

MAR 27 2013

No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

VS.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE  
OLEJNIK AND MATTHEW DURAN)

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

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**PETITION FOR A WRIT OF MANDAMUS**

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## **CORPORATE DISCLOSURE**

Index Newspapers LLC is a Washington limited liability company, duly organized and validly existing in the State of Washington. Index Newspapers LLC has two members: Quarterfold, Inc., an Illinois corporation, and Loaded-For-Bear Publishing Co., a Washington corporation. Neither Quarterfold nor LFB is a public company, and the shareholders of Quarterfold and LFB are all natural persons

Index Newspapers LLC, dba *The Stranger*, by and through its attorney, Neil M. Fox, a cooperating attorney with the National Lawyers Guild, seeks a writ of mandamus directed to the United States District Court for the Western District of Washington.

**1. RELIEF SOUGHT**

Petitioner, Index Newspapers LLC, dba *The Stranger*, requests 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 district court's orders denying Index Newspapers' motions below are located in Appendices A and B.

The information sought to be unsealed is of great public importance, involving a matter extensively covered in the local, national and international media, and therefore touches on the public's sacrosanct right to know.

## **2. ISSUES PRESENTED FOR REVIEW**

a. Does the public have a right to access portions of a grand jury file that do not involve matters enjoined to secrecy by Fed. R. Crim. P. 6(e)?

b. Where the district court recognized that much of the file in a grand jury recalcitrant witness case contained information that the public had the right to obtain, and in fact ordered that the petitioner be allowed access to the transcripts of portions of the contempt hearings, should the district court have unsealed the entire file and ordered the Government to select which portions of the file should then be redacted and sealed?

## **3. STATEMENT OF JURISDICTION**

This Court's jurisdiction is based on 28 U.S.C. § 1651 and F.R.A.P. 21.

## **4. STANDING**

"The press has standing to seek review by petition for writ of mandamus of orders denying access to judicial proceedings or documents."

*The Oregonian v. United States District Court*, 920 F.2d 1462, 1464 (9<sup>th</sup> Cir. 1990), *citing Seattle Times Co. v. United States District Court*, 845 F.2d 1513, 1515 (9<sup>th</sup> Cir. 1988). To vindicate the right of public access to

judicial records, federal courts have traditionally granted third parties standing to litigate access to judicial records:

Though generally invoked by news organizations, the common law right of access to judicial records and documents " is a general right held by all persons." [Citation omitted]It has been invoked, for example, by those with "a proprietary interest" in a document, by those who need a document "as evidence in a lawsuit," by citizens who "desire to keep a watchful eye on the workings of public agencies" and by news organizations seeking "to publish information concerning the operation of government."

*United States v. Business of Custer Battlefield Museum*, 658 F.3d 1188, 1192 n.4 (9<sup>th</sup> Cir. 2011) (citations omitted).

## **5. STATEMENT OF FACTS**

Index Newspapers LLC operates several independent newspapers in the Pacific Northwest, including *The Stranger*, a weekly paper based in Seattle. Beginning in the summer of 2012, a reporter for *The Stranger*, Brendan Kiley, wrote a series of stories about a grand jury sitting in the Western District of Washington that is investigating anarchist activities. The grand jury's focus reportedly has been on damage caused during a May Day demonstration in downtown Seattle on May 1, 2012 (including damage to the William Kenzo Nakamura United States Courthouse).

Several political activists in Portland and Olympia were subpoenaed to testify before the grand jury, and in the Fall of 2012, at least four individuals refused to testify and were incarcerated as recalcitrant witnesses. Some of the witnesses filed motions to quash the subpoenas and these motions were litigated prior to the witness' appearances before the grand jury. Two of these individuals -- Katherine Olejnik and Matthew Duran -- filed recalcitrant witness appeals to this Court, but apparently the Court denied the appeals.<sup>1</sup> Ultimately, the district court (the Hon. Richard Jones) released Mr. Duran and Ms. Olejnik from custody on February 27, 2013. App. C. At least one other individual remains in custody.

Petitioner Index Newspapers LLC, *dba The Stranger*, filed parallel motions with the district court to unseal portions of the grand jury files related to Ms. Olejnik and Mr. Duran that did not contain matters that were covered by the secrecy requirements of Fed. R. Crim. P. 6(e). The requested materials included the transcripts from the hearings related to the motions to quash, the transcripts from the contempt hearings, briefing by the witnesses, the electronic dockets on ECF/PACER, and the pleadings related

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<sup>1</sup> The appeals are themselves sealed, so Petitioner does not know the case numbers in this Court, but believes one docket number may be No. 12-35774.

to the motion to unseal itself. In support of the motions, Petitioner submitted copies of various press articles covering the proceedings, including those from both domestic and international sources. App. E. One of the attorneys for witness Duran submitted a declaration recounting how members of the public were actually excluded from one of the contempt hearings. App. J. The Government opposed unsealing the non-secret portions of the grand jury files, and even the briefing on the motions to unseal was placed in sealed files in the district court. App. F. Both Mr. Duran and Ms. Olejnik filed pleadings in support of the motions to unseal. App. I.

At the same time that Petitioner was litigating access to the *Duran* and *Olejnik* files, Petitioner filed another motion to unseal the search warrant file in *In re Search Warrant Issued on October 3, 2012*, Western District of Washington No. 12-MJ-534. In October 2012, the Government filed a search warrant affidavit related to searches stemming from the investigation of anarchists in the public court file. After two press outlets published stories about this affidavit, the Government obtained an order sealing the file. Petitioner successfully moved to unseal the search warrant file, with the district court placing the burden on the Government to propose

redactions. App. D (Magistrate's Report, Jan. 8, 2013; Order adopting report, January 30, 2013).

On February 4, 2013, in a single order issued for both the *Olejnik* and *Duran* cases, the district court granted Petitioner's motion in part and denied it in part. App. A. The court allowed Petitioner to obtain transcripts of the contempt portions of the hearings, and clarified that the witness' attorneys were free to distribute their pleadings. However, the district court denied the request to unseal the files and then have the Government selectively redact documents that related to secret materials. The district court acknowledged in its order that unsealing, with redactions, could be accomplished, finding that the files contain:

a mix of secret grand jury material, grand jury material that may have lost its secrecy, legal argument, banal information, and more. *It is perhaps possible to assess every document in these files to redact secret grand jury material and divulge the remainder.* The result would likely be an incomplete and sometimes indecipherable "court file" that would be as likely to mislead the public as to enlighten it. Nonetheless, neither the court nor the Government has an obligation to sift through these grand jury proceedings to determine what is secret and what is not.

