that end, please refer to the corresponding Rumsfeld category in notes 173, 179, and 184 for Parts III.C.3.a, b, and c, respectively.

<sup>156</sup> Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* 21 (Chicago 1988) (arguing that "[t]he depth of a secret affects the sorts of justifications [for disclosure] that can be made by those left out of the secret").

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *id.* at 115.

<sup>160</sup> See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 *J. Fin.* 383, 383 (1970) (dividing tests into three categories: weak form, semi-strong form, and strong form). Note that while the original categories remain well-known and useful, Fama and others have proposed changes to the categories. See, for example, Eugene F. Fama, *Efficient*

pected legal analysis as much as Fama's efficient markets hypothesis. Courts directly cite Fama's hypothesis<sup>161</sup> and hundreds of legal articles cite it.<sup>162</sup> Even more courts, including the Supreme Court, cite interpretations of Fama's hypothesis that appear in law reviews and are more accessible to lawyers and judges both because the articles appear in legal databases and because they frame the hypothesis in a legal context.<sup>163</sup> The efficient markets hypothesis has even led to regulatory changes.<sup>164</sup> The hypothesis is not universally accepted, however.<sup>165</sup> Fama himself recognizes that information processing costs are not zero, and that "the extreme version of the market efficiency hypothesis is surely false."<sup>166</sup> This solution builds on the common recognition that efficiencies decrease as processing costs increase.

Fama's framework is often used to divide information into weak, semi-strong, and strong categories.<sup>167</sup> This trichotomy is "really an ap-

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*Capital Markets: II*, 46 J Fin 1575, 1576 (1991) ("At the risk of damning a good thing, I change the categories in this paper.").

<sup>161</sup> See, for example, *In re PolyMedica Corp Securities Litigation*, 432 F3d 1, 10 & n 16 (1st Cir 2005) (citing Fama and providing an extended discussion of the efficient market hypothesis and the three categories used therein in a discussion of fraud on the market).

<sup>162</sup> A Westlaw search for TE("25 J. FIN. 383") conducted on October 4, 2007 using the JLR database returned over two hundred results. A corresponding Lexis search on the same day yielded similar results.

<sup>163</sup> The Supreme Court has cited Ronald J. Gilson and Reinier H. Kraakman's article *The Mechanisms of Market Efficiency*, 70 Va L Rev 549 (1984), which is among the most-cited interpretations. See, for example, *Basic Inc v Levinson*, 485 US 224, 253 n 4 (1988) (White dissenting) (citing Gilson and Kraakman for the position that "[o]f all recent developments in financial economics, the efficient capital market hypothesis [ ] has achieved the widest acceptance by the legal culture"); *Metlyn Realty Corp v Esmark, Inc.*, 763 F2d 826, 835 (7th Cir 1985) (citing with approval Gilson and Kraakman's interpretation). Both Lexis and Westlaw report over five hundred citing references for Gilson and Kraakman's article, including more than a dozen court cases, using the Shepard's and KeyCite services, respectively, on November 10, 2007.

For an update to the Gilson and Kraakman article that incorporates new behavioral finance and behavioral economics research, see Ronald J. Gilson and Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J Corp L 715, 741 (2003) ("Twenty years further, we think, along the road leading from elegant models of the workings of the capital market in a frictionless world, to an understanding of how the market operates in a world where information is costly and unevenly distributed, agents are self-interested, transactions costs are pervasive, and noise traders are common.").

<sup>164</sup> See Gilson and Kraakman, 70 Va L Rev at 550 n 4 (cited in note 163) (describing an SEC revision informed by the hypothesis). But see Michelle N. Comeau, Comment, *The Hidden Contradiction within Insider Trading Regulation*, 53 UCLA L Rev 1275, 1297-98 (2006) (asserting that the SEC has partially, though not completely, moved away from the hypothesis).

<sup>165</sup> See, for example, Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J Corp L 635, 635 (2003) (criticizing the hypothesis and promoting a new model of securities markets).

<sup>166</sup> Fama, 46 J Fin at 1575 (cited in note 160).

