NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, *ex rel.* ANTHONY S. MANGANIELLO; THE STATE OF NEW JERSEY *ex rel.* ANTHONY S. MANGANIELLO ("RELATOR"), *Plaintiffs*, v. INTERNATIONAL FIDELITY INSURANCE COMPANY, I.A.T. INSURANCE GROUP, ABC CORPORATION 1-10 and JOHN DOES 1-10, ACCOUNTANTS 1-10 (representing individual accountants and/or accounting firms), *Defendants*.	Civ. No. 2:22-cv-102 (KSH) (CLW) **OPINION**

Katharine S. Hayden, U.S.D.J.

I. Introduction

This matter comes before the Court on defendants International Fidelity Insurance Company and I.A.T. Insurance Group's motion to maintain under seal the *qui tam* complaint filed by Anthony Manganiello ("the Relator"). Both the United States and the State of New Jersey have filed a series of requests for extensions of time to investigate and decide whether to intervene; as a result, the case has been under seal since January 20, 2022. The parties have now settled the underlying issues, and this motion remains for the Court's decision.

The defendants argue that because it was they who undertook an internal investigation, in which the Relator participated as a junior to defendants' in-house counsel, the complaint in its entirety is privileged. They also argue that their privacy interests outweigh the strong presumption of public access to judicial proceedings.

The State of New Jersey, joined by the United States, has taken the laboring oar in opposing, arguing that the complaint does not contain any privileged communications or work product, and as such it must be unsealed under Local Rule 5.3. The State also asks this Court to maintain under seal the filings relating to the extension requests referenced above.

The Court held oral argument on December 10, 2024. For the reasons set forth below, the Court denies defendants' motion as to the complaint, and orders that the pre-intervention filings shall remain under seal.

II. Factual Background

I.A.T. Insurance Group ("IAT") acquired International Fidelity Insurance Company ("IFIC") in 2018. (D.E. 1, Compl. ¶¶ 16-17.) IFIC was in the business of producing or underwriting surety bonds, where contractors, developers, and companies would deposit funds with IFIC as collateral to "guarantee" the construction or completion of their projects. (*Id.* ¶¶ 22-24.) Typically, these customers would send IFIC approximately 5-10% of their total project's cost, which it would hold as the guarantor until the project was complete. (*Id.* ¶ 24.) In the event the contractor, developer, or company did not complete the project, the Relator asserts that IFIC was required by law either to return the deposit to its customers or to remit the money to the State. (*Id.*) The complaint contains a list of uncompleted projects that, according to the Relator, required IFIC to remit the deposited funds to the State of New Jersey under the terms of the bonds. (*Id.* ¶ 39(a)-(tt).)

By way of oral argument and in their moving papers, defendants respond as follows. Following the 2018 acquisition, IAT became concerned about the age of some of IFIC's collateral and asked IAT's chief legal officer Frank Tanzola ("Tanzola") to investigate and determine whether the collateral should be returned to their customers or escheated to the

government, and also if the State might take enforcement action against the company. (D.E. 26-1, Defs. Mtn. to Maintain Seal at 2.) The Relator, who is a law school graduate, worked under Tanzola, who instructed him to assist with the investigation by reviewing files and reporting back.[1] (*Id.*) At the time of the investigation, the Relator had not yet passed the bar exam. (*Id.*) Before the investigation was completed, the Relator resigned from IFIC. (*Id.* at 2-3.)

On January 7, 2022, the Relator filed a *qui tam* complaint against IFIC and IAT, alleging among other claims that IFIC failed to properly remit over $10 million dollars owed either back to its customers or to the State, in violation of the New Jersey Uniform Unclaimed Property Act, N.J.S.A. 46:30B-1 *et seq.* and the False Claims Act, 31 U.S.C. § 3729 *et seq.* (D.E. 1, Compl. at 17-27.) The Relator sets forth how he calculated the $10 million figure, supporting it with 46 customers files as examples. (*Id.* ¶¶ 26-32, 39(a)-(tt).) At oral argument, the State characterized the complaint as a "reverse" False Claim Act charge, whereby the Relator was suing "for failure to escheat funds that should have gone to the New Jersey Unclaimed Property Administration, but didn't. And our affected state agency here is the Unclaimed Property Administration."[2] (Oral Argument Tr. at 34:15-25.)