Order at 11 (App. A) (emphasis added).

Petitioner filed a motion for reconsideration and a motion to alter or amend the judgment under local rules and Fed. R. Civ. P. 59(e). App. H. Petitioner argued that the Government and/or the court clerk's office should review the files and segregate or redact secret grand jury material and divulge the remainder. App. H. On February 27, 2013, the district court denied Petitioner's motion. App. B. Petitioner now seeks mandamus review in this Court.

6. **REASONS WHY THE WRIT SHOULD ISSUE**

A. *Introduction*

The district court recognized that the public has a right to access court documents and transcripts of those portions of the grand jury proceedings in a recalcitrant witness case that did not involve matters enjoined to secrecy under Fed. R. Crim. P. 6(e).<sup>2</sup> The district court further found that the files at issue contained material that was not secret, and that “[i]t is perhaps possible to assess every document in these files to redact secret grand jury material and divulge the remainder.” Order at 11 (App. A). Yet, the district court concluded that it would be too much trouble to “sift” through

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<sup>2</sup> Pertinent portions of the rule are reproduced in the statutory appendix (App. L).

the file and redact secret matters, and seal only the matters that were required to be sheltered from the public. Moreover, the district court concluded that somehow redactions “would be as likely to mislead the public as to enlighten it.” *Id.*

This conclusion is wrong and conflicts with what other courts have done in similar situations. In fact, the district court’s conclusions conflict with the order it itself issued in the parallel case, involving access to a search warrant affidavit.

Accordingly, the Court should grant the writ of mandamus and order that the files be unsealed, with appropriate redactions.

#### **B.     *The Standard for Mandamus Review***

As noted, this Court has given the press the right to seek mandamus review of order denying access to judicial proceedings or documents. Index Newspapers LLC, *dba The Stranger*, is an independent press weekly.

In *Bauman v. United States District Court*, 557 F.2d 650 (9<sup>th</sup> Cir. 1977), the Court delineated five factors to be evaluated in determining whether a writ of mandamus should be granted:

- (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an off-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

557 F.2d at 654-55. The *Bauman* court acknowledged that although these are helpful guidelines, but they do not always result in clear distinctions, and rarely if ever will a case arise where all of the guidelines point in the same direction or even where all of the guidelines are relevant or applicable. 557 F.2d at 655.

Petitioner -- a press entity -- can easily establish the first and second factors: "[T]he press lacks standing to bring a direct appeal and, therefore, must seek review of orders denying it access to judicial proceedings or documents by petition for writ of mandamus. . . . Moreover, without immediate review, the press will face a serious injury to an important first amendment right." *Oregonian*, 920 F.2d at 1465. "The fifth factor also weighs heavily in favor of issuance of the writ because the issue of press

access” to the contempt portions of the grand jury proceeding “is one of first impression in this circuit.” *Seattle Times*, 845 F.2d at 1515. The fourth factor weighs in favor of the writ because the district court’s refusal to order selective redaction evidences a culture of secrecy and distrust for the ability of the public to understand judicial proceedings that is likely to be repeated in other grand jury proceedings.

Finally, with regard to the third factor -- whether the district court’s decision is clearly erroneous as a matter of law -- the standard is whether this Court is convinced that “a definite and firm conviction that a mistake has been committed.” *United States v. United States District Court*, 694 F.3d 1051, 1057 (9<sup>th</sup> Cir. 2012). As set out below, this factor is established as well.

### **C. *The District Court’s Ruling Was Clearly Erroneous***

#### **I. The Right of Public Access to the Contempt Proceedings**

As this Court noted recently in *United States v. Business of Custer Battlefield Museum, supra*, there is a qualified public right of access to judicial records in criminal cases that arises under both the First Amendment and the common law. *Business of Custer Battlefield Museum*,

658 F.3d at 1192, *citing Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). To be sure, the right is qualified, and does not extend to all judicial documents that have traditionally been kept secret, such as grand jury transcripts and sealed search warrant materials in the midst of a pre-indictment investigation. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).<sup>3</sup>

On the other hand, the secrecy requirements involving grand jury transcripts and other pre-indictment materials do not extend so far as to cut-off public scrutiny of the “ministerial” aspects of a grand jury. *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 (9<sup>th</sup> Cir. 1982). Similarly, concerns about secrecy cannot be applied to ban those called before grand juries from discussing their own testimony, and such a ban would violate the First Amendment. *Butterworth v. Smith*, 494 U.S. 624 (1990).

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<sup>3</sup> The historic reason for the generalized secrecy surrounding grand jury investigations was to protect the grand jurors from the overreaching power of the Crown, and thus was a protection of liberty and freedom, rather than as a tool of government oppression. *See generally United States v. Smyth*, 104 F. Supp. 283, 289 & n.17 (N.D. Cal. 1952) (explaining historic roots of secrecy of grand jury as protection against the Crown during the Stuart years).

Thus, generalized concerns about the secrecy of grand jury proceedings do not require that contempt proceedings associated with so-called "recalcitrant witnesses" be held behind closed doors. In *In re Oliver*, 333 U.S. 257 (1948), the Supreme Court has held unconstitutional a secret summary contempt procedure, in a grand jury-type proceeding, in Michigan:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, [footnote omitted] to the excesses of the English Court of Star Chamber, [footnote omitted] and to the French monarchy's abuse of the *lettre de cachet*. [Footnote omitted] All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, [footnote omitted] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

333 U.S. at 268-70. *See also In re Rosahn*, 671 F.2d 690 (2d Cir. 1982) (vacating contempt citation because of improper closure of contempt proceeding); *In re Fula*, 672 F.2d 279, 283 (2d Cir. 1982) (same); *In re Grand Jury Matter*, 906 F.2d 78 (3d Cir. 1990) (same).

Accordingly, Fed. R. Crim. P. 6(e)(5) has an important limitation to its secrecy requirements: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." The 1983 Advisory Committee notes to this rule explain that this language was included because of concerns about the First Amendment right to public access and to the Fifth and Sixth Amendment rights of the person found in contempt. *See In Re Grand Jury Matter*, 906 F.2d at 86.

