

# PUBLICATION

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## Provider Fights Back Against Whistleblower's Taking of Provider's Documents [Ober|Kaler]

2015: Issue 13 - Focus on White Collar

**Among the challenges for health care providers facing whistleblower lawsuits is the discovery that a whistleblower has secretly taken the provider's documents or data. What options are available to the provider? In the recent case of *Shmushkovich v. Home Bound Healthcare, Inc.*, No. 12 C 2924, 2015 BL 199519 (N.D. Ill. June 23, 2015), a provider was partially successful in its request that the court order the whistleblower to return information taken from the provider.**

In *Shmushkovich*, the provider learned during the course of a qui tam lawsuit that the whistleblower was storing the provider's electronic information on the whistleblower's home computer. The provider requested that the whistleblower return the allegedly "misappropriated" information. The whistleblower deleted the information on his home computer and returned a copy of the provider's files on a hard drive given to the provider, but retained a copy for his lawyer. The provider then requested the court to order the whistleblower to return the original and all copies of the files, whether in the possession of the whistleblower or his lawyer.

In evaluating that request, the court noted that the False Claims Act "contemplated the need for [whistleblowers] to produce and obtain confidential corporate documents," and the court discussed "the importance of not discouraging whistleblowers from undertaking investigative efforts that might expose fraud against the government," even in instances where the whistleblower may "take possession of evidence in a manner that might otherwise violate common discovery practice." At the same time, the court recognized that "[t]he protections afforded self-help discovery under the False Claims Act, however, have only extended to the collection of materials that are reasonably related to the formation of a case."

Balancing those considerations, the court ruled that the whistleblower could retain the provider's information that was "relevant to his claims under the False Claims Act," but he must "destroy any documents that are not relevant to his claims." In addition, the court ordered the whistleblower to give the provider a list of the documents he planned to retain so the provider could evaluate whether to challenge the whistleblower's claim that the documents taken from the provider were relevant to the case.

The court's decision underscores the challenges facing providers that attempt to obtain the return of information taken from them by a whistleblower. Public policy allows a whistleblower a degree of latitude to take possession of a provider's documents and data. This may be an understandable source of frustration for providers. In *Shmushkovich*, the provider allegedly fired the whistleblower, in part, based on the whistleblower taking the provider's information. The termination of a whistleblower's employment in retaliation for a whistleblower engaging in protected activity would violate the False Claims Act, but the court's ruling did not discuss that issue.

While a provider's response to a whistleblower's suspected taking of documents or data must be evaluated carefully by a provider's legal counsel based on the particular circumstances of each case, the following general guidelines should be considered:

- Identify what information was taken by the whistleblower, to the extent possible.

- Evaluate whether the information taken by the whistleblower is relevant to the whistleblower's allegations.
- Consider whether the information taken by the whistleblower is protected by legal privileges that may be claimed by the provider.
- Ascertain whether the whistleblower made an inappropriate disclosure of the information and, if so, consider legal remedies for such disclosure.
- Consider the potential upsides and downsides of requesting the court to order the return of information taken by a whistleblower.
- Avoid retaliation against the whistleblower for taking information.