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[1] Defendants explain that "[s]pecifically, Relator was instructed to gather the name of the principal (the bonded company or individual); the region; the type of bond (e.g., performance, payment, bid, subdivision, contract, maintenance, appeals, Customs, etc.); the nature of the collateral (e.g., cash, letter of credit, real property); the value of the collateral; the date when the collateral was pledged; and a recommendation whether to retain or release the collateral, with a legal explanation for the recommendation, for further review, analysis and a final decision by Tanzola." (*Id.*)

[2] Elsewhere the State agreed with the Court's definition (in very simple terms) of a "reverse" False Claims Act complaint: "[I]n other words, I'm bad under the reverse one because I don't give back to the government what belongs to the government. And I'm bad in the conventional one because I took from the government under a false claim?" (D.E. 32-1, December 10, 2024 Oral Argument Transcript ("Oral Argument Tr.") at 54:15-19.)

On January 20, 2022, Magistrate Judge Waldor granted the Relator's request to seal the complaint pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(2). (D.E. 3.) This Court granted a series of motions filed by the United States to extend the seal under the Act, which were supported by representations about the progress of the investigation and negotiations among the parties. (D.E. 5, 8, 10, 15, 17, 20.) On June 3, 2024, the United States and the State of New Jersey submitted a joint notice to intervene and notified the Court that the parties settled the matter. (D.E. 21.) In accord with the United States' request in the notice, the action has remained under seal to date to accommodate this motion, which defendants filed on August 1, 2024. (D.E. 22, 26.) The motion has been fully briefed and the Court held oral argument, after which the parties submitted supplemental briefs. (D.E. 31, 32.)

III. Applicable Law

A. Motion to Seal Standard

There is a well-established presumption that all judicial proceedings—and documents filed with the court in connection with those proceedings—are open to the public. *Brown v. Caldwell*, 2023 WL 8064283, at *1-2 (D.N.J. Nov. 21, 2023) (Hillman, J.) (citing *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001)). This right of access "provide[s] the public with a more complete understanding of the judicial system and a better perception of its fairness" and aims to "diminish[] possibilities for injustice, incompetence, perjury, and fraud." *In re Cendant Corp.*, 260 F.3d at 192 (quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988)). If a party seeks to rebut that presumption of access, it bears the burden of showing that its "interest in secrecy outweighs the presumption." *Id.* at 194 (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993)). "The party who seeks to seal the document must show that 'the material is the kind of information that courts will protect and that disclosure will

work a clearly defined and serious injury to the party seeking closure.'" *United States v. Janssen Therapeutics*, 795 F. App'x 142, 145 (3d Cir. 2019) (quoting *In re Cendant Corp.*, 260 F.3d at 194).

"In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *In re Cendant Corp.*, 260 F.3d at 194 (internal citation omitted). Sister courts have recognized that "[i]n civil litigation, only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is typically enough to overcome the presumption of access." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 308 (6th Cir. 2016) (internal citation and quotation marks omitted). Further, "[t]he threshold for sealing is higher where the case involves a public entity or official or a matter of public concern." *Brown*, 2023 WL 8064283, at *1 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994)); *see Under Seal v. Under Seal*, 1994 WL 283977, at *2 (4th Cir. June 27, 1994) (noting that courts have "recognized that when cases involve matters of particularly public interest, such as misspent government funds, the rationale for public access is even greater").

To prevail on a motion to seal, Local Rule 5.3(c)(3) requires the movant to show:

> (a) the nature of the materials or proceedings at issue;
> (b) the legitimate private or public interest which warrant the relief sought;
> (c) the clearly defined and serious injury that would result if the relief sought is not granted;
> (d) why a less restrictive alternative to the relief sought is not available;
> (e) any prior order sealing the same materials in the pending action; and
> (f) the identity of any party or nonparty known to be objecting to the sealing request.

"After evaluating each factor, a court's ultimate decision must derive from a balancing test placing the specific need for privacy opposite the general presumption of public access." *In re:*

Benicar (Olmesarten) Prods. Liab. Litig., 2016 WL 266353, at *2 (D.N.J. Jan. 21, 2016) (Schneider, J.) (citing *Pansy*, 23 F.3d at 787); *see Janssen Therapeutics*, 795 F. App'x at 145 ("[C]areful factfinding and balancing of competing interests is required before the strong presumption of openness can be overcome by the secrecy interests of private litigants." (quoting *Leucadia*, 998 F.2d at 167)). Local Rule 5.3(c)(3) also indicates that the movant shall provide an index, "substantially in form suggested by Appendix U" that describes these factors "with particularity."