To be sure, because the civil contempt proceeding for a recalcitrant witness is protected not by the Sixth Amendment's public trial provision, but by the Due Process Clause of the Fifth Amendment, a witness can waive an objection to the closure of the contempt proceedings by not objecting. *Levine v. United States*, 362 U.S. 610 (1960). However, even here, closure is not appropriate where there is a public interest in keeping the proceedings open:

This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation

where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these.

362 U.S. at 619.

In contrast, this is an instance where public scrutiny is needed to ensure that First Amendment rights are not being abused. In response to damage at a federal courthouse, federal law enforcement agents burst into private homes and searched for “anti-government” literature. There have been public allegations that the grand jury is being used as a tool of harassment, and that the FBI was surveilling anarchists in the Pacific Northwest before windows were broken in downtown Seattle on May 1, 2012. Internationally, media accounts have compared the jailing of the recalcitrant witnesses to the incarceration in Russia of Pussy Riot members. J. Slattery, “America’s Pussy Riot,” *Al Jazeera*, Oct. 19, 2012. Armed guards and locked doors prevented supporters of the witnesses to enter the courtroom during the portions of the contempt hearings that were supposed to be open to the public. App. J. When the press attempted to litigate the issue of public access, the pleadings connected to that litigation itself were sealed and kept from public view.

Given these allegations, the public needs reassurance:

As for the historical need for secrecy to protect the grand jury from the Crown, the dynamics of modern federal prosecutions are different, with many citizens regarding the grand jury as weapon of the government rather than a shield from it. Shining some sunlight on the instant dispute reassures the public that someone is watching the watchers, [footnote omitted] and that this district's federal prosecutors are part of the solution, not part of the problem.

*In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, 575-76 (W.D. Wisc. 2007).<sup>4</sup>

Accordingly, under both the common law right of access to judicial documents and the First Amendment, the public, including the press, had the right to access the court files regarding the contempt citations related to Matthew Duran and Katherine Olejnik and their motions to quash the subpoenas, the transcripts of the contempt hearings, any briefing by the attorneys for the witnesses,<sup>5</sup> the electronic dockets on ECF/PACER, and briefing related to the motion to unseal these proceedings.

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<sup>4</sup> The omitted footnote reads:

*"Qui custodiet ipsos custodes?"* -- Juvenal's Satires.

246 F.R.D. at 576 n.2.

<sup>5</sup> Fed. R. Crim. P. 6 does not impose any secrecy requirements on witnesses or their attorneys, and nothing in the rules require briefing on behalf of recalcitrant witnesses to be kept secret.

**ii. Selective Redaction is the Remedy**

The district court agreed that the public had the right to access to material related to the contempt proceedings that did not contain grand jury information. Order at 7-8. The court therefore ordered that Petitioner could order the transcripts of the proceedings. Order at 12. Yet, the district court refused to unseal the files (or even the court docket) and redact the sensitive matters that are secret under Fed.R.Crim.Proc. 6(e). While recognizing that the files could be selectively redacted, the district court concluded that selective redaction would create an “incomplete” court file that would “as likely mislead the public as to enlighten it.” Order at 11.

Thus, the district court’s conclusion, with all due respect, is based upon a suspicion of the public’s understanding of the law, and implies that the public is simply unable to understand the secret nature of the proceedings and how to read a redacted file. This distrust of members of the public (which would include attorneys, reporters, and others well familiar with how to read court files, even those that are selectively redacted) is antithetical to the purposes of the First Amendment and the common law right of access to judicial documents.

On a practical level, the district court's order shields from the public much information that is not subject to the secrecy requirements of Fed. R. Crim. P. 6. Thus, Mr. Duran's and Ms. Olejnik's motions to quash the subpoenas, filed before their appearance before the grand jury, are still sealed, even though none of these documents could possibly contain references to the questions they were asked by the grand jury. The witnesses' briefing related to the contempt hearings, which the district court recognized was not subject to Fed. R. Crim. P. 6, is not accessible by the public, and even the pleadings related to the litigation over unsealing is still not accessible to the public.<sup>6</sup> Finally, the cases are not listed on ECF/PACER, so members of the public still can not even find out the general procedural history of the cases. Thus, ordinary members of the public who do not have the same access to legal counsel that newspaper have cannot find out the names of the court reporters and the dates of the

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<sup>6</sup> Notably, in the parallel motion to unseal the search warrant affidavit, Magistrate Judge Mary Alice Theiler's Report and Recommendation (12-MJ-534) noted that the Government had failed to provide any justification to keep its briefing under seal (App D at p.12 n.4). Judge Jones approved this report, so it is puzzling why he came to a different conclusion here and allowed the Government to keep secret its attempts to keep these files sealed.

contempt hearings so they could even attempt to order the transcripts of the contempt hearings.

Practically, it is not difficult for a court to unseal files and order appropriate redactions -- for instance, to order that the docket be unsealed, but that any information referring to secret matters be redacted from public viewing, or to have the Government determine which pages of its briefing should be redacted. For instance, in a case involving a witness in the so-called "Whitewater" scandal, Susan McDougal, the 8<sup>th</sup> Circuit specifically directed:

OIC [Office of Independent Counsel], working with our Clerk of Court, to substitute for our current sealed file a public file, redacted to exclude portions of the record that disclose substantive grand jury proceedings, supplemented by a filing under seal that contains all redacted portions of the briefs and record on appeal. After an unsealed public file has been created in this fashion, counsel for McDougal may challenge by motion OIC's decision as to the portions of our file which should remain under seal.

*In re Grand Jury Subpoena (Susan McDougal)*, 97 F.3d 1090, 1095 (8<sup>th</sup> Cir. 1996). Years later, Ms. McDougal complained that the clerk's office in the district court had in fact sealed too much and again asked for the file to be unsealed, the 8<sup>th</sup> Circuit rejected her arguments:

McDougal claims that the clerk of court has sealed the entire file, or at least more than Judge Wright or this court ordered. Based on the record it appears that neither the district court nor this court intended to seal the entire record related to the civil contempt proceeding. The sealed docket for Whitewater grand jury case number 96-0003 designates relatively few documents as "under seal" or "sealed." Instead, the majority lack a designation or are classified as "public access." It nevertheless appears that all or at least most of the documents have been placed under seal. McDougal did not, however, request the district court to undertake an in camera review of the sealed record to determine if any materials were sealed in error and should be made accessible or if all must remain under seal. That would have been the appropriate place to initiate such a request rather than in the court of appeals.