<sup>167</sup> Fama's three categories initially represented different tests for determining price behavior, but have since been widely adopted "as a classification of market responses to particular kinds of information." Gilson and Kraakman, 70 Va L Rev at 556-57 (cited in note 163) (empha-

proximation of an underlying relationship between how broadly information is initially distributed” and how people process and act on that information.<sup>168</sup> The efficiency of a market,<sup>169</sup> therefore, depends in part on the cost of processing information. If the cost of processing information is low, the relative efficiency of the market is high; conversely, if the cost is high, the relative efficiency is low. These metrics map onto the weak and strong Fama categories, respectively.<sup>170</sup> Non-zero information processing costs provide the foundation for some of the criticisms of the efficient markets hypothesis, including Fama’s own recognition that markets are not perfectly efficient in the strong category.<sup>171</sup> Acting on information that is buried beneath high processing costs—the strong category—is more expensive and therefore requires larger incentives compared to information that is relatively easy to process.<sup>172</sup>

Processing costs take many forms. In the capital markets, considering only a stock price—a one-dimensional variable—involves relatively low processing costs. Interpreting synthesized information, such as a financial statement or analyst report, increases processing costs. Interpreting nonsynthesized information maximizes processing costs. In the context of fraud against the government, checking for a criminal action—a binary variable, {criminal action, no criminal action}—minimizes information processing costs. Synthesized administrative reports or administrative investigations require more processing costs than merely checking for an indictment. Information processing costs peak for raw, nonsynthesized information. The structure of the enumerated sources prong follows this model, allowing contemporary research to inform the boundaries of the enumerated categories.

*a) Easily accessible information: no claim.* In the simplest case, a government prosecutor acts on known fraud.<sup>173</sup> For example, a gov-

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sis omitted). Fama credits Harry Roberts for distinguishing between the weak and strong forms. See Fama, 25 J Fin at 383 n 1 (cited in note 160).

<sup>168</sup> Gilson and Kraakman, 70 Va L Rev at 593 (cited in note 163) (arguing that, given an initial distribution of information, certain capital market mechanisms are better at achieving efficiency because of how people act on information).

<sup>169</sup> The weak, semi-strong, and strong categories are sometimes used as shorthand to describe the efficiency of markets. See id at 556 & n 28.

<sup>170</sup> See id at 607–08 (explaining and displaying relationships between information costs, market efficiencies, and the Fama categories).

<sup>171</sup> See notes 165–66 and accompanying text.

<sup>172</sup> See Sanford J. Grossman and Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am Econ Rev 393, 394 (1980) (conjecturing that, all else being equal, the higher the cost of information, the lower the number of individuals who will be informed).

<sup>173</sup> In Secretary Rumsfeld’s language, these are “known knowns.” See note 155. Careful readers may note the earlier claim that by definition the government has incorrect information when a party has submitted a false claim. “Known fraud” used here means that the government

ernment audit may uncover discrepancies between a government contractor's reported fuel charges and the actual cost of fuel. In other words, there is no secret; the fraud is then "open and notorious."<sup>174</sup>

When information is broadly distributed and processing costs are low, the weak form of the efficient markets hypothesis predicts that the market operates relatively efficiently. In the market context, the financial press routinely reports simple, summarized information such as historical price information;<sup>175</sup> in the fraud context, outcomes of government actions are publicized.

In this situation, a potential relator has no value to add, so she should not be given an incentive to litigate a qui tam action. The law matches the outcome predicted in this information model; the qui tam provision prohibits actions based on existing government action.<sup>176</sup> In fact, this precise form of low-processing-cost information—a preexisting government indictment—served as the catalyst for the first round of qui tam reform.<sup>177</sup>

*b) Information of intermediate accessibility: no claim.* Often, the government may not have actual knowledge of fraud, but should be on notice for fraud. The government produces many routine reports and investigations. It produces these reports at some cost because the information is more easily understood in a synthesized form than in the form of raw data. Consider a compiled expense report compared to a collection of receipts, or a compiled legislative history for a particular statute compared to a stack of *Congressional Record* volumes. Examining presynthesized reports essentially reduces the costs of discovering fraud compared to examining raw data.<sup>178</sup> A prosecutor with limited resources will turn first to compiled reports or pre-existing investigations.

