

HONORABLE RICHARD A. JONES

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

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.

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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.

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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
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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
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