*United States v. McDougal*, 559 F.3d 837, 841 (8<sup>th</sup> Cir. 2009). *See also In re Grand Jury Proceedings, CF*, No. 09-3938 (8<sup>th</sup> Cir. 2/25/10 & 3/31/10) (unpublished) (involving grand jury recalcitrant witness appeal where the court ordered that the file be partially opened to the public -- "We therefore grant Regan's motion and direct the government to submit proposed redactions to the district court within twenty one days. We also remand this matter to the district court for it to oversee the redaction process and rule on the government's proposals as well as any objections by Regan and petitioner.") & *In the Matter of the Appearance and Testimony of a Grand Jury Witness*, 3:09mc0004 (S.D. Iowa, 3/19/10) (unpublished) (App. K).

In fact, as noted above, when ordering that a sealed search warrant affidavit be unsealed, Judge Jones specifically approved of a procedure by which the Government proposed redactions of the unsealed document. *In re Search Warrant Issued on October 3, 2012*, Western District No. 12-MJ-534 (App. D). The district court's own orders in a parallel case demonstrates that selected redactions is a workable way of balancing the need for secrecy in grand jury matters and the public's right to know what has taken place in cases of intense public interest.

In the search warrant case, not only did the district court properly place the burden of narrow redaction on the government, that is what the Western District of Washington's Local Rules require, in accord with the predominant practice in most districts around the country. Western District of Washington Local Civil Rule 5(g) provides in part

There is a strong presumption of public access to the court's files. This rule applies in all instances where a party seeks to overcome the policy and the presumption by filing a document under seal.

(1) A party must explore all alternatives to filing a document under seal. . . .

. . .

(5) Only in rare circumstances should a party file a motion, opposition, or reply under seal. A party who cannot avoid including confidential information in a motion, opposition, or reply must follow this procedure:

(A) the party shall redact the confidential information from the motion, opposition, or reply and publicly file the redacted motion, opposition, or reply; and

(B) the party shall file the unredacted motion, opposition, or reply under seal, accompanied by a motion or stipulated motion to seal the unredacted motion, opposition, or reply in compliance with part (3) above.

This general policy puts the burden on the party who seeks to shield information from the public to redact the document. This is the norm, not the exception, and does not lead to confusion by the public or an undue burden on the party whose job it is to propose redactions.

The district court cited to *In re Sealed Case*, 199 F.3d. 522 (D.C. 2000). However, that case simply upheld a district court's denial of a press request for a generic rule requiring public docketing of *all* ancillary grand jury related matters. Yet, there was, at least, a local rule in the District of Columbia that provided a mechanism of unsealing grand jury matters. D.C. District Local Criminal Rule 6.1 provided:

papers, orders and transcripts of hearings subject to this rule, or portions thereof, may be made public by the court on its own motion or on motion of any person upon a finding that

continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

199 F.3d at 524.

The D.C. Circuit believed that this rule allowed the media to request a redacted public docket in any specific case, which would then allow for the exercise of discretion on a case-by-case basis where:

the District Court must duly consider the request and, if it denies the request, offer some explanation. The District Court's explanation must bear some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks.

199 F.3d at 527.

Thus, the district court's concern here about the possible burdens was misplaced. It is not uncommon, as the cited cases reflect, to allow for the partial unsealing of grand jury contempt files and the redaction of key documents that the Government believes contain grand jury secrets.

Moreover, to the extent the district recognized that the witnesses here are free to share their briefing, it does not make any sense, given their consent, to continue to seal *their* briefing from the public. In fact, this Court recently noted the 3d Circuit decision relied upon by the district court,

*United States v. Smith*, 123 F.3d 140 (3d Cir. 1997), and distinguished it on the basis that once “secret” materials are in the hands of third persons, there no longer is an interest in secrecy:

In *United States v. Smith*, after the government publicly released a sentencing memorandum that contained allegations of criminal conduct against uncharged individuals, the district court sealed the sentencing memorandum and denied a motion by various newspapers for access to the sentencing memorandum and the sealed briefs. 123 F.3d 140, 143, 145 (3d Cir. 1997). Consistent with our disposition of this case, the Third Circuit held that a motion by newspapers to access the released sentencing memorandum was moot because the newspapers “already possess[ed] it,” and rejected the newspapers’ claim to access the briefs because such access would “disclose additional confidential material.” *Id.* at 146, 154. The court added, however, that “[e]ven if the dissemination by members of the public continues,” an order barring further disclosure of the material in the sentencing memorandum “will at least narrow that dissemination.” *Id.* at 155. This statement is dictum and does not undermine our commonsense conclusion that once a fact is widely available to the public, a court cannot grant any “effective relief” to a person seeking to keep that fact a secret. We doubt, because of the information’s availability on the internet, that enjoining further disclosure by the parties will “narrow [any further] dissemination.”

*Doe v. Reed*, 697 F.3d 1235, 1239-40 (9<sup>th</sup> Cir. 2012). Because the district court’s Order in these cases recognized that any grand jury secrets in the hands of third parties (i.e. the witnesses, their attorneys) can be freely

disseminated, the argument for continued secrecy loses force and thus further secrecy is not required.

Accordingly, the district court's ruling rejecting selective redaction was clearly erroneous and warrants mandamus relief.

## **7. CONCLUSION**

The district court's decision to unseal the transcripts of the two contempt hearings solely for a newspaper is imperfect relief. The public will not be confused by selective redaction, but instead, by opening up non-secret portions of the record of grand jury cases to the public, the public will have a greater understanding of how their legal system works, and, perhaps, greater respect for the Rule of Law. There has been tremendous public attention to the allegations that anarchists damaged property in downtown Seattle, including a federal courthouse. Given this attention to the grand jury proceedings in these cases, this Court should issue a writ of mandamus to the district court to unseal the files (including the ECF docket, the briefing and transcripts) in the Olejnik and Duran cases, and order the Government to propose redactions.

Dated this 22<sup>nd</sup> day of March 2013.