Information contained in a synthesized form fits Scheppele's shallow secrets moniker and the semi-strong Fama category.<sup>179</sup> Search

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knows that the information submitted by the perpetrator is fraudulent. In other words, it knows about the discrepancy between the true state of facts and the fraudulent claim.

<sup>174</sup> This explanation invokes only the familiar phrasing of adverse possession, not its substance.

<sup>175</sup> See Gilson and Kraakman, 70 Va L Rev at 609 (cited in note 163).

<sup>176</sup> See 31 USC § 3730(e)(3) ("In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.").

<sup>177</sup> See notes 25–28 and accompanying text.

<sup>178</sup> Consider also the case of financial information disclosed in footnotes to financial statements compared to information incorporated into the primary financial statements, such as balance sheets. Interpreting footnotes requires more processing costs than interpreting balance sheet figures. See David Hirshleifer and Siew Hong Teoh, *Limited Attention, Information Disclosure, and Financial Reporting*, 36 J Accounting & Econ 337, 339 (2003) ("[I]nformation that is presented in salient, easily processed form is assumed to be absorbed more easily than information that is less salient, or that is only implicit in the public information set.").

<sup>179</sup> Or "known unknowns." See note 155.

costs for shallow secrets are low because the inquirer “can ask for the information directly” and is rewarded with direct answers.<sup>180</sup> Perhaps more importantly, the inquirer can construct a cost-benefit calculation to determine whether the costs of searching for and acting on the information are worth it. Similarly, information processing costs in the semi-strong category reflect savings from realizing the value of work done by others.<sup>181</sup> In the securities context, for example, “information intermediaries” such as analysts prepare synthesized reports for investors that decrease the processing costs compared to investors independently determining securities valuations.

Accordingly, because a synthesized report or investigation lowers the relative cost of discovery, the relator has little value to add; she should not have a *qui tam* cause of action. Here, too, the law matches well to the information model: the public disclosure bar generally prohibits *qui tam* actions based on information contained in these reports or investigations.<sup>182</sup>

*c) Difficult to access information: qui tam action as incentive.* For some fraud, however, the government is not on notice. Given the limited resources of government agencies, as well as the deterrent effects of criminal and civil fraud penalties, the government cannot and need not investigate all spending for potential fraud.<sup>183</sup> Therefore, some government spending escapes the scrutiny and analysis of a government report or investigation.

Fraud that has not been reported or investigated fits the deep secrets category and the strong Fama category.<sup>184</sup> Unlike shallow secrets, direct questions do not uncover deep secrets.<sup>185</sup> In the fraud context, the inquirer must uncover two pieces of raw information: the misrepresented facts, *X*, as well as the true set of facts, *Y*. Search costs for

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<sup>180</sup> See Scheppele, *Legal Secrets* at 21 (cited in note 156) (explaining shallow secrets).

<sup>181</sup> See Gilson and Kraakman, 70 *Va L Rev* at 607 (cited in note 163) (describing the semi-strong Fama category and its lower information costs due to economies of scale resulting from cooperative efforts).

<sup>182</sup> See 31 USC § 3730(e)(4)(a) (“No court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation.”). Note, however, that the public disclosure bar still requires prong one: actual public disclosure. In other words, if the government has not disclosed its reports, either through FOIA or more traditional public disclosures, a potential relator may still have a cause of action. See note 63. This range of potential actions is the direct result of the 1986 amendments, which changed the broad bar from covering all government knowledge to only publicly disclosed government knowledge; this choice properly aligns the relator’s incentives, given the asymmetric information a relator faces when the government has not disclosed its knowledge. See Part I.A. Note also that the public disclosure bar contains exceptions, such as the original source exception. See note 9.

<sup>183</sup> See note 40.

<sup>184</sup> Or “unknown unknowns.” See note 155.

