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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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To Seal or Not to Seal—The Government's Abuse of the Sealing Prerogative in False Claims Act *Qui Tam* Cases

by Stephen A. Wood

The docket in virtually every False Claims Act *qui tam* case reveals an unusual feature, one unique to these cases. Several docket entries pre-dating the government's Notice of Election to either intervene or decline intervention remain under seal, shielded not only from public eyes, but from the eyes of the defendant and defense counsel. The government's notice typically requests that "only the complaint, this notice, and the Court's Order be unsealed and served upon the Defendant. All other contents of the Court's file in this matter . . . should remain under seal and not be made public or served upon the Defendant." Just as typically, the government offers no justification or supporting rationale for its unusual request for complete confidentiality.

These documents were filed during *ex parte* proceedings. And courts almost uniformly accommodate these one-sided, secretive endeavors, even though they come without justification. And on those few occasions when there is defense pushback, the government usually responds by invoking a claim of privilege, or by claiming that the information is either not relevant or, even if arguably relevant, release would somehow harm the government. The government's arguments are varied. Often, it is claimed that secrecy supports the government's need for confidentiality regarding its investigative or deliberative processes. *See, e.g., United States v. Education Mgmt, LLC*, No. 2007-cv-461, 2013 WL 4591317 at *2 (W.D. Pa. Aug. 28, 2013). It also insists that sealing promotes candor with the court.

As noted in one of my earlier *WLF Legal Pulse* posts, the government regularly exploits the False Claims Act sealing provisions, first by seeking multiple extensions of the 60-day seal period—lasting several years in many cases—and again by insisting that all pre-Notice of Election filings remain under seal. The latter abuse, the subject of this post, should be opposed for several reasons. These actions have the potential to deprive the defendant of important information about the government's case. Second, they undermine the public's interest in transparent operation of our government. And third, they undermine the public's interest in access to the court system. Of its varied justifications, only the government's privilege claims may potentially hold water. Even then, defendants should force the government to do what any civil litigant must—establish its claims of privilege with facts and authority.

The Deliberative Process and Investigatory Privileges

The Deliberative Process Privilege. One rationale offered by the government is that sealed information should be protected by the deliberative process privilege. This privilege applies to advisory opinions, recommendations, and deliberations which represent the foundation of government decisions and policy-making. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The privilege rests on the "obvious realization that officials will not communicate candidly

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Stephen A. Wood is a Principal with Chuhak & Tecson, P.C. in the firm's Chicago, IL office. He is the *WLF Legal Pulse*'s Featured Expert Contributor on the False Claims Act.

among themselves if each remark is a potential item of discovery and front-page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government." *Id.* at 8-9; *Environmental Prot. Agency v. Mink*, 410 U.S. 73, 87-88 (1973) *superseded by statute*, Freedom of Information Act, 5 U.S.C. § 552, *as recognized in Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985). One court has stated that the purpose of the privilege is to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny. *Carter v. United States Dept. of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002).

To qualify for the privilege, the document must be both (1) "predecisional," meaning that it precedes the adoption of agency policy, and (2) "deliberative" or related to the policy-making process. *Texaco P.R. Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). A document may be "predecisional" if it is intended to assist agency decision-makers in carrying out those duties. *Formaldehyde Inst. v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). An agency can support its claim if it can pinpoint the specific decision to which the document relates, establish that its author prepared the document for the purpose of assisting agency decision-making, and verify that the document precedes the decision to which it relates. The foregoing requirements have been summarized as follows: a document is "predecisional" if it precedes the actual agency decision and it is "deliberative" if it is a statement of opinion regarding final policy rather than a description of the ultimate policy itself. *See United States ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518, 527 (6th Cir. 2012).

The Investigatory Privilege. Another privilege invoked to forestall disclosure of sealed filings is the investigatory privilege, "a judge-fashioned evidentiary privilege." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997). The privilege protects against the release of information that would harm a government's civil or criminal investigative efforts. *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). To sustain the privilege, the head of the department having control over the requested information must formally assert the privilege, the assertion must be based on the "actual personal consideration" of that official, and the claim must identify specifically the information subject to the privilege along with the reason it falls within the privilege's scope. *Id.* at 271. These requirements ensure that the privilege will be asserted in a deliberate, considered, and reasonably specific manner. *Id.*

The privilege is not absolute, however, and can be overcome by a showing of need. *Dellwood Farms*, 128 F.2d at 1125. What's more, this privilege, like any other, "can be waived and, once waived, is lost." *Id.* at 1126. Waiver arises not only by voluntary disclosure, but also by way of forfeiture, where, for example, the government selectively discloses certain information leading to a broader finding of waiver. *Id.* at 1127. In the end, the court must balance the government's interest in confidentiality against the individual litigant's interest in access to the information. *United States ex rel. Health Outcomes Technologies v. Hallmark Health System, Inc.*, 349 F. Supp. 2d 170, 174 (D. Mass. 2004). Several factors bear on that balancing test, including (1) the extent to which disclosure will discourage citizens from providing information to government, (2) the impact disclosure of identities may have on the interests of informants, and (3) the extent to which disclosure will chill government self-evaluation. *In re Sealed Case*, 856 F.2d at 272.

