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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
INDEX NEWSPAPERS LLC,
DBA The Stranger,
Intervenor - Appellant,
v.
MATTHEW DURAN,
Defendant - Appellee.

} CAUSE NO. 13-35243
} MOTION TO UNSEAL DOCKET
} (PARTIALLY OPPOSED)

1. Identity of Moving Party

Index Newspapers LLC, dba *The Stranger*, the Appellant, by and through its attorney, Neil M. Fox, seeks the relief set out in section 2, *infra*.

2. Statement of Relief Sought

The Stranger seeks an order by this Court to unseal the “civil docket” for the District Court case, Western District of Washington, No. 12-GJ-00149, that was filed with this Court on March 27, 2013 (Dkt. Nos. 1-4). *The Stranger* seeks to file this document as an exhibit in an associated writ of mandamus

1 action, *Index Newspapers, LLC v. United States District Court for the Western*
2 *District of Washington*, No. 13-71021.

3 This motion is brought under Circuit Rule 27-13(d). This motion is
4 partially opposed by one appellee, the United States, and unopposed by the
5 other appellee, Matthew Duran.

6 **3. Factual Background**

7 *The Stranger* is an independent newspaper based in Seattle. Matthew
8 Duran was a grand jury witness who was found in contempt of court for
9 refusing to testify before a grand jury in the Western District of Washington that
10 was investigating damage at the Nakamura Federal Courthouse in Seattle on
11 May 1, 2012. *In re Matthew Duran*, Western District of Washington No.12-GJ-
12 00149.

13 While Mr. Duran's contempt case was pending, *The Stranger* filed a
14 motion in the district court to unseal the transcripts and court file in the *Duran*
15 case (and in a related case, *In re Katherine Olejnik*, Western District of
16 Washington No. 12-GJ-00145). *The Stranger* sought access to materials related
17 to Mr. Duran's and Ms. Olejnik's motions to quash the grand jury subpoenas
18 and the contempt proceedings against them. *The Stranger* did not seek any
19 secret grand jury materials, and asked for redactions if necessary.

20 On February 4, 2013, the district court (the Hon. Richard Jones) granted
21 in part and denied in part *The Stranger's* motions. App. A. The district court
22 allowed for the release to *The Stranger* of the transcripts of the open portions of
23 the contempt hearings, but otherwise denied relief. The district court then
24 denied (on February 27, 2013) *The Stranger's* motion for reconsideration. App.
25 B. Also, on February 27, 2013, the district court granted Mr. Duran's and Ms.
26 Olejnik's motions for release from confinement. App. C.

27 On March 22, 2013, *The Stranger* filed a petition for a writ of mandamus
28 seeking review of the district court's orders denying its motion to unseal the

1 *Duran and Olejnik* files. *Index Newspapers, LLC v. United States District*
2 *Court for the Western District of Washington*, No. 13-71021. The real parties in
3 interest are the United States, Mr. Duran and Ms. Olejnik. On June 20, 2013, the
4 Court ordered a response. App. D. The Government and Mr. Duran filed their
5 responses on July 5, 2013, and *The Stranger* filed its reply on July 10, 2013.

6 On March 26, 2013, *The Stranger* also filed an appeal in the *Duran* case.
7 As explained in *The Stranger*'s recently filed reply in the writ case (No. 13-
8 71021), *The Stranger* sought review under both procedures because of
9 uncertainty as to which procedure was appropriate. *See Reply of Index*
10 *Newspapers LLC (dba The Stranger)*, No. 13-71021 at 2-3, citing *United States*
11 *v. Connolly (In re Boston Herald, Inc.)*, 321 F.3d 174, 177 (1st Cir. 2003)
12 (noting how mandamus petitioner also filed protective appeal); *In re Providence*
13 *Journal Company, Inc.*, 293 F.3d 1, 9 n. 3 (1st Cir. 2002) (same); *In re Special*
14 *Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 779-80 (9th Cir. 1982)
15 (same). *The Stranger*'s opening brief is due on August 5, 2013.

16 The direct appeal is currently under seal, as are the *Duran* and *Olejnik*
17 cases in the district court. The mandamus action is not under seal, and the
18 district court briefing and orders related to the unsealing motion were filed
19 along with the mandamus petition. Following the district court's February 4th
20 order that Mr. Duran was not bound by any secrecy provisions and could release
21 whatever documents they wanted to release,¹ Mr. Duran attached to his response
22

23 ¹ The district court ruled:
24

25 The media reports also rely on statements from Ms. Olejnik,
26 Mr. Duran, their attorneys, and their associates. They are free to
27 make whatever statements they wish; they have no obligation to
28 preserve grand jury secrecy. To the extent they wish to disclose
information they have submitted or received in these proceedings,

(continued...)

1 to the mandamus petition a series of pleadings and orders from his court file
2 below.² Mr. Duran's position (as was Ms. Olejnik's) has always been to unseal
3 the files in these cases.³ Moreover, even though this Court's files for Mr.
4 Duran's and Ms. Olejnik's recalcitrant witness appeals *In re Grand Jury*
5 *Subpoena (Katherine Olejnik)*, No. 12-35811 and *In re Grand Jury Subpoena*
6 *(Matthew Duran)*, No. 12-35774, remain under seal, this Court's decisions are
7 publicly available on the Internet.⁴

8
9 _____
10 ¹(...continued)
11 they may do so.

12 App. A. at 11.

13 The district court's recognition here is based on First Amendment
14 considerations that the Government would have a very heavy burden to try to
15 restrict a person's attempt to inform the public of his or her own experiences
16 before a grand jury. *See, e.g., Butterworth v. Smith*, 494 U.S. 624 (1990) (First
17 Amendment violated by rule prohibiting witness publicly disclosing his own
18 prior grand jury testimony); *In re Grand Jury Proceedings*, 814 F.2d 61 (1st
19 Cir. 1987) (Government's threat to travel agency from disclosing it had received
20 a subpoena for a customer's records was improper); *In re Grand Jury*
Subpoena, 574 F. Supp. 85 (S.D.N.Y. 1983) (rejecting motion to preclude banks
from disclosing grand jury subpoena).

21 ² Mr. Duran filed the transcripts under seal because of confusion about
22 whether counsel could file those publicly (even though the district court had
23 released some of the transcripts to *The Stranger*).

24 ³ Attached in App. E is an except from Mr. Duran's pleading filed in the
25 mandamus case, setting out the reasons why he wishes his file to be unsealed.

26 ⁴ *In re Grand Jury Subpoena (Katherine Olejnik)*, No. 12-35811, (9th Cir.
27 10/22/13), [http://law.justia.com/cases/federal/appellate-courts/ca9/12-35811/](http://law.justia.com/cases/federal/appellate-courts/ca9/12-35811/12-35811-2012-10-22.html)
28 [12-35811-2012-10-22.html](http://law.justia.com/cases/federal/appellate-courts/ca9/12-35811/12-35811-2012-10-22.html); *In re Grand Jury Subpoena (Matthew Duran)*, No.
No. 12-35774 (9th Cir.10/22/13), <http://law.justia.com/cases/>

(continued...)

