

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA *ex rel.*,
ANDREW SHEA,

Plaintiff,

v.

eHEALTH, INC., *et al.*,

Defendants.

No. 21-cv-11777-DJC

**THE UNITED STATES’ PARTIAL OPPOSITION TO DEFENDANTS’ MOTION
TO UNSEAL ALL PRE-INTERVENTION FILINGS**

The dispute before the Court is far narrower than Defendants suggest. In fact, the United States does not oppose unsealing the vast majority of the documents at issue—it objects only to the unsealing of the extension memoranda it submitted under the False Claims Act (“FCA”) and of its related Motion for Clarification.¹ Continued sealing of these documents is appropriate because: (1) they discuss the content, extent, and strategy of the United States’ law enforcement investigations and, (2) unique to the FCA context, the Government provided them to the Court for the sole purpose of aiding its evaluation of whether to extend the seal and intervention deadline. *See, e.g., United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 902 F. Supp. 189, 192 (E.D. Mo. 1995) (declining to lift seal for documents that provide “some substantive details regarding the government’s methods of investigation”). Indeed, the United States included much of this law

¹ The Government does not have access to a docket report of the sealed filings. It provides here its best understanding of the docket numbers for the six extension memoranda, as well as the dates on which the Government filed them (to facilitate the Court’s identification of the documents): Dkt. Nos. 7 (Jan. 3, 2022), 12 (July 6, 2022), 16 (Jan. 4, 2023), 23 (June 22, 2023), 26 (Jan. 2, 2024), 30 (July 5, 2024). The motion for clarification is Dkt. No. 33 (Sep. 18, 2024).

enforcement investigative information in its sealed filings in direct response to the Court's orders for timelines and status reports concerning the Government's investigation.

Moreover, Defendants have made no effort to identify any interest that outweighs the Government's, whether in their Motion or in abbreviated conferral.² Their gesture at "assess[ing]," Dkt. No. 194 at 1, unspecified defenses relating to the duration of the Government's investigation—a duration that is obvious from the public docket—is insufficient to justify unsealing law enforcement material. Given the unique context of the FCA, the Government's privileges, the fact that the Government provided information at the Court's request, and the lack of any proffered rationale by Defendants, continued sealing of these few documents is appropriate here.

BACKGROUND

I. Process and Purpose of Sealed Investigative Filings Under the FCA

The FCA and its qui tam provision are "unique in the law." *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 n.2 (9th Cir. 1994). Although qui tam plaintiffs, known as relators, may initiate suit under the FCA, Congress has assigned to the Attorney General the responsibility to investigate suspected violations "diligently" and to consider bringing a civil action if a violation is found. 31 U.S.C. § 3730(a). Congress required that relators file qui tam complaints under seal to protect the Government's investigative processes. The seal exists "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and

² When Defendants contacted the Government about unsealing, they did not meaningfully confer, but instead wrote to notify the United States that they "intend[ed] to file a motion in the next few days." Ex. 1 at 4. The Government sought to understand to which defenses any sealed filings might apply, but Defendants refused to respond substantively. *Id.* at 1–3. Defendants' Certificate of Compliance with Local Rule 7.1(a)(2) states that "[t]he Government did not advise defendants why it believes any pre-intervention filings should remain sealed." Dkt. No. 194 at 9. But the Government's position is already in the public record of this case. *See* Dkt. No. 34 at 1–2.

to determine . . . whether it is in the Government’s interest to intervene and take over the civil action.” S. Rep. No. 345, 99th Cong., 2d Sess. 18 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289; *cf. United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 296–98 (6th Cir. 2010) (discussing the Senate Report and the purposes of the FCA seal).

The Attorney General—through the Civil Division, Commercial Litigation Branch of the Department of Justice, and United States Attorneys’ Offices—oversees investigations into qui tam complaints. These investigations commonly require longer than sixty days to complete. As a result, Government attorneys file, under seal, requests to extend the seal and the time within which to make an intervention decision, as the Government did here.

The FCA requires that the United States demonstrate good cause for extensions of the seal and of the Government’s time to elect whether to intervene. 31 U.S.C. § 3730(b)(3). To demonstrate good cause, the United States often must disclose, at least to a degree, the details and progress of its investigations to the court. Therefore, the Government’s memoranda submitted in support of its requests for extensions of the seal and evaluation period, as with the extension memoranda at issue here, may inform the court of the actions taken or anticipated in furtherance of the Government’s investigations, the progress made, or the identification of the Government agencies or personnel involved.