The government's invocation of these narrow privileges is frequently too broad. Yet, in this instance, as with any claim of privilege, the burden falls upon the party asserting it to establish the claim with evidence and authority. The starting point should be the production of a log identifying the particular documents, the applicable privilege, and further information establishing the elements of the privilege in sufficient detail to permit the defendant to make an independent assessment of the assertion's validity. Thereafter, if a dispute remains, the matter should be submitted to the court for resolution.

A Word About Attorney Work Product Claims

Apart from the foregoing privileges, the government often invokes the work product doctrine in an effort to maintain the seal on records it has filed with the court. Some courts have held that work product is inapplicable in this instance, since this is not about discovery. *See Health Outcomes*, 349 F. Supp. 2d at 174 (work product inapplicable in opposing motion to unseal, because motion was not aimed at discovery). As set forth in Rule 26(b)(3) of the Federal Rules of Civil Procedure, the work product protection prevents party discovery of information gathered or prepared in anticipation of litigation. Materials filed under seal by the government do not represent trial preparation materials prepared by a party that a party-opponent is seeking to discover. *See, e.g., United States ex rel. Goodstein v. Mclaren Regional Medical Ctr.*, No. 97-cv-72992, 2001 WL 34091259 at *3 (E. D. Mich. Jan. 24, 2001) ("[The] work product doctrine is inapplicable here, as a discovery request is not at issue. Rather, the Defendants are simply requesting 'access to materials filed with the Court in a normally public record.'").

The distinction is not merely one of form, but of substance. The concept of work product arose in the context of civil litigation with one party seeking the fruits of a party-opponent's trial preparation labors, including information reflecting litigation strategies and plans, so-called mental impressions, and so forth. *See Hickman v. Taylor*, 329 U.S. 495 (1947). These materials should be shielded from discovery, except upon a showing of need, that the information sought cannot reasonably be obtained elsewhere and is essential to the requesting party's trial preparation. A motion aimed at unsealing records on a court's docket that were sealed at the request of the government is different. The filing of documents with a court in this instance is not part of the discovery process, but something typically intended to satisfy a statutory requirement. The request to unseal is about access to materials already produced by the government, but only to the court. This is by definition not discovery, and the rules governing discovery, including the work product doctrine, should not come into play.

Additional Government Arguments for Maintaining the Seal

The False Claims Act Commands It. The government may argue that the FCA commands that all filings will remain sealed except the complaint. *See, e.g.*, Plaintiff's Response in Opposition to Defendants' Motion to Amend Seal Orders at 4-5, *United States v. Education Management Corp.*, ECF No. 283 ("Congress clearly considered whether the seal could harm defendants' interests by keeping from them necessary information, and drafted the FCA to exclusively provide for the complaint to be served on defendants. The detailed legislative balancing that is evident in the FCA's seal provisions should not be lightly set aside.") The complaint, the government argues, is the only document the statute specifically requires to be unsealed and served upon the defendant when the court so orders. *See* 31 U.S.C. § 3730(b)(2). In addition, the statute specifically provides for the "in camera" filing of "affidavits or other submissions" in support of requests for extension of the 60-day statutory seal period. Thus, the argument goes, the (silent?) command of the False Claims Act is that any paper that is to be sealed and is not specifically required to be unsealed, should remain permanently sealed.

This argument lacks logic and ascribes a purpose to the law neither stated nor fairly implied by the statutory text. While it is true that the False Claims Act requires sealing of *qui tam* complaints upon filing, the law doesn't require any other document to be sealed. As for affidavits or other submissions related to motions to extend the sealing of the complaint, the statute states that "such motions *may* be supported by affidavits or other submissions in camera." 31 U.S.C. § 3730(b)((3) (emphasis added). The filing under seal of such documents, by law, is therefore optional. That the statute is silent on the matter of unsealing documents other than the complaint does not mean, *ipso facto*, that such documents must never be seen by defendants or their counsel. Since the statute provides no clear guidance one way or the other, the court must be guided by common-law rules and procedures in determining whether to maintain or lift the seal on other filings by the government.