1 When *The Stranger* filed its direct appeal in this case, the Clerk of the
2 District Court forwarded to this Court the “civil docket” from *In re Duran*, 12-
3 GJ-149. Because the district court did not unseal the file below, that docket
4 remains sealed in the district court and is currently sealed in this Court. *The*
5 *Stranger* would like the panel considering the mandamus petition to review the
6 district court’s docket from *In re Duran*, 12-GJ-149, which does not contain any
7 secret grand jury information.

8 While counsel for Mr. Duran -- Kimberly Gordon -- has no objection to
9 the unsealing of this docket so that the undersigned counsel could re-file it in
10 the mandamus case,⁵ by email, AUSA Michael Dion proposed that the docket
11 be unsealed for the limited purpose of filing it in the writ case, but that the
12 docket should then be filed as a sealed exhibit in the writ case.

13 The undersigned counsel, who represents a newspaper, does not believe
14 that he has any obligations under Rule 6(e). *See* District Court Order Denying
15 Reconsideration, App. B, at 2 (“*The Stranger* (like the grand jury witnesses) has
16 no obligation to preserve grand jury secrecy. The court’s decision to maintain
17 the files in these proceedings under seal does not prevent *The Stranger* from
18 disclosing portions of those files in its possession.”). Still, in an interest of
19 caution, counsel wishes to obtain the permission of the Court before taking a
20 document filed under seal in this case (and still closed to the public in the
21 district court), and filing it in the public mandamus court file.

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25 _____
26 ⁴(...continued)
27 federal/appellate-courts/ca9/12-35774/12-35774-2012-10-19.html.

28 ⁵ By telephone on July 11, 2013, Ms. Gordon indicated she would not
oppose this motion.

1 **4. Argument**

2 *The Stranger* seeks to take the civil docket sheet filed in this Court on
3 March 27, 2013, from *In re Matthew Duran*, Western District of Washington
4 No.12-GJ-00149, and file it unsealed in the court file of the mandamus action in
5 *Index Newspapers, LLC v. United States District Court for the Western District*
6 *of Washington*, No. 13-71021. As noted, Mr. Duran does not object, while the
7 Government does not object to it being filed in the writ case, but wants it filed
8 under seal. However, there is no basis even for this appeal, in addition to the
9 docket from below, to remain under seal.

10 This appeal is not a recalcitrant witness appeal brought under 28 U.S.C. §
11 1826. The witness -- Matthew Duran -- has no interest in being identified as a
12 "Witness Doe" or and does not want to have any papers associated with his case
13 filed under seal.⁶ Because this appeal does not involve a recalcitrant witness,
14 and because the appeal only relates to the litigation below over sealing or
15 unsealing of the file, this is not a case where it is likely that secret grand jury
16 materials will be filed or released, and there is no basis under the First
17 Amendment, the common law and Fed. R. Crim. P. Rule 6(e)(5) & (6) to restrict
18 access to the files here.

19 Under both the First Amendment and common law, the public has a well-
20 recognized right to access court files. *Kamakana v. City & Cnty. of Honolulu*,
21 447 F.3d 1172, 1178 (9th Cir. 2006). Of course, there are notable narrow
22 exceptions, such as secret grand jury materials. *Id.* ("Our case law has
23 identified two categories of documents that fall in this category: grand jury
24 transcripts and warrant materials in the midst of a pre-indictment
25 investigation."). These narrow restrictions pointedly do not include limits to
26

27 ⁶ See *Circuit Advisory Committee Note to Rule 3-5* ("A party may file
28 documents using a Doe designation or under seal to avoid disclosure of the
identity of the applicant or the subject matter of the grand jury investigation.").

1 public access of court files that involve litigation over media access to court
2 files.

3 In its response in the mandamus case, the Government relied heavily on a
4 D.C. Circuit case, *In re Motions of Dow Jones & Co. Inc.*, 142 F.3d 496 (D.C.
5 Cir. 1998), but this case made it clear that there was no basis to seal the very
6 proceedings related to a media’s motion to unseal documents:

7 District court hearings on the motions filed by the press in
8 this matter are of course an exception. These motions related to the
9 grand jury but obviously revealed nothing about its workings. For
that reason, we ordered the Chief Judge's orders denying the
motions to be unsealed.

10 142 F.3d at 501 n. 8.

11 While, ultimately, this Court will decide whether the district court erred
12 when it denied *The Stranger’s* motion based on common law, U.S. Const.
13 amend. 1 and Fed. R. Crim. P. Rule 6(e)(6), to unseal (in a redacted form) the
14 file below, there is no basis to require that this very litigation be conducted in a
15 sealed fashion.

16 A copy of the docket from *In re Matthew Duran*, Western District of
17 Washington No.12-GJ-00149 has been filed with the Clerk of this Court as part
18 of processing when the case was opened. The docket is only a copy of what a
19 viewer on PACER would see when “clicking” on the “Docket Report” tabs, but
20 does not allow for the opening of the hyperlinks to the actual pleadings, exhibits
21 and orders.

1 While Rule 6(e)(6)'s⁷ grand jury secrecy requirements apply to this Court
2 under Rule 1(a)(1),⁸ the secrecy interests of that rule are protected by the Court
3 reviewing the materials at issue and determining whether they truly contain
4 secret information:

5 In cases on appeal from orders issued in ancillary proceedings,
6 which we usually caption "In re Sealed Case," we have sometimes
7 taken portions of briefs and other papers under seal, and then held
8 the oral argument in open court after assuring ourselves that no
9 grand jury matter would be discussed.

10 *In re Motions of Dow Jones & Co. Inc.*, 142 F.3d at 502.

11 Here, a review of the docket at issue will show that it contains nothing
12 that could be construed as being secret grand jury material.⁹ In fact, given the

13 ⁷ Rule 6(e)(6) provides:

14 Records, orders, and subpoenas relating to grand-jury
15 proceedings must be kept under seal to the extent and as long as
16 necessary to prevent the unauthorized disclosure of a matter
17 occurring before a grand jury.

18 ⁸ Rule 1(a)(1) provides:

19 These rules govern the procedure in all criminal proceedings
20 in the United States district courts, the United States courts of
21 appeals, and the Supreme Court of the United States.

22 ⁹ The Supreme Court has set out the test for access to secret grand jury
23 material for use in another proceeding:

24 Parties seeking grand jury transcripts under Rule 6 (e) must show
25 that the material they seek is needed to avoid a possible injustice in
26 another judicial proceeding, that the need for disclosure is greater
27 than the need for continued secrecy, and that their request is
28 structured to cover only material so needed. [Footnote omitted]
Such a showing must be made even when the grand jury whose
transcripts are sought has concluded its operations, as it had in

(continued...)

1 materials already filed publicly in the mandamus file (the briefs, many exhibits,
2 the court orders from the district court), if there was ever any “secret” material
3 in the docket, the “cat is out of the bag” and there is no longer any justification
4 for keeping it sealed. *See In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir.
5 1990); *Pickard v. Department of Justice*, 653 F.3d 782, 784 (9th Cir. 2011).
6 The public file in No. 13-71021 already contains most of the information listed
7 on the docket.