B. Privilege

If defendants can prove that specific allegations or information in the complaint are privileged, that may be sufficient to overcome the strong presumption of access to judicial proceedings and could permit the Court to seal that information alone. *See Maldonado v. N.J. ex rel. Admin. Office of Cts.-Prob. Div.*, 225 F.R.D. 120, 127 (D.N.J. 2004) (Rodriguez, J.) ("[T]he party claiming the privilege has the burden of establishing that the privilege applies."); *U.S. ex rel. Plaintiff v. Yakima Products Inc.*, 2024 U.S. Dist. LEXIS 16500, at *4-5 (W.D. Wash. Jan. 30, 2024) (noting it was the defendant's burden to demonstrate the specific allegations in the complaint were attorney-client privileged). Here, defendants have not provided an index identifying specifically what allegations are attorney-client privileged communications or work product as directed by Local Rule 5.3(c)(3), instead asserting that the entire *qui tam* complaint is privileged. (*See* D.E. 26-5.)

Attorney-client privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014). Both sides argue that *Kellogg*, a False Claims Act case, supports their competing positions. There, then

Judge Kavanaugh, writing for the panel, held that the district court clearly erred in ordering the production of documents exchanged during an internal investigation—including emails, handwritten and typed notes, status reports, and memoranda—between Kellogg's employees and attorneys. *Id.* at 757-60; *see U.S. ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162 (D.D.C. 2014) & D.E. 135-5. The *Kellogg* decision reasoned that it was irrelevant to the privilege analysis whether an internal investigation was conducted pursuant to regulatory law or corporate policy. 756 F.3d at 760. So long as "one of the significant purposes of the internal investigation was to obtain or provide legal advice," the privilege applied to communications underlying that internal investigation. *Id.* But the court drew a line:

> In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." Barko was able to pursue the facts underlying [Kellogg's] investigation. But he was not entitled to [Kellogg's] own investigation files.

Id. at 764. (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)).

Thus, while *Kellogg* clarified that the relator was not able to compel production of documents and communications generated between counsel and investigators during an internal investigation, it also emphasized that the privilege did not prohibit the relator from pursuing the facts underlying the internal investigation.

Defendants also argue the attorney work product doctrine applies here. That bedrock doctrine "protects from discovery materials prepared or collected by an attorney 'in the course of preparation for possible litigation.'" *In re Grand Jury Investigation*, 599 F.2d 1224, 1228 (3d Cir. 1979) (quoting *Hickman v. Taylor*, 329 U.S. 495, 505 (1947)). Federal Rule of Civil Procedure 26(b)(3) partially codifies the work product doctrine and "conditions the production of 'documents and tangible things' prepared in anticipation of litigation by or for an opposing party

on the moving party's showing of substantial need and undue hardship." *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985). But even where such a showing is made, the trial court must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* (quoting Fed. R. Civ. P. 26(b)(3)).

IV. Discussion

The crux of defendants' argument is that the underlying facts and information contained in the complaint are privileged, such that unsealing the complaint would result in a compelled waiver. (D.E. 26-1 at 1.) As defendants' attorney explained at oral argument,

> [T]he affidavits in the record are unrebutted. And the complaint that was filed admits that there was an internal investigation that resulted in this process. So that is the first point that I would like to make. Now, under those circumstances we have two issues. One would be: Is this investigation attorney-client privileged? And then, two, is the work product that was produced as a result of this investigation subject to the work product doctrine?
>
> (Oral Argument Tr. at 19:6-15.)

In short, defendants argue that the entire complaint is a byproduct of an internal investigation in the course of which the Relator was working for defendants' attorney and guided by his theories and concerns about collateral held by IFIC. (D.E. 26-1 at 4-7.) Further, in their reply brief, defendants argue that the list of 46 customers in the complaint is "attorney curated" because these customers were pulled out of the 272 files of old collateral that the Relator reviewed under Tanzola's direction. (D.E. 28 at 5-7; Oral Argument Tr. at 26:24-27:6.) Finally, defendants submitted at oral argument that Tanzola's "legal theories" are found within the complaint, as defendants allege that it was Tanzola who conceived, but ultimately rejected, the idea that there could be exposure from the old collateral. (Oral Argument Tr. at 27:20-28:13.)

