

# Internal Investigation Documents Are Protected from Disclosure in False Claims Act Case, D.C. Circuit Holds

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Reversing a lower court decision, the [D.C. Circuit recently concluded](#) – for a second time – that certain internal audit documents are protected from disclosure by the attorney-client communication and work production privileges. On August 11, 2015, the D.C. Circuit issued a second writ of mandamus regarding the same group of documents, internal reports which the plaintiff/whistleblower sought in connection with his False Claims Act suit alleging kickbacks and overbilling related to Iraq War subcontracting. The appellate court reversed the district court’s order requiring KBR, Inc. to produce the documents, holding that permitting disclosure would “inject[] uncertainty into application of attorney-client privilege and work-product protection to internal investigations.”

## **Prior Proceedings:**

This is the second time that the protection of these specific documents has been addressed by the D.C. Circuit in this lawsuit. The D.C. Circuit issued an earlier writ of mandamus in June 2014, holding that the district court judge had applied the wrong legal standards in ordering KBR to turn over 89 internal reports. The appellate court’s decision in that case found that the lower court’s order was based on a misunderstanding of the U.S. Supreme Court holding in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The appellate court then remanded the matter to the lower court for further proceedings, including “timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection.”

## **August 2015 Writ of Mandamus:**

Following the appellate court’s remand of the case, the lower court again ordered disclosure of the documents, based on its conclusion that the privilege had been waived based on a company official’s review of the documents in preparation for a deposition and KBR’s purported attempt to use some of the content of the documents in briefing on a motion for summary judgment. Again, the D.C. Circuit concluded that the lower court had applied an incorrect standard to its legal analysis, as the District Court’s ruling “would allow the attorney-client privilege and work product protection covered internal investigations to be defeated routinely by a counter-party. . .”

## **Key Takeaways:**

Although the appellate court's recent decision ultimately protects the internal investigation documents from disclosure, inside and outside counsel must continue to exercise caution in handling privileged documents. As illustrated in the lower court's decision, a company's treatment of the privileged documents in discovery long after the original investigation could result in a waiver of the applicable privilege.

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National Law Review, Volume V, Number 236

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