8 This docket, however, is important to show in the mandamus case the
9 district court’s error in keeping the *Duran* and *Olejnik* files sealed. As
10 explained in detail in the writ case, opening the docket up to public inspection
11 could only increase public respect for the grand jury system, without
12 compromising secrecy. Through an inspection of the docket, the procedure
13 followed in Mr. Duran’s case would be easily exposed to the public, and it
14 could be demonstrated that the procedures used in his case were not nefarious.
15 From the docket, one could that there were adversarial proceedings before a
16 disinterested judge, that Mr. Duran had counsel at public expense, that various
17 orders were entered after briefing and argument, that Mr. Duran was given the
18 opportunity to purge himself of contempt, that he had the opportunity to appeal
19

20 ⁹(...continued)

21 Dennis. For in considering the effects of disclosure on grand jury
22 proceedings, the courts must consider not only the immediate
23 effects upon a particular grand jury, but also the possible effect
24 upon the functioning of future grand juries.

25 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

26 While *The Stranger* believes that this test is easily satisfied here, the test
27 is really not relevant because *The Stranger* does not seek to file *secret* materials
28 from the appeal in the mandamus case. It is seeking only to unseal *non-secret*
information and then file it in the public file of the mandamus action.

1 to this Court, and, that, ultimately, the district court released Mr. Duran. The
2 Government could have no possible interest in keeping this information secret,
3 and given Mr. Duran's wishes not to keep his identity secret, the docket should
4 no longer be sealed.

5 **5. Conclusion**

6 Accordingly, because, under Rule 6(e)(6), it is not necessary to keep the
7 district court docket in the *Duran* case under seal, and no grand jury secrets
8 would be released, the Court should unseal the docket from *In re Matthew*
9 *Duran*, Western District of Washington No.12-GJ-00149, that is currently filed
10 in this case file in this Court, and allow counsel to file it unsealed in *Index*
11 *Newspapers, LLC v. United States District Court for the Western District of*
12 *Washington*, No. 13-71021.

13 Dated this 12th day of July 2013.

14 Respectfully submitted,

15 /s/ Neil M. Fox

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17 Attorney for Index Newspapers LLC
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22 Fax: 206-448-2252
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1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on the 12th day of July 2013, I electronically filed the
4 foregoing with the Clerk of the Court using the CM/ECF system which will
5 send notification of such filing to attorney of record for the United States,
6 Matthew Duran, Katherine Olejnik and all other parties.

7 I certify or declare under penalty of perjury that the foregoing is true and
8 correct, this 12th day of July 2013, at Seattle WA.

9 /s/Neil M. Fox
10 NEIL M. FOX
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APPENDIX A

HONORABLE RICHARD A. JONES

FILED ENTERED
LODGED RECEIVED

FEB 4 2013

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE KATHERINE OLEJNIK,
Grand Jury Witness,

CASE NO. 12-GJ-145

IN RE MATTHEW DURAN,
Grand Jury Witness.

CASE NO. 12-GJ-149

ORDER

I. INTRODUCTION

Index Newspapers LLC, doing business as "The Stranger," a Seattle-based weekly newspaper, has filed a motion to unseal the court file for each of the above-captioned sealed proceedings, which are ancillary to one or more grand jury proceedings. No. 12-GJ-145, Dkt. # 16; No. 12-GJ-149, Dkt. # 24. For the reasons stated below, the court GRANTS the motions in part and DENIES them in part. The above-captioned files shall remain sealed, although the court authorizes The Stranger to obtain transcripts of the public portions of hearings in which this court held Katherine Olejnik and Matthew Duran in contempt, ordered them confined, or continued their confinement.

II. BACKGROUND

One or more grand juries empaneled in the United States District Court for the Western District of Washington subpoenaed Katherine Olejnik and Matthew Duran to provide testimony. Both witnesses refused to answer at least some of the grand jury's

ORDER - 1

1 questions. At a hearing on September 13, 2012, the court held Mr. Duran in civil
2 contempt and ordered him confined until he either agreed to testify or until the expiration
3 of the grand jury's term. *See* 28 U.S.C. § 1826. At a hearing on September 26, Mr.
4 Duran returned to court for a status hearing on his confinement. Mr. Duran reiterated his
5 refusal to testify, and the court continued his confinement. At a September 27 hearing,
6 the court found Ms. Olejnik in civil contempt and ordered her confined until she either
7 agreed to testify or until the expiration of the grand jury's term. *See id.* Both witnesses
8 remain confined at the Federal Detention Center in SeaTac. Since September, neither
9 they nor their counsel have asked this court to release them.

10 Each of the facts the court has just recounted was disclosed during portions of
11 each witness's contempt hearings that were open to the public. Nothing has prevented or
12 will prevent anyone from publicizing those facts. The Stranger, like any other member of
13 the public, is entitled to access the transcripts of the public portions of these hearings.
14 This order will conclude with instructions for obtaining the transcripts.

15 The Stranger asks for more, however. Its requests come in several forms: it asks
16 the court to "unseal the file" in each of the above-captioned cases (Mot. at 1), it asks for
17 "the court files involving the contempt proceedings against Mr. Duran and Ms. Olejnik"
18 (Mot. at 4), it demands that the court "unseal the files in these cases and allow the public
19 to have access to the court files regarding the contempt citations related to Matthew
20 Duran and Katherine Olejnik, the transcripts of the contempt hearings, and any briefing"
21 (Mot. at 6). It is not clear whether The Stranger merely seeks to unseal portions of these
22 case files pertaining to the contempt hearing, or whether it seeks to unseal the files in
23 their entirety. There are documents in the court file that are unrelated to any contempt
24 proceeding. The Stranger has no way of knowing this, however, because the dockets in
25 each of these cases are sealed. Only the court and its staff have access to them. For
26 purposes of these motions, the court assumes that The Stranger would like the court to

1 unseal as much of each witness's court file as possible. The court now considers that
2 request.

3 III. BACKGROUND

4 A. The Public Has a Right of Access to Most, But Not All, Court Proceedings.

5 In the ordinary case, The Stranger would have no need to request disclosure of
6 court records. There is a broad public right of access to court records and court hearings.
7 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). That
8 right arises both from common law and from the First Amendment. *United States v.*
9 *Custer Battlefield Museum*, 658 F.3d 1188, 1192 (9th Cir. 2011). Anyone wishing to seal
10 even a single document in a proceeding in which a public right of access applies must
11 make a compelling showing to overcome a presumption of public access to court files.
12 *Kamakana*, 447 F.3d at 1178-79.

13 There are some court proceedings, however, to which the public has no right of
14 access. Many of those are criminal proceedings, in which a variety of interests mitigate
15 in favor of secrecy. Some criminal proceedings arise before anyone has been charged
16 with a crime. Granting the public access to those proceedings would permit suspects to
17 flee, destroy evidence, or otherwise elude prosecution. It is for that reason, for example,
18 that the public has no right of access to search warrant materials, at least before the
19 conclusion of an investigation. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1218-
20 19 (9th Cir. 1989) (rejecting both First Amendment and common-law right of access to
21 search warrant materials during an ongoing investigation); *Custer Battlefield Museum*,
22 658 F.3d at 1194 (recognizing common law right of access to warrant materials after
23 investigation ends). Similarly, where a suspect has yet to be accused of a crime (and may
24 never be accused of a crime), the suspect has an interest in preventing public disclosure
25 of the government's suspicions. *Times Mirror*, 873 F.2d at 1216.