The State argues in its opposition that defendants have failed "to overcome the strong presumption in favor of public access to judicial proceedings, particularly in matters of public interest, such as fraud on the government." (D.E. 27 at 1.) The State notes that the attorney-client privilege, in the context of internal investigations, "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." (*Id.* at 6 (quoting *Kellogg*, 756 F.3d at 764).) It distinguishes the facts of *Kellogg*, where the D.C. Circuit vacated the district court's document production order as to emails and memoranda, to the record here, where the complaint sets forth the underlying facts the internal investigation developed. (*Id.* at 6-8.) Similarly, the State argues that the work product doctrine is not implicated because the complaint does not include any documents or materials prepared for or in anticipation of litigation. (*Id.* at 7-8.) Rather, it just includes the facts underlying defendants' internal investigation. (*Id.*)

It is worth noting that the complaint does not reference defendants' attorney Tanzola, or his communications with the Relator. It does not include or attach any internal memoranda, documents, or communications Tanzola or the Relator made during the internal investigation. It is true that the Relator discovered the information that ultimately led to the filing of his *qui tam* complaint during an internal investigation of the defendants' company. But the Court cannot overlook the fact, which the State reiterated at oral argument, that the complaint is devoid of any reference to Tanzola, or to any communications or memoranda regarding the internal investigation, least of all any communications that render legal advice. (*See* Oral Argument Tr. at 39:9-16, 44:1-17.) The Court learned from defendants at oral argument that Tanzola ultimately concluded there was no exposure from the old collateral (*id.* at 28:7-8)—which *would* be protected legal advice—but this is not indicated in, or material to, the recitals in the

complaint. *See Yakima Prods.*, 2024 U.S. Dist. LEXIS 16500, at *5-9 (emphasizing, in a similar context, that the attorney-privilege analysis turns on whether the allegations in the complaint describe legal advice given by the attorney to the relator or to the client). Ultimately, Tanzola's concerns about old collateral are context, not the focus.

That an internal investigation was undertaken by a company and pursued by its attorneys does not render the facts that result as privileged and hidden from the public by an enduring seal on the complaint. As *Kellogg* and *Upjohn* explain, the attorney-client privilege protects disclosure of communications themselves, as protecting these communications promotes "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Kellogg*, 756 F.3d at 764 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)); *Upjohn*, 449 U.S. at 398; *see Faulman v. Sec. Mut. Fin. Life Ins. Co.*, 2006 WL 1541059, at *3 (D.N.J. June 2, 2006) (Thompson, J.) (finding that unsealing an exhibit would not violate the defendant's attorney-client privilege where the substance of the parties' conversations had been redacted or were otherwise not provided in the exhibit).

But the Court is hard pressed to find that the Relator's allegations reflect communications between Tanzola, and arguably himself, and the employer, or documents generated out of Tanzola's representation of the company, or that it spools out of a protected relationship between Tanzola/the Relator and IFIC. Tanzola's decision to conduct an internal investigation to explore old collateral after IAT acquired IFIC doesn't end the inquiry, as defendants would have it. Otherwise, public access would be blocked simply by the existence of an internal investigation per se, and the expected and required lifting of the seal rendered impossible.

The *Kellogg* court found that emails, memoranda, reports, and notes between counsel and internal investigators were likely privileged under *Upjohn*, but that the relator could pursue the facts contained within those privileged documents. The IFIC files showing old collateral paid in by IFIC customers are not privileged as attorney work product because they were reviewed during an internal investigation. They are files, and they do not change their nature because IFIC's attorney reviewed them, nor does his selection change their nature. And it is the content of those files viewed in light of the requirements of the transactions between the customers and IFIC that formed the basis for the Relator's allegations under the False Claims Act. This is consistent with *Sporck*, where the Third Circuit granted work product protection to the defense counsel's grouping of documents *for his client's deposition preparation*, but simultaneously noted that the individual documents themselves were not alleged to be privileged. 759 F.2d at 313-17. That critical distinction applies here, where certain files were listed by the Relator as establishing IFIC's liability not because Tanzola provided advice, but because the files contained facts material to supporting the claims in the complaint.

Moreover, what is ultimately known about Tanzola's role in the internal investigation comes from defendants, not from the complaint. For the first time, defendants argued at oral argument that Tanzola was the one who first theorized there could be exposure from the old collateral and so the complaint reflects his legal theories as IFIC's lawyer. (Oral Argument Tr. at 27:20-28:13.) Again, facts in IFIC's files about specific amounts of money held by IFIC are recited in the complaint and make up the False Claims Act allegations against defendants. And significantly, there is no indication in the complaint that Tanzola's theories about the propriety or existence of old collateral are reflected in the Relator's own allegations. Nor is the Court persuaded by defendants' curator argument about the selection of the 46 exemplar files. The

surface appeal fades when considering that the merits of the complaint rest on the content of the files, not on their selection. The Court is satisfied that this complaint does not recite or depend upon attorney-client communications or work product, and so rejects the extreme measure of sealing it from public view.

