IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity	)	
As Inspector General, U.S. Department of	)	
Housing and Urban Development,	)	
451 - 7th Street, S.W.	)	
Washington, D.C. 20410	)	
	)	
Petitioner,	)	
	)	**Misc. No. 98-262**
v.	)	
	)	**FILED UNDER SEAL**
THE HAMILTON SECURITIES GROUP,	)	
INC. and HAMILTON SECURITIES	)	
ADVISORY SERVICES, INC.,	)	
7 Dupont Circle, N.W.	)	
Washington, D.C. 20036	)	
	)	
Respondent.	)	

MOTION OF THE HAMILTON SECURITIES GROUP, INC. AND HAMILTON SECURITIES ADVISORY SERVICES, INC. TO UNSEAL RECORD

Movants, The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively "Hamilton") respectfully request this Court to unseal the record with respect to the above-captioned matter, Misc. No. 98-262.

I.

BACKGROUND

This matter arises out of an attempt by the Inspector General of the U.S. Department of Housing and Urban Development ("OIG") to enforce administrative subpoenas served upon Hamilton as part of its 27-month-long investigation. According to the OIG, its Petition is "related to" (1) a qui tam action that was filed in this court, in which Hamilton is a named

defendant (Civ. No. 97-1258 (SS)); (2) a civil suit filed by Hamilton against the OIG and HUD, among others (Civ. No. 98-36 (SS)); and (3) a civil suit filed by Ervin & Associates, Inc. against HUD, among others (Civ. No. 96-1253 (WBB)).

All pleadings pertaining to this enforcement proceeding have been filed under seal, at the OIG's request. These pleadings include the OIG's Petition, Hamilton's Opposition, and OIG's Reply, as well as the preceding pleadings regarding OIG's Motion for a Temporary Restraining Order and a Preliminary Injunction.

The circumstances by which the file came to be sealed are unclear, but the OIG summarized the reasons for its preference in its April 24, 1998 Response to Respondents' Exception to Recommendation of the Special Masters, at 15 n.10:

> The government's motion to seal is premised on the fact that there are references in the government's Petition for Summary Enforcement of Administrative Subpoenas to the qui tam action, which is under seal while the government determines whether to intervene.

For the reasons stated below, Hamilton contends that the OIG's asserted basis for sealing all parts of all pleadings and orders in this entire matter cannot withstand scrutiny.

II.

DISCUSSION

It has long been the case in this jurisdiction that there is a "strong presumption in favor of public access to judicial proceedings." Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991). Such public access is a "common law tradition" in this country, and "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." United States v. Hubbard, 650 F.2d 293, 314-15 (D.C. Cir. 1980).

In ascertaining "whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption," this court must weigh a series of six "generalized" factors:

> (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Johnson, 951 F.2d at 1277 & n.14; see Hubbard, 650 F.2d at 317-22. The court should further consider whatever "particularized" factors might be deemed to exist. Hubbard, 650 F.2d at 322-24.

In light of the circumspect nature of the OIG's justification for maintaining a clandestine record, only a limited vetting of the above factors will be necessary to show that the OIG has not met its burden of rebutting this "strong presumption." With respect to the first factor, the need for public access is substantial in that the OIG is funded by taxpayer dollars. The citizens should be permitted to examine the record to determine whether their funds have been well-spent in this extended investigation which has not resulted in any specific allegations, but has resulted in the near-insolvency of a once-growing business. Further, public interest in this matter is evidenced by the existence of numerous articles on this investigation, published in such sources as *The Washington Times* (3/11/98), *U.S. News & World Report* (11/11/96), and repeated in trade publications. See Complaint, Civ. No. 98-36, ¶¶ 56-59. The publication of the misinformation[1] in these articles is also relevant to the

[1] Even the OIG, on page 17 of its Response to Respondents' Exception to Recommendation of the Special Masters, conceded that the information contained in *The Washington Times* was "totally wrong."

second factor, in that the public has had significant access to the details of this investigation despite the sealing order. Indeed, Hamilton contends that the record can be unsealed on this basis alone, so that Hamilton has the opportunity, without violating a sealing order, to rectify the damage to its reputation caused by the misinformation leaked by the OIG. See id. ¶¶ 56-59.

The remaining factors relate to the OIG's sole asserted justification for sealing the record -- namely, that its Petition contains "references" to the qui tam action. This argument is flawed for two reasons.

First, the Petition refers only to the *existence* of a qui tam suit, and this is insufficient to justify the sealing of that document. As the Petition states, "Hamilton has been apprised of the existence of the qui tam action, but has not been advised of the nature of the allegations or of any other information concerning the qui tam, which remains under seal." To allow public access to such rote statements would not result in disclosure of "confidential investigative techniques," nor of "information which could jeopardize an ongoing investigation," nor of "matters which could injure non-parties." United States ex rel. Mikes v. Straus; 846 F. Supp. 21, 23 (S.D.N.Y. 1994). While it is true that qui tam complaints "shall be filed in camera [and] shall remain under seal for at least 60 days" (as was done here), 31 U.S.C. § 3730 (b)(2) (1983 & Supp. 1998), nothing in the False Claims Act forbids the mere mention of the fact that the suit exists. In short, the OIG can articulate no risk of

prejudice sufficient to overcome the substantial judicial preference for public access to court records.[2]

Second, even if the OIG is correct that disclosure of the existence of the qui tam suit would be inappropriate, it does not follow that the entire record should be sealed. As the D.C. Circuit in Johnson directed the District Court on remand, "[s]hould the court determine that some kind of sealing order is warranted, that order should be *no broader than is necessary* to protect those specific interests identified as in need of protection." 951 F.2d at 1278 (emphasis added). This can be accomplished in this case by redacting from the pleadings any reference to the qui tam suit that the court finds deserving of secrecy. Such a narrowly tailored approach is far more consistent with the D.C. Circuit's directive than is the OIG's preference for blanket concealment.

WHEREFORE, your movant respectfully requests this Court to unseal the full record for Misc. No. 98-262 or, in the alternative, to unseal the record in redacted form, as specified above.[3]

Respectfully submitted,

September 22, 1998

____
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[2] Indeed, if there is any party that could conceivably be prejudiced by disclosure of the fact that Hamilton is a subject of investigation in a qui tam suit, it is Hamilton. However, as the OIG has essentially leaked as much already, Hamilton's interest in such confidentiality has been considerably reduced.

[3] Though Hamilton now advocates full, unrestricted access to the record as it presently exists, it nonetheless reserves the right to argue that future aspects of the record should be sealed, particularly if the OIG attempts to disclose privileged information or confidential intellectual capital. See Hubbard, 650 F.2d at 315 (the disclosure of "trade secrets" is one of the "time-honored exceptions" to the tradition of public access).

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CERTIFICATE OF SERVICE

This is to certify that on this ______ day of September, 1998, a copy of the Motion of The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. to Unseal Record was sent, via first-class mail, postage prepaid, to:

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