1 The Supreme Court requires a court to consider two factors before deciding
2 whether the public has a First Amendment right to access to a particular type of
3 proceeding. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8-9 (1986).
4 First, the court must “consider[] whether the place and process have historically been
5 open to the press and general public.” *Id.* at 8. Second, the court must consider “whether
6 public access plays a significant positive role in the functioning of the particular process
7 in question.” *Id.*

8 Although the Supreme Court has not articulated a test for determining a common
9 law right of access, that right does not extend to “documents which have traditionally
10 been kept secret for important policy reasons.” *Times Mirror*, 873 F.2d at 1218, 1219.

11 **B. There is No Public Right of Access to Proceedings Before the Grand Jury or**
12 **to Court Proceedings Ancillary to Grand Jury Investigations.**

13 The Stranger’s motion requires the court to decide whether there is a right of
14 access to grand jury proceedings. Before making that decision, the court places it in
15 context. The Fifth Amendment gives the grand jury alone the power to issue indictments
16 for those accused of “infamous” federal crimes. Although a court empanels a grand jury,
17 no judge presides at its meetings. *United States v. Calandra*, 414 U.S. 338, 343 (1974).
18 The only people present when a grand jury convenes are the grand jurors themselves,
19 attorneys for the prosecutor presenting evidence to the grand jury, any witness the grand
20 jury has subpoenaed, a court reporter, and an interpreter if necessary. Fed. R. Crim. P.
21 6(d). Transcripts of what occurs before a grand jury are not court records; the prosecutor
22 maintains custody over them. Fed. R. Crim. P. 6(e)(1). Thus, although the grand jury in
23 some ways serves as an “arm of the court,” *Levine v. United States*, 362 U.S. 610, 617
24 (1960), and fulfills functions that “are intimately related to the functions of the court, the
25 grand jury is not and should not be a captive to the judiciary,” *United States v.*
26 *Armstrong*, 781 F.2d 700, 704 (9th Cir. 1986).

1 There is no public right of access to proceedings occurring before the grand jury.
2 Grand jury proceedings are not traditionally public and would not benefit from public
3 access, and thus have neither of the characteristics the *Press-Enterprise* Court identified
4 as prerequisite to a First Amendment right of access. What occurs in front of the grand
5 jury has been secret since the Seventeenth Century, long before the Fifth Amendment.
6 *Douglas Oil Co. v. Petrol Stops NW*, 441 U.S. 211, 218 n.9 (1979). As to the second
7 factor, grand jury proceedings are a “classic example” of the “kind[] of government
8 operation[] that would be totally frustrated if conducted openly.” *Press-Enterprise*, 478
9 U.S. at 9. Grand jury secrecy helps ensure that people suspected of crimes cannot flee or
10 interfere with potential grand jury witnesses. *Douglas Oil*, 441 U.S. at 219 n.10. It
11 protects the privacy of suspects by ensuring that the grand jury’s mere suspicions do not
12 become public. *Id.* It permits grand jury witnesses to testify freely, without fear of
13 reprisal or unwanted publicity. *Id.* It protects the grand jurors themselves not only from
14 unwanted publicity, but from improper attempts to influence their deliberations. *Id.* For
15 the same reasons, any argument for a common law right of access fares no better. The
16 considerations that led the *Times Mirror* court to reject a common law right of access to
17 pre-indictment search warrant materials apply with equal force to matters occurring
18 before the grand jury.

19 The same analysis dictates that there is no public right of access to court
20 proceedings ancillary to grand jury investigations. The Stranger does not directly request
21 records of what occurred before the grand jury, it requests records from proceedings
22 before this court involving Ms. Olejnik and Mr. Duran. Every ancillary proceeding,
23 however, requires some disclosure of what has occurred before the grand jury. A witness
24 cannot move to quash a grand jury subpoena without revealing, at a minimum, that the
25 grand jury has chosen to subpoena her. The Government cannot justify a request for an
26 order compelling a witness to testify without disclosing aspects of the grand jury’s

1 investigation. A court cannot hold a witness in contempt without hearing evidence that
2 reveals what questions the grand jury asked and how the witness responded. Every
3 ancillary proceeding is likely to involve argument and evidence that does not reveal
4 grand jury material, but that argument and evidence is necessarily interwoven with grand
5 jury material. To recognize a public right of access to ancillary proceedings would be to
6 grant the public access to matters occurring before the grand jury, a result that precedent
7 forecloses.

8 Although the public's interest in access to judicial proceedings is important, it is
9 insufficient to overcome the considerations that counsel in favor of grand jury secrecy.
10 Like other courts, this court acknowledges that "the public's interest in self-governance
11 and prevention of abuse of official power would be served to some degree if grand jury
12 proceedings were opened." *Times Mirror*, 873 F.2d at 1213. But just as the *Times*
13 *Mirror* court found that interest "more than outweighed by the damage to the criminal
14 investigatory process that could result" from public access to pre-indictment warrant
15 materials, the public benefit from access to grand jury proceedings is more than
16 outweighed by the damage that access would cause to the grand jury's investigative
17 functions. *See Douglas Oil*, 441 U.S. at 218 ("We consistently have recognized that the
18 proper functioning of our grand jury system depends on the secrecy of grand jury
19 proceedings.").

20 Although the conclusion that the public has no right of access to grand jury
21 proceedings or ancillary proceedings flows from precedent, the Federal Rules of Criminal
22 Procedure also codify that conclusion at Rule 6(e). *United States v. Sells Eng'g*, 463 U.S.
23 418, 424 (1983). That rule requires that all "records, orders, and subpoenas relating to
24 grand-jury proceedings must be kept under seal to the extent and as long as necessary to
25 prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R.
26 Crim. P. 6(e)(6). With the exception of contempt proceedings, which the court will

1 discuss later, it must “close any hearing to the extent necessary to prevent disclosure of a
2 matter occurring before the grand jury.” Fed. R. Crim. P. 6(e)(5). Grand jurors, court
3 reporters, and government attorneys (among others) may not “disclose a matter occurring
4 before the grand jury.” Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) extends to any document
5 that reveals what has occurred before the grand jury. *U.S. Indus., Inc. v. United States*
6 *Dist. Ct.*, 345 F.2d 18, 20-21 (9th Cir. 1965).

7 **C. The Stranger Is Entitled to Material Related to the Contempt Proceedings**
8 **That Does Not Disclose Grand Jury Information.**

9 Not every record that pertains to the grand jury is subject to the traditional secrecy
10 requirement. There is a right of access to “ministerial” records of the grand jury, records
11 that “relate to the procedural aspects of the empaneling and operation” of a grand jury,
12 “as opposed to records which relate to the substance of the . . . investigation.” *In re*
13 *Special Grand Jury*, 674 F.2d 778, 779 n.1, 781 (9th Cir. 1982). That right may permit
14 access to court orders summoning and empaneling a grand jury as well as orders
15 pertaining to the duration of the grand jury’s service. *Id.* at 780, 782. And, of particular
16 importance in this dispute, a witness who the grand jury subpoenas has a “right to an
17 open hearing in a contempt proceeding.” Fed. R. Crim. P. 6(e)(5).