<sup>185</sup> Compare note 180 and accompanying text.

deep secrets are high because the inquirer must not only uncover  $X$  and  $Y$ , but she must also process the information into the allegation of fraud,  $Z$ . In contrast, shallow secrets have already been synthesized into  $Z$ , or at least into the unit  $(X + Y)$ . Cost-benefit calculations are largely meaningless for deep secrets because, by definition, the inquirer is unaware of even the possibility of hidden information. The probability of discovery, then, is nearly zero, or, more realistically, somewhat uncertain.<sup>186</sup>

Accordingly, information processing costs peak in Fama's strong category. When the information is hidden in nonsynthesized raw data, "[p]rocessing costs are higher because the information is less intelligible."<sup>187</sup> In the securities markets, the strong category may reflect, for example, information held by insiders that is not reported in the *Wall Street Journal's* "Heard on the Street" column.<sup>188</sup> Processing information in this category requires individual expenditures of human capital that are not shared among many as they are in the case of the semi-strong analyst reports. If a market were strong-form efficient, securities prices would still accurately reflect even this hidden information. But the general recognition that markets are not strong-form efficient because of nonzero processing costs implies that incentives are necessary to bring this information forward when parties are not otherwise able to capitalize on the information as they are in the securities markets.<sup>189</sup>

Is a strong-form efficient market possible? The Grossman-Stiglitz paradox captures the idea that people with information require an incentive to act on that information.<sup>190</sup> This paradox, that a strong-form efficient market is impossible, follows directly from the fact that transactions and information are costly.<sup>191</sup> Applied to this problem, a

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<sup>186</sup> Note that uncertainty as used here is different from risk. Uncertainty does not mean that the probability of discovery is low, but rather that the range of potential probabilities is large.

<sup>187</sup> See Gilson and Kraakman, 70 Va L Rev at 607 (cited in note 163) (describing various factors that increase information costs in the strong Fama category).

<sup>188</sup> See Fama, 46 J Fin at 1605, 1607–08 (cited in note 160) (summarizing the effects of published private information).

<sup>189</sup> Of course, the hidden information in this context often takes the form of insider information. Much of the legal discussion of the efficient markets hypothesis grapples with the question of insider trading. See generally, for example, Comeau, Comment, 53 UCLA L Rev 1275 (cited in note 164) (discussing the efficient markets hypothesis in the context of insider trading disclosure rules); Gilson and Kraakman, 70 Va L Rev 549 (cited in note 163) (demonstrating the usefulness of the theory by applying it to insider trading).

<sup>190</sup> See Grossman and Stiglitz, 70 Am Econ Rev at 405 (cited in note 172) (explaining that "because information is costly . . . those who spent resources to obtain it [must] receive . . . compensation").

<sup>191</sup> See *id.* See also Richard A. Posner, *Economic Analysis of Law* 51 (Aspen 7th ed 2007) (noting that "[t]ransaction costs are never zero" when discussing refinements of the Coase Theorem); R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 15–19 (1960) (explaining that the assumption of no transaction costs "is, of course, a very unrealistic assumption"). For a more

potential relator will not, absent an incentive, incur the search and processing costs to uncover fraud. Even if the potential relator already knows the information, she would still require an incentive to act on that information by bringing a lawsuit. The Grossman-Stiglitz paradox suggests that absent those required incentives, the information may never become public. And while Grossman and Stiglitz initially refused to comment on “the social benefits of information,”<sup>192</sup> it should come as no surprise that uncovering fraud against the government is socially beneficial.

In this category, then, a relator may add significant value. The government prosecutor is not on notice for potential fraud and when searching for fraud will probably turn to lower-cost methods such as presynthesized reports or investigations. In contrast, a relator may be an expert in the field or she may have simply stumbled upon suspicious activity.<sup>193</sup> In any event, a potential relator with expertise, skill, or even luck is better situated to uncover fraud than a prosecutor facing raw data. Therefore, a relator has significant value to add.

Shallow secrets and the semi-strong category are different from deep secrets and the strong category in this fraud situation because shallow secrets may be uncovered through synthesized information, which reduces the value a relator may add. The synthesis and analysis that accompany agency reports or investigations are the hallmark of shallow secrets and the semi-strong category.