Respectfully submitted,

/s/ Neil M. Fox

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**8.     STATEMENT OF RELATED CASES**

Katherine Olejnik and Matthew Duran filed recalcitrant witness appeals in this Court in the Fall of 2013. The files are sealed and the docket numbers are not accessible through PACER, although counsel thinks one number is 12-35774.

**9. CERTIFICATE OF COMPLIANCE**

I certify that this Petition for a Writ of Mandamus complies with F.R.A.P. 21 and 32(c)(2), and Circuit Rules 21-1 and 21-2.

I further certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains 5271 words (not including the corporate disclosure statement, tables, statement of related cases and this certificate).

/s/ Neil M. Fox

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No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

vs.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE OLEJNIK  
AND MATTHEW DURAN)

---

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

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**APPENDICES A-D**

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## ***APPENDICES***

- A. Order Granting and Denying Motion to Unseal, 2/4/13
- B. Order Denying Reconsideration, 2/27/13
- C. Order Releasing Duran and Olejnik, 2/27/13
- D. Order (1/30/13) and Magistrate Report (1/8/13) re Search Warrant
- E. Motions to Unseal Olejnik and Duran Files
- F. Government's Opposition to Motion to Unseal
- G. Reply Regarding Motion to Unseal
- H. Motions for Reconsideration
- I. Declarations of Matthew Duran and Katherine Olejnik
- J. Declaration of Kimberly Gordon
- K. Unpublished Opinions and Orders from the 8<sup>th</sup> Circuit
- L. Pertinent Statutes and Rules

## 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,

CASE NO. 12-GJ-145

Grand Jury Witness,

IN RE MATTHEW DURAN,

CASE NO. 12-GJ-149

Grand Jury Witness.

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,<sup>1</sup> 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 <sup>1</sup> 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.<sup>2</sup> 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  
25 <sup>2</sup> The Stranger attempts to place the burden on the Government to justify the sealing of these  
26 files, relying on Local Civil Rule 5(g). That rule applies only in proceedings to which there is a  
27 presumption of public access. Local Criminal Rule 6(j)(2) authorizes the filing under seal of "all  
28 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.<sup>3</sup> 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.<sup>4</sup> 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 <sup>3</sup> 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 <sup>4</sup> 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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## 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,

CASE NO. 12-GJ-145

Grand Jury Witness,

IN RE MATTHEW DURAN,

CASE NO. 12-GJ-149

Grand Jury Witness.

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

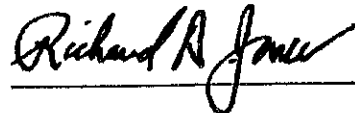
1 court opened Mr. Duran's initial contempt hearing to the public. The February 1 order  
2 says nothing about what happened outside the courtroom on the date in question, in part  
3 because it was (and is) immaterial to the order, and in part because the court summarized  
4 only what took place within 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

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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## APPENDIX C

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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,

CASE NO. 12-GJ-145

Grand Jury Witness,

IN RE MATTHEW DURAN,

CASE NO. 12-GJ-149

Grand Jury Witness.

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

## APPENDIX D

HONORABLE RICHARD A. JONES

FILED ENTERED  
LODGED RECEIVED

JAN 30 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 SEARCH WARRANT ISSUED ON  
OCTOBER 3, 2012.

CASE NO. 12-MJ-534  
ORDER

This matter comes before the court on a Report and Recommendation ("R&R") from the Honorable Mary Alice Theiler, United States Magistrate Judge. Dkt. # 8. The R&R recommends that the court grant the motion of Index Newspapers, LLC (doing business as "The Stranger"), to unseal the file in this case. The R&R permits the Government to redact the names of suspects named in the search warrant application materials that are the subject of the case, as well as other specific information that might compromise the underlying investigation.

The Stranger has not objected to the R&R.

The Government has responded to the R&R by submitting versions of the search warrant application (including the affidavit supporting that allegation) as well as the search warrant return in which it has redacted the names of suspects as well as certain other identifying information. Dkt. # 9. The other information consists of several addresses, a few license plate numbers, and serial numbers and other specific identifying information for certain devices that were the subject of the application.

The court finds that the Government's redactions are consistent with the R&R.

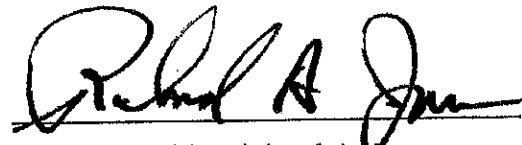
ORDER - 1

1 The court orders as follows:

- 2 1) The court ADOPTS the R&R (Dkt. # 9) and grants The Stranger's motion to  
3 unseal the file in this case (Dkt. # 5), subject to the conditions stated in the  
4 R&R.
- 5 2) The clerk shall UNSEAL the file in this case, but shall SEAL the following  
6 specific documents:
- 7 a) the unredacted search warrant application (Dkt. # 1);  
8 b) the unredacted search warrant return (Dkt. # 2).
- 9 3) The clerk shall ensure that a copy of this order is delivered by electronic mail  
10 to Neil Fox, attorney for The Stranger.
- 11 4) The clerk shall ensure that Judge Theiler receives notice of this order.

12 The court notes that the Stranger has also filed motions to unseal the case files in  
13 two grand jury proceedings (In re Duran, No. 12-GJ-149; In re Olejnik, No. 12-GJ-145).  
14 The court will rule on those motions by the end of this week.

15 Dated this 30<sup>th</sup> day of January, 2013.

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18 The Honorable Richard A. Jones  
19 United States District Court Judge  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

)  
) CASE NO. 12-MJ-534-RAJ  
)  
)  
) IN RE SEARCH WARRANT ISSUED ON  
) OCTOBER 3, 2012  
) REPORT AND RECOMMENDATION  
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INTRODUCTION

This matter comes before the undersigned on a motion filed by Index Newspapers LLC dba *The Stranger* to unseal the search warrant affidavit and related materials filed in this case. (Dkt. 5.) The Government opposes the motion to unseal. (Dkt. 6.) Now, having considered the motion and all papers filed in support and opposition, along with the remainder of the record, the Court finds oral argument unnecessary and recommends the motion to unseal be GRANTED and the search warrant materials unsealed in a redacted form.  
///

01 BACKGROUND

02 The Government obtained a search warrant in connection with the investigation into  
03 vandalism at the William Kenzo Nakamura United States Courthouse on May 1, 2012. The  
04 search warrant identified six individuals as anarchists suspected of participating and/or  
05 conspiring in the vandalism, and authorized the search of various electronic devices seized  
06 during searches conducted in Portland, Oregon. The Government filed the search warrant  
07 return on October 17, 2012 and, owing to the absence of a motion to seal due to an oversight on  
08 the part of the Government, the docket was unsealed. Beginning on the following day, the  
09 *Seattle Post-Intelligencer* and the *Seattle Times* published reports describing the content of the  
10 search warrant affidavit, but not naming the identified suspects. (Dkt. 5, Ex. 1.) (*See also id.*,  
11 Ex. 2 (articles from other new sources referencing the *Seattle Times* reporting).) On October  
12 19, 2012, the Government filed and the Court granted a motion to seal the file.