Because extension memoranda regularly contain information protected by the United States’ investigatory files privilege, described further below, and because a purpose of the FCA’s seal is to protect the Government’s investigative processes (not simply to avoid tipping off possible defendants), the United States typically files extension memoranda under seal and requests that they remain sealed. Congress recognized the need to protect these sensitive communications between the Government and the court when it provided that memoranda supporting the United

States’ extension motions may be filed *in camera*. 31 U.S.C. § 3730(b)(3). And although the FCA specifically authorizes the unsealing of an operative *complaint*, it does *not* discuss unsealing the United States’ extension requests. *Id.* § 3730(b)(2); *e.g.*, *United States ex rel. Coughlin v. Int’l Bus. Machs. Corp.*, 992 F. Supp. 137, 140 (N.D.N.Y. 1998) (“[S]ection 3730 only provides for the unsealing of the complaint and no other section of the False Claims Act references the unsealing of any other documents filed with the court.”). Instead, “[t]he FCA . . . provides a unique statutory scheme that favors sealing.” *United States ex rel. Aldridge v. Cain*, No. 1:16-CV-369 HTW-LRA, 2018 WL 1162252, at *5 (S.D. Miss. Mar. 4, 2018); *see also* *ACLU v. Holder*, 673 F.3d 245, 253–254 (4th Cir. 2011) (observing that “the FCA’s seal provisions are narrowly tailored to serve a compelling government interest,” specifically, protecting the integrity of fraud investigations).

II. Legal Standard

Considering the statutory framework of the FCA, including its statutory sealing provisions, “an overwhelming number of district courts apply a balancing test that is unique to unsealing documents in *qui tam* actions—balancing the harm of disclosure with the movant’s need for the information.”³ *La Frontera Ctr., Inc. v. United Behav. Health, Inc.*, No. 1:15-cv-01164-KWR-JMR, 2023 WL 6443560, at *8 (D.N.M. Oct. 3, 2023); *accord* *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 349 F. Supp. 2d 170, 174 (D. Mass. 2004) (“balancing defendants’ interest in obtaining the information with the government’s interest in continued confidentiality”); *United States ex rel. Mikes v. Straus*, 846 F. Supp. 21, 23 (S.D.N.Y.

³ Defendants are, of course, the moving parties. Nevertheless, they attempt to flip the burden by asserting that “[t]o date, the Government has offered no reason why any entries on the docket should remain sealed.” Dkt. No. 194 at 4. Beyond the attempted burden switching, that statement is incorrect. As said, the Government’s unsealed intervention notice described bases for the continued sealing of such extension material, Dkt. No. 34 at 1–2, which the Government explains further here.

1994) (considering “a pragmatic balancing of the need for and harm risked by, disclosures sought”).

The Government agrees that a common law presumption of access generally applies to “judicial records” such as court orders and “materials on which a court relies in determining the litigants’ substantive rights.” *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986)). The special features of the FCA relating to sealed investigative filings, however, require particular consideration of material filed solely to apprise the court of the status of the Government’s sealed investigation. Indeed, the presumption of public access is rebuttable rather than absolute, as courts “weigh[] the interests advanced by the parties in light of the public interest and the duty of the courts,” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 602 (1978), and “[t]he public interest does not require that the government turn over to a private litigant documents revealing its investigatory procedures.” *Miskiel v. Equitable Life Assur. Soc. of the United States*, No. 98-cv-3135, 1999 WL 95998, at *4 (E.D. Pa. Feb. 24, 1999).

ARGUMENT

I. The Government’s FCA Extension Memoranda Contain Protected Information That Should Remain Sealed

The seal should remain on portions of the United States’ extension applications under the FCA and the related Motion for Clarification because (1) this material discusses the content, strategy, and extent of the United States’ investigation, and includes information that is privileged; and (2) the Government provided such material to the Court in response to Court orders and for the sole purpose of aiding its evaluation of whether to extend the seal and intervention deadline.

In its efforts to provide this Court with sufficient information about its investigation, the Government’s extension memoranda included information subject to the Government’s

investigatory files privilege—that is, information about the content, extent, and strategy of the United States’ law enforcement investigation, including specific investigative steps. Courts have consistently recognized the law enforcement/investigatory files privilege. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984) (“There surely is such a thing as a qualified common-law privilege . . . for law-enforcement investigatory files.”) (citation omitted). As the Supreme Court has repeatedly explained, “Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case.” *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *accord John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156–57 (1989).