18 The right to an open contempt hearing does not encompass a right of access to
19 every aspect of a contempt proceeding. When the Government asks the court to hold a
20 witness in contempt, it is common to reveal grand jury material to justify the request. As
21 to Ms. Olejnik and Mr. Duran, in both its written motions for contempt and its oral
22 arguments in favor of those motions, the Government disclosed grand jury material.
23 Among other things, the court reporter who recorded Ms. Olejnik’s and Mr. Duran’s
24 grand jury testimony appeared to read back the grand jury’s questions and each witness’s
25 answers. The public had no right to be present for those portions of the proceedings.
26 *Levine*, 362 U.S. at 618 (finding “no right to have the general public present while the
27 grand jury’s questions were being read”). It had no more right to be present for other

1 portions of the contempt hearing where the Government disclosed grand jury material.
2 The right to public access encompasses only the right to observe the adjudication of
3 contempt. *Id.*

4 For both Ms. Olejnik and Mr. Duran, the court conducted open contempt hearings,
5 but closed those portions of the hearings where the attorneys and the court discussed
6 grand jury material. The public has a right to the transcripts of the open portions of the
7 hearings,¹ but no more. As to the written material submitted to the court in connection
8 with the contempt proceedings, they contain grand jury information, and they are not
9 subject to the public right of access that applies to contempt hearings.

10 **D. The Court Will Not Make an Exception to Grand Jury Secrecy in This Case.**

11 The Stranger argues that regardless of the need for secrecy in an ordinary grand
12 jury proceeding, Ms. Olejnik's and Mr. Duran's circumstances justify a departure from
13 the general rule. That argument, the court observes, is not a valid argument for a public
14 right of access. Courts do not decide the existence of a public right of access on a case-
15 by-case basis, they decide it based on the characteristics of an entire class of judicial
16 proceedings. For example, although the request for search warrant material in *Times*
17 *Mirror* arose in the context of an investigation into "corruption and fraud in the
18 procurement of military weapons systems," 873 F.2d at 1211, the court did not consider
19 the public importance of the investigation when deciding if there was a general right of
20 access to pre-indictment search warrant materials.

21 Courts have the authority to grant exceptions to grand jury secrecy requirements.
22 Rule 6(e) itself permits a court to authorize disclosure in a variety of circumstances, none
23 of which apply here. For example, the court can authorize disclosure to a defendant
24 seeking to dismiss an indictment the grand jury has returned against her (Fed. R. Crim. P.

25
26 ¹ For reasons it does not explain, the Government has not conceded that the transcripts of the
27 public portions of the contempt hearings should be available to the public. It does not, however,
28 offer any justification for keeping them secret.

1 6(e)(2)(E)(ii) or, when the Government requests it, to other law enforcement authorities
2 (Fed. R. Crim. P. 6(e)(2)(E)(iii)-(v)). There is also an exception for disclosure
3 “preliminarily or in connection with a judicial proceeding,” but that exception applies
4 only to parties to a different judicial proceeding who can demonstrate a compelling need
5 for grand jury material. *Douglas Oil*, 441 U.S. at 222 (requiring party to show that grand
6 jury “material they seek is needed to avoid a possible injustice in another judicial
7 proceeding”); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)
8 (requiring “compelling necessity” to use documents in a different judicial proceeding);
9 *see also U.S. Indus.*, 345 F.2d at 21 (requiring “particularized and compelling need”
10 before permitting disclosure of grand jury material referenced in sentencing
11 memorandum); *Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656
12 F.2d 856, 868 (D.C. Cir. 1981) (“[A]n examination of the language and legislative history
13 of [predecessor to Rule 6(e)(2)(E)(i)] reveals that it contemplates disclosure in the course
14 of parallel civil proceedings and does not include the very proceeding instituted for the
15 purpose of obtaining disclosure.”). A member of the public who intervenes in a grand
16 jury ancillary proceeding (as The Stranger does here) does not fall within the scope of
17 this exception. Even if it did, the Stranger has not articulated a compelling need for the
18 grand jury material at issue.² It relies instead on the general public interest in favor of
19 access to judicial proceedings, an interest that the court has already found insufficient.
20 The Stranger also points to the media attention that Ms. Olejnik and Mr. Duran have
21 received. The court is aware of no authority that permits a member of the public or a
22 media outlet to sidestep grand jury secrecy because a particular investigation is receiving
23 media attention. Investigations into high-profile matters are no less deserving of secrecy.

24
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26 ² The Stranger attempts to place the burden on the Government to justify the sealing of these
27 files, relying on Local Civil Rule 5(g). That rule applies only in proceedings to which there is a
28 presumption of public access. Local Criminal Rule 6(j)(2) authorizes the filing under seal of “all
motions and accompanying papers” that are “related to Grand Jury matters.”

1 *See, e.g., United States v. McDougal*, 559 F.3d 837, (8th Cir. 2009) (declining, more than
2 ten years after Whitewater investigation, to release records from contempt proceeding).

3 **E. Media Reports and Ms. Olejnik and Mr. Duran Have Not Obviated the Need
4 for Grand Jury Secrecy in These Matters.**

5 Finally, the Stranger argues that media reports touching on Ms. Olejnik and Mr.
6 Duran's confinement for contempt have already revealed any grand jury secret that the
7 court protects today. This is not a request for an exception to grand jury secrecy,
8 precisely, it is an argument that there are no longer grand jury secrets to protect because
9 of previous public disclosures.

10 The court observes that neither the Supreme Court nor the Ninth Circuit has held
11 that the disclosure of grand jury material is a basis to lift secrecy protections. Other
12 courts have made limited disclosures of grand jury material after widespread disclosures.
13 *See, e.g., In re Grand Jury Proceedings (Miller)*, 493 F.3d 152, at 154-55 (D.C. Cir.
14 2007) (disclosing two affidavits and a portion of a judicial opinion after conviction of one
15 grand jury target and grand jury witness's appearance on national news program to
16 discuss his testimony); *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (granting Iran-
17 Contra Affair special prosecutor's request to disclose his final report on grand jury
18 investigation in light of widespread national publicity). So far as the court is aware,
19 however, every federal court of appeals to consider the issue has held that grand jury
20 secrecy is not waivable, even where grand jury secrets are disclosed publicly. *North*, 16
21 F.3d 1245 ("Rule 6(e) does not create a type of secrecy which is waived once public
22 disclosure occurs."); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (2d Cir.
23 1998) (citing *North*); *United States v. Smith*, 123 F.3d 140, 154 (3d Cir. 1997).