13 Brendan Kiley, a reporter with *The Stranger*, has written several stories about the grand  
14 jury investigation into the vandalism and related contempt proceedings. (*Id.*, Ex. 3.) Through  
15 filing the motion under consideration, Kiley and *The Stranger* seek to make available to the  
16 public the search warrant materials previously filed publicly in this matter.

17 DISCUSSION

18 There is a presumption of public access to judicial records and documents. *Nixon v.*  
19 *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this  
20 country recognize a general right to inspect and copy public records and documents, including  
21 judicial records and documents.”). *See also* Local Civil Rule (LCR) 5(g) (“There is a strong  
22 presumption of public access to the court’s files.”). The right of public access includes “a

01 common law right 'to inspect and copy public records and documents, including judicial  
02 records and documents,' and 'a First Amendment right of access to criminal proceedings' and  
03 documents therein[.]” *United States v. Bus. of the Custer Battlefield Museum*, 658 F.3d 1188,  
04 1192 (9th Cir. 2011) (quoting *Nixon*, 435 U.S. at 597, and *Press-Enter. Co. v. Superior Court*,  
05 478 U.S. 1, 8 (1986)). The right of public access “‘is a general right held by all persons[.]’”  
06 and “has been invoked, for example, by those with ‘a proprietary interest’ in a document, by  
07 those who need a document ‘as evidence in a lawsuit,’ by citizens who ‘desire to keep a  
08 watchful eye on the workings of public agencies’ and by news organizations seeking ‘to publish  
09 information concerning the operation of government.’” *Id.* at 1192 n.4 (discussing within the  
10 context of the common law right of access) (quoting *In re EyeCare Physicians of Am.*, 100 F.3d  
11 514, 517 (7th Cir. 1996), and *Nixon*, 435 U.S. at 597-98)).<sup>1</sup>

12 The public’s right of access is qualified, not absolute. *Id.* at 1192; accord *Nixon*, 435  
13 U.S. at 597. See also *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940,  
14 946 (9th Cir. 1998) (“Of course, there is no right of access which attaches to all judicial  
15 proceedings, even all criminal proceedings.”). Access may be denied where outweighed by a  
16 compelling governmental interest, and narrowly tailored to serve that interest. *Times Mirror*  
17 *Co. v. United States*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989) (cited sources omitted). The

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18  
19 1 The Government does not dispute and the Court finds no basis for questioning either the  
20 standing of Kiley and *The Stranger* in seeking access to the sealed files, or the procedural mechanism  
21 utilized in that pursuit. See, e.g., *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778,  
22 780-84 (9th Cir. 1982) (recognizing public’s standing to assert limited right of access to grand jury  
records and the propriety of filing direct requests for disclosure to the court supervising a grand jury’s  
activities); *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009) (“Domestic press  
outlets unquestionably have standing to challenge access to court documents.”) (cited source omitted).  
See also LCR 5(g)(8) (“A non-party seeking access to a sealed document may intervene in a case for the  
purpose of filing a motion to unseal the document.”).

01 party seeking to file or maintain a document under seal bears the burden of showing compelling  
02 reasons overcoming the presumption of public access. *Kamakana v. City of Honolulu*, 447  
03 F.3d 1172, 1178 (9th Cir. 2006).

04       The decision as to access rests within the discretion of the district court, exercised with  
05 consideration of the facts and circumstances at issue. *Nixon*, 435 U.S. at 599. The Court  
06 weighs the interests of the public and government, looking to “considerations of experience  
07 and logic[.]” *Times Mirror Co.*, 873 F.2d at 1213, 1218-19 (in a First Amendment analysis,  
08 the Court looks for a historic tradition of public access, and whether public access would play a  
09 “significant positive role” in the process, while a common law analysis looks to a history of  
10 access and the existence of an important public need, or whether disclosure would “serve the  
11 ends of justice.”) (quoting *Press-Enter. Co.*, 478 U.S. at 8-9, and *United States v. Schlette*, 842  
12 F.2d 1574, 1581 (9th Cir. 1988)). In sealing or retaining a seal, the court must “base its  
13 decision on a compelling reason and articulate the factual basis for its ruling, without relying on  
14 hypothesis or conjecture.” *Kamakana*, 447 F.3d at 1179 (quoting *Hagestad v. Tragesser*, 49  
15 F.3d 1430, 1434 (9th Cir. 1995)).

16       “A narrow range of documents is not subject to the right of public access at all because  
17 the records have ‘traditionally been kept secret for important policy reasons.’” *Id.* at 1178. In  
18 *Times Mirror Co.*, the Ninth Circuit held that “members of the public have no right of access to  
19 search warrant materials while a pre-indictment investigation is under way.” 873 F.2d at 1211.  
20 *See also Press-Enterprise*, 478 U.S. at 10 (“[G]rand jury proceedings have traditionally been  
21 closed to the public and the accused.”); *Kamakana*, 447 F.3d at 1178 (no right of public access  
22 to grand jury transcripts). The Court found no historic tradition of public access to warrant

01 proceedings, that “public access would hinder, rather than facilitate, the warrant process and the  
02 government’s ability to conduct criminal investigations[,]” and that “the ends of justice would  
03 be frustrated, not served, if the public were allowed access to warrant materials in the midst of a  
04 pre-indictment investigation into suspected criminal activity.” *Id.* at 1214-19. The Court  
05 observed that suspects identified “might destroy evidence, coordinate their stories before  
06 testifying, or even flee the jurisdiction[,]” as well as potential injury to the privacy interests of  
07 identified individuals. *Id.*

08 Kiley and *The Stranger* (hereinafter collectively *The Stranger*) seek the public  
09 disclosure of search warrant materials pertaining to a pre-indictment investigation. Without  
10 more, this request would be foreclosed by Ninth Circuit law. *See id.* However, as argued by  
11 *The Stranger* and for the reasons described below, the circumstances at issue in this case  
12 warrant public access.