To Promote Candor with the Court. The government has argued that the continued sealing of docket entries, including motions for extension and supporting papers, promotes candor with the court. Conversely, if the court were to unseal these filings, it would in effect penalize the government for its candor. In other words, the sealing of documents other than the complaint is necessary to encourage prosecutors to be open and forthcoming in their arguments to the court without fear that these arguments, documents, and information will be shared with the object of the complaint.

On its face, the argument is dubious for more than one reason. To begin with, in every jurisdiction in this country, attorneys, even those employed by the government, are considered officers of the court and thus owe the court a duty of candor. Rule 3.3 of the American Bar Association Model Rules of Professional Conduct sets forth the attorney-advocate's obligations in dealings with the court, mandating honesty in communication. Even more pertinent and notable, the rule imposes special duties in the event of *ex parte* proceedings: "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." ABA Model Rules of Professional Conduct, R. 3.3(d). The comments to the Rule expand on this duty:

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. *The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.*

ABA Model Rule 3.3, Comments (emphasis added). In light of the independent duty of candor owed the court, the notion that the seal is necessary to promote candor rings hollow. The Rule does not provide the government with the special option of withholding information on the possibility that it could be made known to the defendant. The government's lawyers should not receive a special incentive or reward for merely fulfilling their ethical obligations.

Even apart from professional responsibilities owed to the courts by their officers, the False Claims Act imposes on the government in the particular instance of a request for extension of the seal period a duty to establish "good cause." *See* 31 U.S.C. §3730(b)(3). The government needs no more independent rationale to disclose all material facts in support of requests to extend the seal period in light of this requirement. Importantly, the statute lacks a corresponding mandate to maintain the seal on papers supporting a good cause showing. It is, as noted, silent on the matter.

The Information under Seal is Not Relevant. The government may also argue that the seal should remain in place because the documents do not concern the substantive issues in the case. They reflect at most investigative techniques and deliberative processes, which must remain hidden from defendants' and the public's view. The government's typically conclusory argument is that a defendant need look no further than the complaint to understand the claims and supporting facts. Alternatively, any information contained in the sealed government filings would likely be duplicative of any information obtained in discovery of the affected agency.

Simply because documents from the involved agency may be separately discoverable is no reason to maintain the same documents under seal. In fact, that the documents are otherwise discoverable would seem to undermine the government's argument against unsealing. And no defendant should be required to take the government at its word that documents under seal are not relevant to the issues

in the case. The argument, again, seems to allude to rules of discovery, (even though the scope of discovery is not limited by relevance). As noted *supra*, unsealing of sealed documents in this instance is not governed by Rule 26.

Conclusion

The concerns of defendants rightly grow with the length of time a *qui tam* complaint remains under seal. Longer typically means more sealed filings, more information conveyed to the court that should be shared with the defendant once the government has made its intervention decision. Given that many *qui tam* cases can remain under seal for years (despite the statutory limit of 60 days), the total number of sealed proceedings can be significant. *See, e.g., United States ex rel. Yannacopolos v. General Dynamics*, 457 F. Supp. 2d 854, 857 (N. D. Ill. 2006) (*qui tam* complaint remained under seal for 7 years; court unsealed 11 *ex parte* motions to extend the seal period over the government's objection). In *Yannacopolos*, for example, among other reasons, the defendant sought the sealed materials because they might support a statute of limitations defense.

As noted above, the government's policy on sealing court records in False Claims Act cases raises several concerns, not the least of which is that it conflicts with the public's interest in an open judicial process: "In considering the appropriateness of sealing court records, the Seventh Circuit has given great weight to the strong public interest in disclosure. Concealing judicial records 'disserves the values protected by the free-speech and free-press clauses of the First Amendment ... [and prevents] the public [from] monitor[ing] judicial performance adequately.'" *Id.* at 858 (citations omitted).

Consistent with the Seventh Circuit's approach, courts should presume that *ex parte* filings will be unsealed once the government announces its decision on intervention. The sealing of records on the docket, concealing them from defense counsel, should be an option of last resort for the court. Before this, if unsealing to provide public access is not appropriate, the court should consider unsealing for the benefit of defendant and defense counsel. If the information is of the sort that should not be shared with the defendant, then review can be limited to defense counsel only, as is often done in the case of trade secret information. Finally, redactions may be appropriate, but in that event the redacted documents should be accompanied by a privilege log that allows defendants to assess the propriety of the redactions.

Lastly, a legislative proposal may be in order here. Congress could consider an amendment requiring the unsealing of all matters preceding the government's election decision, except those where the government establishes that the information is subject to a claim of privilege or other showing that disclosure would be contrary to the public interest. This would in essence represent a codification of the common law, but it would eliminate any question about whether the drafters of the False Claims Act intended that *ex parte* proceedings should be concealed indefinitely from the public and the defendant.