Disclosure of the Government’s privileged and protected information in extension memoranda is not in the “public interest” generally and is particularly unwarranted here. *Nixon*, 435 U.S. at 602. First, the Government provided information to the Court for the sole, statutorily required purpose of supporting the Court’s evaluation of whether to extend the seal and intervention deadline. Moreover, when the Court sought additional information, the Government complied. As early as January 20, 2023, this Court ordered the United States to provide a specific timeline for its investigation of the Defendants’ unlawful conduct. With each successive order, the Court directed the Government to update its timeline and provide a status report. *See, e.g.*, Dkt. No. 24. In effect, were the Court now to unseal these status reports and memoranda, the Court would be penalizing the Government for its openness in response to earlier Court orders. Second, such disclosure would hinder future Government investigations by revealing investigative strategy and approach. *See, e.g., United States ex rel. Denomme v. Powell*, No. 00-0768-CB-C, 2001 WL 37124485, at *2 (S.D. Ala. Oct. 31, 2001) (denying unsealing where “the information did, at least

to some extent, reveal the Government's strategy and thought processes concerning investigation of the claim"); *Mikes*, 846 Supp. at 23 (considering "confidential investigative techniques [and] information which could jeopardize an ongoing investigation"). Third, it would necessarily limit the Government's openness in future written submissions under 31 U.S.C. § 3730(b)(3). Wholesale unsealing during adversarial proceedings would force the Government, going forward, to reconsider how it communicates with the Court regarding sealed investigations. This result would not be in the public interest and would run contrary to Congressional intent.

II. Defendants Have Demonstrated No Specific Need for This Protected Material

Defendants offer little for the Court's "pragmatic balancing of the need for and harm risked by, disclosures sought." *Mikes*, 846 F. Supp. at 23; *see also Hallmark Health*, 349 F. Supp. 2d at 174. Attempts to unseal the Government's pre-intervention filings because they "*may* directly relate to Defendants' *potential* defenses," are insufficient to "demonstrate[] [Defendants'] need for the documents or show[] how [Defendants] will be prejudiced if these records are not disclosed." *Aldridge*, 2018 WL 1162252, at *7. In fact, Defendants' reference to "potential defenses," Dkt. No. 194 at 5, is exactly what courts have described as a "wish to go on a fishing expedition," *Aldridge*, 2018 WL 1162252, at *7.

Moreover, the only "potential defense[]" to which Defendants allude is an amorphous one "related to the significant duration of the Government's investigation." Dkt. No. 194 at 5. Defendants' Answers provide minimal or no detail as to what this defense might be. Only Elevance Health mentioned the seal period in its Answer, as its Twenty-Eighth Affirmative Defense ("the prolonged seal period and related delay caused substantial prejudice to Elevance Health in violation of due process"). Dkt. No. 167 at 148. To state the obvious, the content of sealed filings cannot change the "duration of the Government's investigation," Dkt. No. 194 at 5, and the date of the relator's filing of his qui tam complaint is public.

Assuming charitably that all Defendants intend some due process argument, that still would not warrant disclosure of the information sought. Defendants' only cited case within in the First Circuit *rejected* a due process argument and explained that because a defendant had early notice of the Government's investigation and "engaged in considerable efforts to persuade the government not to intervene," any "prejudice is unlikely." *In re Pharm. Indus. Average Wholesale Price Litig. (AWP Litigation)*, 498 F. Supp. 2d 389, 399 (D. Mass. 2007). Just so here: as Defendants themselves describe it, over three years, "Defendants produced hundreds of thousands of pages of materials, made personnel available for interviews, and delivered detailed presentations to the Government." Dkt. No. 194 at 1. In other words, Defendants "engaged in considerable effort[]" to avert the Government's intervention. *AWP Litigation*, 498 F. Supp. 2d at 399. Ultimately, the *AWP Litigation* court found that the Government's investigation over "nearly a decade" did not trigger due process concerns. 498 F. Supp. 2d at 399. There are no plausible due process concerns based on the investigation that preceded the Government's intervention in this case (and, again, its duration is clear from the docket). Similarly, in ordering partial unsealing, the district court in *United States ex rel. Compton v. HCR ManorCare, Inc.* focused on "procedural irregularities . . . that have already been identified" and questioned "why it took the government *nearly a decade* to make [its] election." No. CV 16-0851-KSM, 2026 WL 1066520, at *6 (E.D. Pa. Apr. 17, 2026). Defendants' shortened quote (which omits all words after "took the"), Dkt. No. 194 at 4, wrongly implies that the court focused broadly on *any* length of investigation rather than specifically on the almost ten-year length. In any event, neither issue is present here, where the Government diligently investigated a ten-defendant case in three years.

Finally, Defendants leave the Court (and the Government) only to guess at what the "other reasons," Dkt. No. 194 at 5, for disclosure of the protected information might be. With the Court

having made the Relator's complaints and the Government's Complaint-in-Intervention public long ago, Defendants "should be able to understand the allegations against them." *Aldridge*, 2018 WL 1162252, at *8. That Defendants do understand is demonstrated by their lengthy briefing on their motion to dismiss and their Answers.