13 The search warrant materials were filed publicly and obtained by, at a minimum, two  
14 news sources, the *Seattle Times* and the *Seattle Post-Intelligencer*. Those sources wrote  
15 detailed articles describing the content of the search warrant materials (Dkt. 5, Ex. 1), and  
16 articles from a variety of other news sources followed (*id.*, Ex. 2 (reports from Q13 Fox News,  
17 HeraldNet, King5.com, KGW.com, SFGate, and RT)).

18 This case is distinguishable from *Times Mirror Co.* and requests for pre-indictment  
19 warrant materials never before revealed to the public. The search warrant materials at issue  
20 here were made available to the public and only later sealed. In such circumstances, the  
21 justification for continued secrecy is necessarily called into question. *See, e.g., Virginia Dep’t*  
22 *of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (interest in protecting

01 integrity of ongoing law enforcement investigation insufficient to override right of public  
02 access where the bulk of information under seal was already a matter of public knowledge); *In*  
03 *re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (holding that, where judge mistakenly  
04 named a target of a grand jury investigation in open court and attempted to enjoin reporters  
05 from disclosing the name of the target: “On the present record, . . . ‘the cat is out of the bag.’  
06 The district court did not close the hearing and the disclosure was made in the courtroom, a  
07 particularly public forum. Once announced to the world, the information lost its secret  
08 characteristic, an aspect that could not be restored by the issuance of an injunction to two  
09 reporters.”); *In re North*, 16 F.3d 1234, 1240-41 (D.C. Cir. 1994) (finding grand jury material  
10 widely reported on “lost its protected character[]” and stating: “Information widely known is  
11 not secret.”); *United States v. Loughner*, 769 F. Supp. 2d 1188, 1191-92 (D. Ariz. 2011) (noting  
12 Ninth Circuit recognition that “logic alone may be enough to establish a qualified right of  
13 access to court documents[,]” and finding changed circumstances rendered inapposite the bar  
14 on search warrant disclosure set forth in *Times Mirror, Co.*, which “was predicated on the need  
15 for secrecy during an investigation and before a final indictment [was] returned”) (citing *In re*  
16 *Copley Press*, 518 F.3d 1022, 1026 (9th Cir. 2008)).<sup>2</sup>

17 *The Stranger* persuasively argues that, because the search warrant materials have  
18 already been released and made the subject of extensive reporting, the “cat is out of the bag”  
19 and the public’s First Amendment and/or common law rights of access “come[] into play.” *In*  
20 *re Charlotte Observer*, 921 F.2d at 50. This is not to say that the Government does not raise

21  
22 <sup>2</sup> As noted by the Government, the request to unseal at issue in *Loughner* occurred post-indictment, not pre-indictment. 769 F. Supp. 2d at 1191-92.

01 valid concerns regarding disclosure of the search warrant materials. However, the  
02 Government fails to support the conclusion that the interest in maintaining the secrecy of the  
03 materials outweighs the public's right of access.

04       The Government argues the need to prevent disclosure of the search warrant materials  
05 in order to avoid interference with the ongoing investigation. It avers disclosure of the  
06 affidavit to "a few members of the press is only damaging to the extent that the press chooses to  
07 report the details of the affidavit." (Dkt. 6 at 3.) The Government maintains the press  
08 coverage has been very limited, omitting numerous details, including the names of the suspects  
09 and other details allowing for both suspect identification and a roadmap of the evidence  
10 compiled in the investigation to date. It rejects *The Stranger's* suggestion that the suspects are  
11 likely aware they are under investigation as mere speculation, and further denies that redaction  
12 of the suspects' names will remedy potential harms, noting their identities could be discerned  
13 through other information, and contending the affidavit includes far more sensitive material  
14 than the suspects' names. The Government avers that disclosure of the affidavit could  
15 interfere with the investigation by causing suspects to flee or destroy evidence, or result in the  
16 contamination or otherwise affect the testimony of potential witnesses. It distinguishes case  
17 law relied upon by *The Stranger* as not involving, as here, information remaining secret to the  
18 general public and (to its knowledge) to the suspects and witnesses involved in the  
19 investigation. Finally, the Government stresses that it is not the Court's job to ensure fairness  
20 or a level playing field among newspapers, noting *The Stranger* had as much access to the  
21 search warrant materials as any other newspaper or media organization during the period of  
22 public release.

01 It should first be noted that the right of the media to access information is co-extensive  
02 and does not exceed the right of the public. *Virginia Dep't of State Police*, 386 F.3d at 575 n.5.  
03 *Accord Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011). While the Court need not ensure a  
04 level playing field between media outlets, it cannot ignore the First Amendment and common  
05 law rights of access afforded to the public as a whole.

06 The Government here unsuccessfully seeks to minimize the relevance of the fact that  
07 the search warrant materials were filed in the public record. If the Court were to deny the  
08 pending motion, the search warrant materials would remain sealed in only an artificial and  
09 selective sense. That is, they would remain sealed only to those who did not access the  
10 materials when filed publicly in this case. As other courts have found, "[o]nce announced to  
11 the world, the information lost its secret characteristic, an aspect that [can] not be restored" by  
12 simply re-sealing the information. *In re Charlotte, Observer*, 921 F.2d at 48-50. *See also In*  
13 *re North*, 16 F.3d at 1244-45 ("As one member of this panel observed in a far different context,  
14 it 'is impossible' to 'remove[] leaked material from the news media and cram [] it back into  
15 grand jury secrecy.' Just so here.") (quoting *Barry*, 865 F.2d at 1328 (Sentelle, J., dissenting)).