#### 4. Applying the models to the statute.

The public disclosure bar enumerates four triggering government sources: reports, hearings, audits, and investigations.<sup>194</sup> Each of these sources typically involves additional synthesis and analysis beyond the raw data. Additionally, disclosures in news media sources bar qui tam actions.<sup>195</sup> Like the enumerated government sources, news media sources are in the very business of compiling, synthesizing, and analyz-

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thorough examination of the role of transaction costs, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S Cal L Rev 1661, 1695 (1989) (“[I]n making the zero transaction cost assumption, one eliminates so many features of the real world that any subsequent conclusions reached in the analysis are largely irrelevant for the real world.”).

<sup>192</sup> Grossman and Stiglitz, 70 Am Econ Rev at 405 (cited in note 172).

<sup>193</sup> The chance of an expert stumbling upon suspicious activity is not particularly unlikely. In *Catholic Healthcare*, the relator initially investigated animal abuses, not fraud. The relator uncovered fraud only as a byproduct of the animal investigations. See 445 F3d at 1149–50. Scheppele also notes that “deep secrets may be discovered by luck.” Scheppele, *Legal Secrets* at 75 n 30 (cited in note 156).

<sup>194</sup> See 31 USC § 3730(e)(4)(a). While these sources are somewhat qualified, the qualifications are not relevant here.

<sup>195</sup> Id (“No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . [in] the news media.”).



ing information. No enumerated source, government or otherwise, encompasses raw data.

The enumerated sources prong of the public disclosure bar should be interpreted with this distinction in mind. Part III.C.1 concluded that, based on *noscitur a sociis*, the terms “administrative report” and “administrative investigation” should be considered in the context of the surrounding terms, all of which connote some value-added synthesis or analysis. Part III.C.2 concluded that the legislative history, evidenced by the differences in the amendments and confirmed by the record and the courts, indicates that the modern public disclosure bar is geared towards setting the correct incentives. Considering the underlying document itself unites these two lines of analysis by making the categorical determination at the document level, not the disclosure level. Considering the document gives effect to the 1986 amendments, while allowing all FOIA requests to trigger the bar leaves us largely in the 1943 universe. Considering the document gives meaning to the second prong of the public disclosure bar, while allowing all FOIA requests to trigger the bar merely folds the second prong into the first. Considering the document gives meaning to the statutory terms in context, recognizing that hearings, audits, investigations, and the news media all add value to raw data by analyzing and synthesizing, while some FOIA disclosures do not. Finally, considering the document sets the right incentives for relators. It does not allow relators to recover in a purely parasitic action, nor does it allow relators to act when the government should be on notice of potential fraud. It encourages relators to act when the government has the raw data but not the expertise or resources to analyze it; it encourages relators to act when the government is not on notice for potential fraud.

Making the categorical determination at the document level rather than the disclosure level involves more costs than the bright-line rule of allowing all FOIA disclosures to trigger the bar. These costs are both necessary and efficient. They are necessary because, as described in this Part, the statute calls for an individual determination for each document. While the statute establishes a bright-line rule for certain types of documents, courts must still determine whether each document fits into one of those document categories. This solution does not create a murky standard not present in the text of the statute, but rather fixes the appropriate level of abstraction for making the categorical determination. It is efficient because the costs of such determinations are low while the benefits are high. The test calls for only determining whether a document is of a certain type; such a determination is simple and low-cost. In fact, it is the same determination that would be required if the same document were disclosed via a different method. And because fraud against the government is high and the

government detects fraud at such low rates,<sup>196</sup> the benefits—increasing fraud detection by increasing incentives—are high.

Note that this test does not create a rule that FOIA-disclosed documents do not trigger the public disclosure bar of the qui tam provision. Part III.C.1.b provides several examples of documents that may trigger the bar. For example, actual administrative reports or actual administrative investigations should trigger the bar regardless of the disclosure mechanism, as long as they were, in fact, publicly disclosed.

But the same Part also provides examples of documents that have actually been requested and disclosed that fall on the opposite end of the spectrum and should not trigger the public disclosure bar because they do not trigger one of the enumerated document types—the most obvious examples include documents that are mere compilations or documents that are not even authored by the government. The mere existence of these disclosed documents, which would have to be particularly elastic<sup>197</sup> to stretch far enough to be considered an administrative report or an administrative investigation, should be enough to recognize that not all FOIA disclosures trigger the public disclosure bar.