In their motion papers, defendants also allege that their privacy interests outweigh the public's right of access to judicial proceedings. (D.E. 26 at 9.) Pursuant to Local Rule 5.3(c)(3), the Court must balance the strong presumption of public access against any "clearly defined and serious injury that would result if the relief sought is not granted."[3] It is well-settled that "the common law right of access begins with a thumb on the scale in favor of openness—the strong presumption of public access." *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 676 (3d Cir. 2019).

Defendants maintain they will suffer "financial damage, damage to business relationships, damage to their commercial standing, or other irreparable harm from public disclosure of the confidential proprietary, commercial, and competitively sensitive business information" as well as harm to their reputation if the complaint is unsealed. (D.E. 26-3, Hemming Cert. ¶¶ 6, 9-10.) However, they do not elaborate further on the bases for these assertions. The broadly described but unsupported alleged harm is insufficient to meet the

[3] Appendix U, a sample index identified in the Local Rules, contemplates that for each statement a party wishes to be redacted, the party should identify the "basis for sealing," the "clearly defined and serious injury that would result if the relief is not granted," and "why a less restrictive alternative to the relief sought is not available." In the certification of defendants' attorney Keith Hemming, Hemming references "an index identifying the Confidential Materials with particularity, including" information regarding Local Rule 5.3's factors. (Certification of Keith R. Hemming ("Hemming Cert.") ¶ 3.) Upon review of that index, which is only one row, the "confidential materials" are identified as the complaint alone, and the "basis for sealing" is alleged to be breach of attorney-client or work-product privileges. (D.E. 26-5.) Thus, the Court does not have the benefit of a comprehensive index that identifies the information in the complaint alleged to be tied to a clearly defined and serious injury.

"clearly defined and serious injury" requirement of Local Rule 5.3(c)(3). *See In re: Benicar*, 2016 WL 266353, at *6 (finding the defendants failed to demonstrate their "personal knowledge as to how disclosure of the exhibits in question will create a 'clearly defined and serious injury,'" as their assertions that competitive harm would result from disclosure were too "speculative and conclusory"); *U.S. ex rel. Silver v. Omnicare, Inc.*, 2016 WL 11807817, at *2 (D.N.J. Feb. 10, 2016) (Schneider, J.) (denying the defendant's motion to seal where it failed to provide "specific examples as to potential damage [to the defendant's business] or articulating a cogent theory about how the disclosure of the information could harm defendant"). The defendants did not press the basis for continuing the seal at oral argument, and their papers are lacking any particularized examples of damage, real or potential, to their business interests. The argument fails.

Finally, the Court considers whether to grant the State's request to seal its pre-intervention filings. Courts in this district have been amenable to such requests when the government has alleged specific harm that would result from disclosure—such as when the filings contain information about confidential investigative techniques—reasoning that disclosure could harm the government's ability to investigate and prosecute fraud. *See U.S. ex rel. Ryan v. Endo Pharms., Inc.*, 2014 WL 5364908, at *2-3 (E.D. Pa. Oct. 22, 2014); *U.S. ex rel. Smith v. Progressive Holdings, LLC*, 2012 WL 225925, at *1 (W.D. Pa. Jan. 25, 2012). The State asks this Court to maintain the pre-intervention filings under seal to "preserv[e] the secrecy of its investigations into false claims against the government" (D.E. 27 at 2 n.1), and defendants have not objected (Oral Argument Tr. at 5:18-25). A review of the pre-intervention filings demonstrates that as a group, they outline the investigative functions undertaken here, which are entitled to protection. *See U.S. ex rel. Ryan*, 2014 WL 5364908, at *2-3 (declining to unseal

several of the government's pre-intervention filings because unsealing would reveal confidential investigatory techniques used by the government).

V. Conclusion

For the foregoing reasons, the Court denies defendants' motion to maintain the complaint under seal and grants the State's request to maintain its pre-intervention filings under seal. An appropriate order accompanies this opinion.

Dated: January 29, 2025

/s Katharine S. Hayden
Katharine S. Hayden, U.S.D.J.