24 Assuming that there is a point at which public disclosure of grand jury material
25 obviates the need for secrecy, The Stranger has not established that the public disclosures
26 in this case have not reached that point. The only documents that the Stranger has
27 submitted to demonstrate disclosure are media reports. Those reports reflect that certain

1 facts about the grand jury's investigation are no longer secret. For example, it is no
2 secret that the grand jury subpoenaed Ms. Olejnik and Mr. Duran. Other facts have come
3 to light not as the result of the disclosure of grand jury material, but as the result of the
4 execution of search warrants.³ The media and others are free to speculate as to the
5 connection between those searches and a grand jury investigation, but that speculation is
6 a far cry from revealing a grand jury secret.

7 The media reports also rely on statements from Ms. Olejnik, Mr. Duran, their
8 attorneys, and their associates. They are free to make whatever statements they wish;
9 they have no obligation to preserve grand jury secrecy.⁴ To the extent they wish to
10 disclose information they have submitted or received in these proceedings, they may do
11 so. The Stranger has not, however, demonstrated that their disclosures have revealed the
12 grand jury's investigation to a degree that secrecy is no longer necessary.

13 Before concluding, the court observes that the court files the Strangers seeks are a
14 mix of secret grand jury material, grand jury material that may have lost its secrecy, legal
15 argument, banal information, and more. It is perhaps possible to assess every document
16 in these files to redact secret grand jury material and divulge the remainder. The result
17 would likely be an incomplete and sometimes indecipherable "court file" that would be
18 as likely to mislead the public as to enlighten it. Nonetheless, neither the court nor the
19 Government has an obligation to sift through these grand jury proceedings to determine
20 what is secret and what is not. Putting aside contempt hearings, no public right of access
21

22 ³ Several of the media reports that The Stranger has submitted publicize facts extracted from a
23 search warrant affidavit that the Government inadvertently allowed to be publicly filed. In a
24 separate order, the court has unsealed the case file pertaining to that search warrant, including the
25 affidavit. The warrant affidavit does not mention any grand jury.

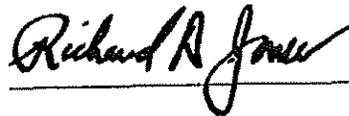
26 ⁴ Ms. Olejnik and Mr. Duran have filed declarations in which they consent to the disclosure of
27 anything in these court files. Grand jury secrecy, however, is not theirs to waive. As the court
28 has already noted, grand jury secrecy allows the grand jury to investigate without alerting
suspects and allows the grand jurors to investigate without interference. Although the court
acknowledges Ms. Olejnik's and Mr. Duran's willingness to waive protection of their own
privacy, that is insufficient to obviate the need for continued secrecy.

1 attaches to grand jury material, and courts have rejected the notion that they have an
2 obligation to publicize even those aspects of grand jury material that do not reveal grand
3 jury secrets. *See, e.g., Smith*, 123 F.3d at 153-54 (holding that district court had no
4 obligation to separate secret from non-secret grand jury hearings and documents); *In re*
5 *Sealed Case*, 199 F.3d 522, (D.C. Cir. 2000) (rejecting request “for a generic rule
6 requiring public docketing of all grand jury ancillary proceedings”).

7 **IV. CONCLUSION**

8 For the reasons previously stated, the court GRANTS The Stranger’s motions in
9 part and DENIES them in part. No. 12-GJ-145, Dkt. # 16; No. 12-GJ-149, Dkt. # 24.
10 The court authorizes The Stranger to obtain transcripts of the public portions of the
11 hearing the court held regarding Mr. Duran’s contempt on September 13 and September
12 26, and regarding Ms. Olejnik’s contempt on September 27. The transcript requests are
13 subject to any applicable fees. The Stranger may contact court reporter Kari McGrath to
14 obtain the September 13 excerpts, and may contact court reporter Nancy Bauer to obtain
15 the September 26 and 27 excerpts. The court declines to unseal either Ms. Olejnik’s or
16 Mr. Duran’s case files.

17 DATED this 1st day of February, 2013.

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21 The Honorable Richard A. Jones
22 United States District Court Judge

APPENDIX B

FILED ENTERED
LODGED RECEIVED

HONORABLE RICHARD A. JONES

FEB 27 2013

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE KATHERINE OLEJNIK,
Grand Jury Witness,

CASE NO. 12-GJ-145

IN RE MATTHEW DURAN,
Grand Jury Witness.

CASE NO. 12-GJ-149

ORDER

This matter comes before the court on The Stranger's motion for reconsideration of the court's February 1 order in each of the above-captioned grand jury ancillary proceedings. That order permitted the Stranger to obtain transcripts of public portions of hearings held on September 13, 26, and 27, but declined to otherwise unseal the court files for these proceedings. For the reasons stated herein, the court DENIES the motion for reconsideration.

Motions for reconsideration are "disfavored," and the court will "ordinarily deny them . . . in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority" that "could not have been brought to [the court's] attention earlier with reasonable diligence." Local Rules W.D. Wash. LCR 7(h)(i).

The Stranger's motion satisfies neither standard. The Stranger first asks the court to change its factual summary based on the "unrebutted" declaration of Mr. Duran's counsel that members of the public outside the courtroom were not informed when the

ORDER - 1

1 court opened Mr. Duran's initial contempt hearing to the public. The February 1 order
2 says nothing about what happened outside the courtroom on the date in question, in part
3 because it was (and is) immaterial to the order, and in part because the court summarized
4 only what took place within its courtroom. Mr. Duran's counsel's declaration is
5 "unrebutted" because The Stranger submitted it in conjunction with its reply brief, thus
6 giving the Government no opportunity to respond to it. There is no reason for the court
7 to change the factual summary it provided in the February 1 order.

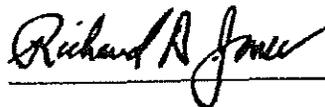
8 The Stranger also asks the court to reconsider its decision not to unseal more of
9 the docket and court files in these proceedings. The court explained in the February 1
10 order that if "there is a point at which public disclosure of grand jury material obviates
11 the need for grand jury secrecy, The Stranger has not established that the public
12 disclosures in this case have [] reached that point." The court observed that the only
13 public disclosures that The Stranger relied on, putting aside a search warrant affidavit that
14 has been made available to the public, were those contained in media reports. The
15 Stranger had not pointed to any document from the files in these cases that had been
16 publicly disclosed. In its most recent motion, The Stranger points to no additional public
17 disclosures, much less additional public disclosures it could not have identified in its
18 original motion. The Stranger correctly points out (as the court did on February 1) that
19 grand jury witnesses are free to disclose court documents in their possession. The
20 Stranger has not pointed to any document that any grand jury witness has publicly
21 disclosed in these proceedings.

22 The Stranger contends that the court's order prevents the disclosure of even the
23 documents it and the Government filed regarding its original motion. The Stranger is
24 mistaken. The Stranger (like the grand jury witnesses) has no obligation to preserve
25 grand jury secrecy. The court's decision to maintain the files in these proceedings under
26 seal does not prevent The Stranger from disclosing portions of those files in its

27 ORDER - 2
28

1 possession. As is the case with the grand jury witnesses, however, there is no evidence
2 that The Stranger has disseminated any document from these proceedings to the public.
3 Under these circumstances, the court finds no error (much less manifest error) in its
4 decision to maintain the files in these proceedings under seal.