Instead, the statute calls for an individual assessment of each document. The method of disclosure, FOIA for the purposes of this Comment, matters for the first prong, whether the document was in fact publicly disclosed. But prong two, the enumerated sources requirement, shifts the analysis to the document type; the disclosure method must fall out of the equation.

#### D. Potential Refinement: Alternate Reward Structure

So far, this solution has presented the appropriate interpretation of the existing public disclosure bar. Importantly, it fits within the language of the statute and allows a court to make the same types of determinations for FOIA-disclosed documents as it would for any other document. It requires no action by Congress. Fortunately, the structure of the modern qui tam provision came very close to the just-right Goldilocks standard, as demonstrated by how the results of the efficient capital markets hypothesis and Grossman-Stiglitz paradox fit right in.

That said, the modern statute is not perfect. Careful readers may have noticed several simplifying assumptions. For example, Part III.C.3(b) assumed that prosecutors act on all information that is eas-

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<sup>196</sup> See notes 4 and 7 (describing fraud levels); notes 38, 40, and accompanying text (describing low detection rates).

<sup>197</sup> See *United States v Torres*, 751 F.2d 875, 886 (7th Cir. 1984) (“Statutory language, to be stretchable, should be elastic.”).

ily digestible. Resource constraints, agency problems, and simple mistakes surely prove this assumption false.

This silent assumption led to the claim that the government does not need to provide an additional incentive to litigate, which in turn led to the conclusion that qui tam actions in this category should be barred, in line with the statutory text. But prosecutors surely leave some low- and medium-hanging fruit on the tree.

A sliding qui tam reward may align the incentives more appropriately and result in increased recoveries for the government. The sliding system does not require a complex design. At one end of the scale, the *Marcus* end,<sup>198</sup> a relator should receive no compensation for actions based on filed criminal actions or other such documents. At the other end, a relator should receive the most compensation for actions based on nonpublic information. In the middle, courts would scale the reward based on the synthesis required to uncover the fraud. A relator who brings an action based on a compiled report, for example, would recover a fraction of what she would recover if the document contained only raw data and she had analyzed it herself.

This system, of course, does not fit within the statutory language, so it would require legislation. It would also introduce additional decision costs. Whether the complexities are worth the trouble might be answered by an empirical analysis.

#### CONCLUSION

Successfully recovered fraud against the government totals in the billions of dollars. Undetected fraud may be orders of magnitude greater. Private qui tam litigants have demonstrated their value by helping to recover more than half of the total recoveries over the past two decades.

Private plaintiffs may only act to help recover fraud thanks to the qui tam provision of the False Claims Act. Over the past century and a half, we have witnessed three versions of the qui tam provision: the overly permissive original 1863 version, which encouraged unnecessary and parasitic litigation; the overly restrictive 1943 version, which prohibited almost all private suits; and the current 1986 version, which struck an appropriate balance between the two extremes.

Some courts, however, have interpreted the modern qui tam provision in a way that essentially reverts back to the 1943 version and ignores half of the statutory text by triggering the public disclosure bar with any FOIA disclosure. Such a restrictive interpretation of the

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<sup>198</sup> See note 27 and accompanying text.

qui tam provision is inconsistent with the language of the statute, the history of the False Claims Act, and the value-added approach the history and statute call for.

The modern False Claims Act uses a two-part test for the public disclosure bar. The statute bars qui tam actions if they are based on (1) a publicly disclosed document that (2) fits into one of several enumerated categories. FOIA is essentially a statute that requires publication of government information, so it probably satisfies the first prong. But the only documents that trigger the second prong involve synthesis or analysis above and beyond raw information. FOIA serves to disclose both types of documents—those that include such synthesis and analysis as well as those that do not. A rule that triggers the test for all FOIA documents folds the second prong into the first, and is thereby overinclusive, ignores the history and the language of the statute, and creates the wrong incentives.

Potential relators need incentives to act when the government is not on notice of potential fraud, but need no incentives when the government should be on notice. Interpreting the public disclosure bar as requiring consideration of the document itself, rather than the disclosure method, sets the correct incentives as intended by Congress and gives full effect to the history and language of the statute.