

KAREN L. LOEFFLER
United States Attorney

RICHARD L. POMEROY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9, Rm. 253
Anchorage, Alaska 99513-7567
Telephone: (907) 271-5071
Facsimile: (907) 271-2344
richard.pomeroy@usdoj.gov

Attorney for United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA)	
ex rel. Law Project for Psychiatric)	
Rights,)	
)	
Plaintiff,)	Case No. 3:09-cv-0080-TMB
)	
vs.)	
)	
Osami H. Matsutani, et al.)	
)	
Defendants.)	

**REPLY OF THE UNITED STATES IN OPPOSITION
TO THE UNSEALING OF CERTAIN SEALED DOCUMENTS**

Pursuant to the Court’s April 8, 2010 Order (Doc. 98), the government files
this Reply brief in opposition to the unsealing of the sealed portions of the docket

in the above-captioned case with respect both to the Defendants and to the public at large.

As the government explained more fully in its March 15, 2010 Response to the Court's order requesting further briefing on this issue, the sealed documents in this case should remain sealed because they are not the type of documents that are normally subject to discovery. First, the extension request and related documents should remain sealed because they record the government's investigative processes. *NLRB v. Health Tec Division*, 566 F.2d 1367, 1370 (9th Cir. 1978). Second, the extension request and related documents should remain under seal because they record the government's work product. *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). Finally, the extension request and related documents should remain under seal because the Defendants have no legitimate need for these documents. *United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998).

The government does not intend to repeat these arguments here, but rather files this reply in order to address the points raised in the responses filed by the Relator and the Defendant. In its March 15, 2010 response, the Relator reiterated the general rule that "judicial records" should be open to the public. The United States does not dispute this general proposition. However, the sealed documents

in this case are not “judicial records” as contemplated by the authority cited by the Relator. Rather, because of the unique *qui tam* provisions of the False Claims Act (FCA), the pre-intervention documents filed with the Court were created only because the FCA requires them to be created incident to the United States’ obligation to investigate claims brought by the Relator. 31 U.S.C. § 3730(b)(3). In addition, these documents were filed with the Court although the United States is not a party to this litigation. 31 U.S.C. § 3730(b)(2), (3); *United States ex rel. Eisenstein v. City of New York*, 540 F.3d 94, 95 (2d Cir. 2008) (“where the United States has declined to intervene in a False Claims action, the United States is not a party to the action.”). As a result, the documents are not “judicial records” as this is normally understood, but rather “investigative records” that are not normally subject to discovery. *United States ex rel. O’Keefe v. McDonnell Douglas Corp.* 902 F. Supp 189, 191-92 (E. D. Mo. 1995). Similarly, when courts do weigh the right of a party to seek information against the protections of the investigative privilege, they consider a host of factors which, in this case, largely counsel in favor of retaining the seal over the documents at issue. *See In re Micron Technology, Inc. Securities Lit.*, 264 F.R.D. 7, 10-11 (D. D.C. 2010).

Both the Relator and the Defendant contend that the sealed materials should be unsealed to the extent that they only reveal general information about the government's investigation and do not reveal specific techniques or references to the specific investigation at issue. However, neither the Defendants nor the Relator have made the threshold showing of a legitimate need for the disclosure of these documents. *Kaczynski*, 154 F.3d at 931 (9th Cir. 1998). In the absence of this threshold showing, the government need not come forward with specific information about the sealed documents that warrants maintenance of the seal. *Id.* In addition, to the extent that the Court does wish to conduct an *in camera* review of these documents, following is a brief description of the way in which certain of the sealed documents reveal the government's investigative processes or work product:

1. (Doc. 3) Relator's Motion to Unseal: refers to statements made by an Assistant United States Attorney to the Relator about the conduct of the investigation in this case and includes as exhibits email exchanges between the Relator and the Assistant United States Attorney about the government's investigation in this case;

2. (Doc. 4) Relator's Affidavit in Support of Motion to Unseal: contains counsel for Relator's recitation of a conversation with a Department of Justice Trial Attorney regarding the government's investigation;
3. (Doc. 6 and Doc. 7) United States' Motion for an Extension of Time and Memorandum in Support of this Motion: describes the conduct of the government's investigation in furtherance of demonstrating "good cause" for an extension of time;
4. (Doc. 8) Relator's Opposition to the Government's Motion for an Extension of Time: contains substantive quotations from the government's Memorandum in Support of its Motion for an Extension of Time that describe the government's investigation; and
5. (Doc. 9) United States' Reply to Response to Motion for an Extension of Time: contains a detailed explanation of "good cause" that includes the details of the investigation in this case and describes the investigation process more generally.

CONCLUSION

For the foregoing reasons, the Court should maintain the seal on the documents currently sealed in this case from both the Defendants in this case and the public at large.

RESPECTFULLY SUBMITTED this 14th day of April, 2010.

KAREN L. LOEFFLER
United States Attorney

s/ Richard L. Pomeroy
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9, Rm. 253
Anchorage, Alaska 99513-7567
Telephone: (907) 271-5071
Facsimile: (907) 271-2344
Alaska Bar #8906031

TONY WEST
Assistant Attorney General

/s/ Evan C. Zoldan
Joyce R. Branda
Daniel R. Anderson
Evan C. Zoldan
Civil Division
Commercial Litigation Branch
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
Phone: 202-305-2335

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2010,
a copy of the foregoing **REPLY OF THE
UNITED STATES IN OPPOSITION
TO THE UNSEALING OF CERTAIN
SEALED DOCUMENTS** was served
electronically on all counsel of record.

s/ Richard L. Pomeroy