CONCLUSION

The Court should deny Defendants' motion as it relates to the United States' extension memoranda and Motion for Clarification. *See supra* note 1 (identifying docket numbers). The Government does not oppose unsealing of all other currently sealed material in this case.

Dated: July 28, 2026

Respectfully submitted,

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Assistant Attorney General
Civil Division

LEAH B. FOLEY
United States Attorney

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Attorneys for the United States

EXHIBIT 1

From: [Hafer, Zachary](#)
To: [Weinograd, Charles \(USAMA\)](#)
Cc: [McLane, Laura](#); [Noller, Lisa M.](#); hconley@wc.com; [Hibbert, Kelly H.](#); [Westling, Richard](#); ctlee@ebglaw.com; [Miller, David G. \(CIV\)](#); [Gregg Shapiro](#)
Subject: [EXTERNAL] RE: Motion to Unseal
Date: Monday, July 13, 2026 10:43:07 PM

Thanks Charlie.

I will indicate the below as the government's and Relator's (as we haven't heard differently from Gregg) position when we file tomorrow.

Best,

Zach

From: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>
Sent: Monday, July 13, 2026 4:26 PM
To: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Subject: RE: Motion to Unseal

*** External Email ***

Zach,

As I said, we are willing to see whether we can reach an agreement with Defendants and obviate the need for motions practice that will needlessly expend judicial and party resources. But Defendants would be the moving parties, and the documents are sealed by statute and court order. So, we don't see a need for the Government to make an affirmative case in conferral, particularly where Defendants took no action on this until July 2026—eighteen months after we told Defendants about our intervention and fourteen months after we filed our complaint.

In the interest of conferral, however, we would not oppose Defendants' motion to unseal notices of attorney appearance, court orders, or documents filed after the Government noticed intervention.

In evaluating the rest of Defendants' request (i.e., unsealing of materials related to the seal itself), we are happy to consider a more specific explanation for a challenge beyond

preparation of your unspecified defenses.

Best,
Charlie

From: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Sent: Friday, July 10, 2026 5:32 PM
To: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Subject: [EXTERNAL] RE: Motion to Unseal

Thanks, Charlie.

Given the asymmetry here, perhaps more efficient for conferral purposes if you tell us the government's bases for continued sealing, other than unnamed parties, which we agree should remain sealed?

Best,

Zach

From: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>
Sent: Friday, July 10, 2026 3:58 PM
To: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Subject: RE: Motion to Unseal

*** External Email ***

Zach,

Thanks for your response. To which defenses would the sealed filings relate? We are seeking this information in the hopes of narrowing any dispute between the parties. We may be able to reach an agreement on the court unsealing certain documents and/or

portions of documents.

Best,
Charlie

From: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Sent: Friday, July 10, 2026 9:02 AM
To: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Subject: [EXTERNAL] RE: Motion to Unseal

Morning Charlie,

Please see my **responses** below.

From: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>
Sent: Thursday, July 9, 2026 4:57 PM
To: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Subject: RE: Motion to Unseal

*** External Email ***

Zach,

So that we can evaluate your request, can you please clarify:

1. Is this eHealth's motion or all defendants' motion? **All defendants**
2. Do you seek to unseal everything on the docket that is currently under seal? **Yes, subject to any redactions for unnamed parties**
3. What is the basis for unsealing? **Presumption of public access, lack of need for continued sealing, preparation of our defense**

Best,
Charlie

From: Hafer, Zachary <Zachary.Hafer@stblaw.com>
Sent: Thursday, July 9, 2026 10:59 AM
To: Weinograd, Charles (USAMA) <Charles.Weinograd@usdoj.gov>; Miller, David G. (CIV) <David.G.Miller@usdoj.gov>; Gregg Shapiro <gshapiro@greggshapirolaw.com>
Cc: McLane, Laura <lmclane@mcdermottlaw.com>; Noller, Lisa M. <lnoller@foley.com>; hconley@wc.com; Hibbert, Kelly H. <kelly.hibbert@bassberry.com>; Westling, Richard <rwestling@proskauer.com>; ctlee@ebglaw.com
Subject: [EXTERNAL] Motion to Unseal

Charlie, Dave, and Gregg –

Hope you're all well.

We intend to file a motion in the next few days seeking to unseal the significant number (~37) of pre-intervention filings that have been sealed on the docket for years. To the extent there are unnamed third parties referenced in the filings, we consent to them being redacted.

Could you please let me know DOJ's position on the motion?

Thanks,

Zach

Zachary Hafer ([bio](#))
Simpson Thacher & Bartlett LLP
Boston, MA
M: (781) 771-3785

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