5 DATED this 27th day of February, 2013.

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9 The Honorable Richard A. Jones
10 United States District Court Judge

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ORDER - 3

APPENDIX C

FILED _____ ENTERED _____
LODGED _____ RECEIVED

HONORABLE RICHARD A. JONES

FEB 27 2013

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE KATHERINE OLEJNIK,
Grand Jury Witness,

CASE NO. 12-GJ-145

IN RE MATTHEW DURAN,
Grand Jury Witness.

CASE NO. 12-GJ-149

ORDER

I. INTRODUCTION

This matter comes before the court on motions from grand jury witnesses Katherine Olejnik and Matthew Duran to end their confinement for civil contempt. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149, Dkt. # 35. For the reasons stated below, the court GRANTS both motions and orders that Ms. Olejnik and Mr. Duran are to be released from custody no later than 4:00 p.m. on February 28, 2013.

II. BACKGROUND

One or more grand juries empaneled in the United States District Court for the Western District of Washington subpoenaed Katherine Olejnik and Matthew Duran to provide testimony related to an investigation. Both witnesses refused to answer at least some of the grand jury's questions. At a hearing on September 13, 2012, the court held Mr. Duran in civil contempt and, at the Government's request, ordered him confined until he either agreed to testify or until the expiration of the grand jury's term. See 28 U.S.C. § 1826. The court ordered a status hearing for Mr. Duran on September 26, at which time

ORDER -- 1

1 he confirmed his refusal to testify and declined the court's offer to periodically hold
2 status hearings. At a September 27 hearing, the court found Ms. Olejnik in civil
3 contempt and ordered her confined until she either agreed to testify or until the expiration
4 of the grand jury's term. *See id.* Both witnesses unsuccessfully appealed the court's
5 contempt findings. Both witnesses remain confined at the Federal Detention Center in
6 SeaTac.

7 After five months of confinement, both witnesses reiterate their refusal to answer
8 the grand jury's questions, but both ask the court to release them on the ground that
9 continued confinement will not coerce their testimony.

10 III. ANALYSIS

11 When a witness unlawfully refuses to answer questions from a grand jury, a court
12 has authority to declare her in civil contempt. *Shillitani v. United States*, 384 U.S. 364,
13 370 (1966). In those cases, the purpose of confinement following a finding of civil
14 contempt is to coerce the witness's testimony. *Id.* at 371. The confinement must end, for
15 example, when the term of the grand jury expires (because the witness cannot testify
16 before a grand jury that does not exist), or when the witness chooses to testify. *Id.*

17 Due process also demands, however, that the court end confinement where it is
18 substantially likely that the witness's confinement is no longer coercive. *Lambert v.*
19 *Montana*, 545 F.2d 87, 91 (9th Cir. 1976). Confinement without the possibility of
20 coercing testimony is purely punitive, and falls within the realm of criminal law. *Id.* at
21 90. So far as the court is aware, the Government has not charged either Ms. Olejnik or
22 Mr. Duran with criminal contempt.

23 Several federal courts of appeal, including the Ninth Circuit, have offered
24 instruction on determining whether confinement for civil contempt has ceased to be
25 coercive. Each of them requires a court to conduct an individualized assessment of
26 whether the contemnor is likely to testify. *E.g., SEC v. Elmas Trading Corp.*, 824 F.2d

1 732, 733 (9th Cir. 1987); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re*
2 *Crededio*, 759 F.2d 589, 592 (7th Cir. 1985). The burden is on the contemnor to
3 persuade the court. *Simkin*, 715 F.2d at 37; *In re Grand Jury Investigation (Braun)*, 600
4 F.2d 420, 425 (3d Cir. 1979). Acknowledging that the Recalcitrant Witness Statute
5 places an eighteen-month limit on confinement for civil contempt, *see* 28 U.S.C.
6 § 1826(a), some courts urge reluctance in finding that confinement for fewer than
7 eighteen months has lost its coercive character. *Braun*, 600 F.2d at 427 (“[W]e are
8 reluctant to conclude, in the absence of unusual circumstances, that, as a matter
9 cognizable under due process, confinement for civil contempt that has not yet reached the
10 eighteen-month limit has nonetheless lost its coercive impact and become punitive.”); *see*
11 *also Simkin*, 715 F.2d at 37. All of these courts recognize, however, that a trial court has
12 discretion to decide whether periods of confinement of fewer than 18 months have lost
13 their power to coerce. *Elmas Trading*, 824 F.2d at 733; *Simkin*, 715 F.2d at 38 (“[W]e
14 think a district judge has virtually unreviewable discretion both as to the procedure he
15 will use to reach his conclusion, and as to the merits of his conclusion.”); *Braun*, 600
16 F.2d at 428; *Crededio*, 759 F.2d at 591.

17 Both Ms. Olejnik and Mr. Duran have provided extensive declarations explaining
18 that although they wish to end their confinement, they will never end their confinement
19 by testifying. The court finds their declarations persuasive. They have submitted to five
20 months of confinement. For a substantial portion of that confinement, they have been
21 held in the special housing unit of the Federal Detention Center at SeaTac, during which
22 they have had no contact with other detainees, very little contact even with prison staff,
23 and exceedingly limited ability to communicate with the outside world. Mr. Duran was
24 confined in the special housing unit for the first two weeks of his confinement, was
25 placed there again on December 27, and has remained there since. Ms. Olejnik spent the
26 first six days of her confinement in the special housing unit, was placed there again on

1 December 27, and remained there at least through February 12. The Government states
2 that she has recently been returned to general population. The Government does not
3 dispute the witnesses' assertions that confinement in the special housing unit entails 23
4 hours of solitary confinement in their cells and an hour of solitary time alone in a larger
5 room each day, a single fifteen-minute phone call each month (as opposed to five hours
6 of monthly phone time for detainees outside the special housing unit), and exceedingly
7 limited access to reading and writing material. Their physical health has deteriorated
8 sharply and their mental health has also suffered from the effects of solitary confinement.
9 Their confinement has cost them; they have suffered the loss of jobs, income, and
10 important personal relationships. They face the possibility of criminal convictions for
11 contempt. Ms. Olejnik plausibly explains, moreover, that she would face ostracism
12 within her community of friends if she were to testify, based on the experience of another
13 grand jury witness within her community who she believes chose to testify rather than
14 face continued confinement. Both she and Mr. Duran have nonetheless refused to testify.

15 The Government rebuts none of the assertions in Ms. Olejnik's or Mr. Duran's
16 declarations. The Government suggests no reason to disbelieve those assertions. The
17 Government suggests no particular reason for the court to conclude that there is a
18 substantial likelihood either witness will testify if the court continues their confinement.
19 Indeed, the court queries whether it can characterize the Government's opposition to their
20 motions as an opposition to their requests for release. The Government merely insists
21 that their written statements are insufficient to carry their burden, and that the court
22 should "hear from [each witness] and others to assess whether [he or] she has established
23 a due process violation."

24 The court finds no need to have the witnesses confirm their written statements at a
25 hearing. There is no reason to suspect their testimony at a hearing would be any different
26 (with respect to the central inquiry relevant to their release). The Government does not

1 suggest that the witnesses will testify differently, or will offer additional testimony
2 relevant to the coercive effective of their continued confinement. The court has observed
3 both Ms. Olejnik and Mr. Duran in their prior appearances before the court. Whatever
4 the merits of their choices not to testify, their demeanor has never given the court reason
5 to doubt their sincerity or the strength of their convictions. Courts have recognized that a
6 trial court need not follow any particular procedure when conducting the individualized
7 inquiry relevant to the release of a contemptuous witness. *E.g., Simkin*, 715 F.2d at 38
8 (“[W]e think a district judge has virtually unreviewable discretion both as to the
9 procedure he will use to reach his conclusion, and as to the merits of his conclusion.”);
10 *Braun*, 600 F.2d at 428 (finding no need for evidentiary hearing to assess coercive nature
11 of continued confinement).

12 The court cannot rule out all possibility that continued confinement would
13 convince the witnesses to testify, but it is not required to. The witnesses face
14 confinement that could last another thirteen months, and there is always the chance that
15 additional confinement will break the resolve of any contemnor. For these witnesses,
16 however, their resolve appears to increase as their confinement continues. Each of them
17 points out that to testify now would mean that the past five months of their confinement
18 was for naught. That conviction is unlikely to lessen as their confinement goes on.

19 Although the Government does not bear the burden here, the court notes that it has
20 not provided any evidence that continued confinement is likely to coerce testimony. It
21 has instead relied on the generalized notion that lengthier confinement is more coercive
22 than a shorter term of confinement. The court does not doubt the truth of that proposition
23 as a general matter, but it finds that Ms. Olejnik and Mr. Duran have shown that it no
24 longer applies to them.

25 The witnesses and the Government also invite the court to consider arguments
26 specific to the grand jury investigation at issue. The witnesses argue, for example, that

1 any testimony they could offer would be, at best, tangential to the investigation. They
2 contend that other jurisdictions have charged people for what the witnesses believe are
3 similar crimes without the need for tangential testimony. They also contend that the
4 duration of their confinement already exceeds the likely imprisonment of anyone who
5 might be convicted as a result of the grand jury's investigation. Each of these arguments,
6 however, strays from the court's central inquiry: are these witnesses likely to testify if
7 their confinement continues? The court observes, moreover, that the witnesses'
8 speculations about the grand jury investigation and its likely future course are a much
9 shakier foundation for their request for release than their personal statements about their
10 confinement, their principles, and the reasons that they will never provide testimony.

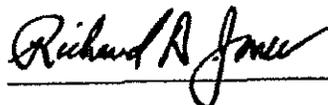
11 On this record, the court concludes that there is no substantial likelihood that
12 continued confinement would coerce Ms. Olejnik or Mr. Duran to testify. Although they
13 remain in contempt of court, the court finds no basis for their continued confinement.

14 IV. CONCLUSION

15 For the reasons previously stated, the court GRANTS the motions to terminate the
16 confinement of Ms. Olejnik and Mr. Duran. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149,
17 Dkt. # 35. The court also GRANTS Ms. Olejnik's motion to file an overlength brief. No.
18 12-GJ-145, Dkt. # 23.

19 The court orders that Ms. Olejnik and Mr. Duran are to be released from custody
20 no later than 4:00 p.m. on February 28, 2013. The court orders the Government to
21 provide the warden of the Federal Detention Center at SeaTac with notice of this order as
22 soon as possible.

23 DATED this 27th day of February, 2013.

24 

25
26 The Honorable Richard A. Jones
27 United States District Court Judge

28 ORDER - 6

APPENDIX D

FILED

UNITED STATES COURT OF APPEALS

JUN 20 2013

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: INDEX NEWSPAPERS LLC.

No. 13-71021

INDEX NEWSPAPERS LLC, d/b/a The
Stranger,

D.C. Nos. 12-GJ-145
12-GJ-149

Petitioner,

Western District of Washington,
Seattle

v.

ORDER

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, SEATTLE,

Respondent,

UNITED STATES OF AMERICA,

Plaintiff - Real Party in Interest,

KATHERINE OLEJNIK and MATTHEW
DURAN,

Defendants - Real Parties in Interest.

Before: HAWKINS and WATFORD, Circuit Judges.

This petition for a writ of mandamus raises issues that warrant a response.

See Fed. R. App. P. 21(b). Accordingly, within 14 days after the date of this order,

the real parties in interest shall file a response.

jp/MOATT

The district court, within 14 days after the date of this order, also may file a response if it so desires. Petitioner may file a reply within 5 days after service of the response(s). The petition, response(s) and any reply shall be referred to the next available motions panel.

APPENDIX E

NO. 13-71021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE INDEX NEWSPAPERS LLC.

INDEX NEWSPAPERS LLC (*dba The Stranger*),
Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Respondent,
UNITED STATES OF AMERICA,
Plaintiff – Real Party in Interest,
KATHERIN OLEJNIK and MATTHEW DURAN,
Defendants – Real Parties in Interest.

Writ Directed to
United States District Court for the Western District of Washington
No. 12-GJ-145 & No. 12-GJ-149

**MATTHEW DURAN'S RESPONSE
TO PETITION FOR A WRIT OF MANDAMUS**

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I. RELIEF SOUGHT

Petitioner, Index Newspapers LLC, dba *The Stranger*, has requested that this Court issue a writ of mandamus ordering the United States District Court for the Western District of Washington to unseal to the public the portions of the grand jury contempt files in *In re Matthew Duran*, Western District of Washington, No. 12-GJ-149 and *In re Katherine Olejnik*, Western District of Washington No. 12-GJ-145, that do not involve matters that are protected by Fed. R. Crim. P. 6. The order denying the motions is attached as Appendix A.

Matthew Duran, a Real Party in Interest, agrees that the information sought is of great public importance, involving a matter extensively covered in the local, national and international media. Mr. Duran also agrees that the information touches on the public's sacrosanct right to know.

Mr. Duran is also interested in the unsealing of the requested records for two more personal reasons. First, the hearings on Mr. Duran's Motion to Quash and the government's motion for civil contempt were closed to the public, regardless of Mr. Duran's Due Process right to have the portions of

the hearings that did not pertain to substantive grand jury matters conducted openly. But it is now possible to sort through and determine which portions of the record – if any – pertain to substantive grand jury matters. The record is complete, recorded, and can be reviewed and redacted if needed.

Second, whether or not the government intended for this to happen, Mr. Duran's grand jury appearance and the related court proceedings have affected his right to associate with the organizations and individuals that are important to him. Mr. Duran is interested in the release of these records because they will corroborate his claims that he is not a government informant, thereby alleviating this as a barrier to association.

Mr. Duran confirms, as he did in the court below, that he waives protection of his own privacy and consents to the disclosure of anything in the files to which the Petitioner seeks access. A copy of Mr. Duran's Declaration to this effect is attached to this Response as Appendix B. The District Court has acknowledged receipt of Mr. Duran's consent to disclosure and waiver of privacy. Appx. A at 11, n.4.