16 The fact that only portions of the search warrant materials have been introduced to the  
17 public as a whole does not render inapposite the case law relied upon by *The Stranger* and the  
18 Court herein. For instance, in *In re Charlotte, Observer*, the Court found no basis for an  
19 injunction prohibiting disclosure of a suspect's name where the two reporters made privy to that  
20 information had not as yet reported the name publicly. 921 F.2d at 48-50. What mattered to  
21 the Court was that the reporters had, as members of the press and the public, obtained  
22 knowledge of that information. *Id.* at 50. Also, contrary to the suggestion of the

01 Government, the Court in *Virginia State Dep't of Police* considered relevant the fact that the  
02 "bulk of the information" under seal had already been publicly revealed, it did not limit the  
03 unsealing of information to only that previously publicly revealed. 386 F.3d at 579-80  
04 (emphasis added). *See also id.* at 580-81 (finding no basis to keep a portion of a hearing  
05 transcript under seal where the government failed to offer any reason specific to that document,  
06 but remanding for consideration of four documents where neither the district court, nor the  
07 parties offered sufficient explanation for their positions).

08       It further remains entirely unclear how many entities or individuals obtained copies of  
09 the search warrant materials prior to their sealing. While the contention of wider disclosure is  
10 perhaps speculative, the Government is likewise incapable of providing assurance as to the  
11 extent of disclosure.

12       It is equally speculative to conclude that retaining the documents under seal will avoid  
13 any further disclosure and, therefore, promote the Government's objective of preventing  
14 interference with the ongoing investigation. The investigation associated with the search  
15 warrant, as well as related contempt matters, is unquestionably newsworthy and of broad public  
16 interest, and is likely to remain that way for the remainder of the investigation. There is no  
17 basis for concluding that reporting on subsequent events will not reveal additional details from  
18 the search warrant materials, or that such details will not otherwise find their way into the  
19 public domain.

20       The Government also unsuccessfully downplays the details included in published  
21 reports to date. The news articles identify numerous details concerning the suspects, including  
22 that five of the six suspects drove in a rental car from Oregon to Seattle, stopping in Olympia on

01 the way. (*See, e.g.*, Dkt. 5, Ex. 1.) The articles describe the investigation into the suspects'  
02 activities, including a May 3, 2012 search of "a known anarchist 'squat' – crash pad – where  
03 they recovered 'distinctive clothing' from some of the alleged conspirators that was observed  
04 being worn by members of the black bloc protesters in Seattle[.]" and a "trio of FBI searches  
05 July 25 in Portland – two homes and a storage shed – where they recovered clothing, phones  
06 and laptop computers[.]" (*Id.* at 6 (also noting the seizure of "five cellphones, six digital  
07 storage devices, two iPods and one camera"); *see also id.* at 3 (noting investigators seized "14  
08 pieces of electronics and 11 CDs[.]").) The articles quote language used in text messages  
09 recovered in the searches and provide partial descriptions of clothing worn by the suspects  
10 during the vandalism. (*See, e.g.*, Ex. 1 at 3, 6 ("I only cut the shirt in half becuse its [sic] not  
11 big enough,' one suspect wrote. 'If you can figure out two slightly small bandanas out of it,  
12 thatd [sic] be great.'"; "We are all OK,' a May 1 text about the protest from one activist reads.  
13 'It was awesome.'") and Ex. 1 at 6 (describing surveillance-camera footage as allowing  
14 identification of "suspects based on clues: the white strip around one suspect's waist, the  
15 'fringe' of a shirt, the shape of a backpack."))

16 The amount of detail revealed in the news articles calls into question one of the primary  
17 justifications offered by the Government for keeping the materials under seal – confirmation of  
18 the suspects' identities and any potential ramifications thereof, such as flight of the suspects or  
19 destruction of evidence. The information contained in the search warrant materials cannot be  
20 viewed in a vacuum. The articles followed multiple searches conducted by law enforcement  
21 personnel. The suspects' clothing, cell phones, and other equipment and personal belongings  
22 were seized. The Court finds highly unconvincing the suggestion that the individuals under

01 suspicion remain ignorant of that fact, or would only flee or destroy evidence once they  
02 received confirmation through the unsealing of the search warrant materials.

03       In maintaining the need for continued secrecy, the Government also alludes to the  
04 presence of far more sensitive material than the suspects' names, describes the search warrant  
05 affidavit as a roadmap of the investigation, and points to the potential for contamination or  
06 some other effect on the testimony of potential witnesses. Maintaining the integrity of an  
07 ongoing law enforcement investigation is, without question, a compelling governmental  
08 interest. *Times Mirror Co.*, 873 F.2d at 1213, 1215. Indeed, had the search warrant materials  
09 not been inadvertently publicly filed, they would not now be subject to public access given that  
10 important interest. *Id.* However, while the various other justifications proffered by the  
11 Government may be valid in a general sense, the Government fails to provide the necessary  
12 specificity in relation to this particular case. *See, e.g., Virginia Dep't of State Police*, 386 F.3d  
13 at 579 (party asserting the need to protect the integrity of an ongoing investigation must provide  
14 "specific underlying reasons for the district court to understand how the integrity of the  
15 investigation reasonably could be affected by the release of such information."); *United States*  
16 *v. James*, 663 F. Supp. 2d 1018, 1021 (W.D. Wash. 2009) (finding justification for sealing only  
17 a portion of documents in question; noting that a "significant portion" of the documents  
18 contained "boilerplate language" and information otherwise a matter of public record, and  
19 concluding "the government has not shown how most of the information in the documents will  
20 compromise its active investigation. Rather, the assertion to that effect is vague.")

21       Courts can accommodate concerns regarding, *inter alia*, the protection of an ongoing  
22 investigation, privacy interests, and the need for secrecy in grand jury proceedings "by

01 redacting sensitive information rather than refusing to unseal the matters entirely.” *Bus. of the*  
02 *Custer Battlefield Museum*, 658 F.3d at 1195 n.5. *See also Loughner*, 769 F.2d at 1196  
03 (finding compelling need to redact limited portions of documents “likely to be inflammatory  
04 and difficult to forget, or inadmissible at trial.”) In this case, redaction of the names of the  
05 suspects is not opposed by *The Stranger* and would serve the important purpose of protecting  
06 the privacy interests of those individuals.<sup>3</sup> Further redactions could be warranted upon a  
07 showing that divulging specific sensitive material would affect the integrity of the investigation  
08 by, for example, allowing for the contamination of witness testimony. As it stands, however,  
09 the Court is unable to make such a determination. Any further findings as to redactions would  
10 need to follow a specific showing on the part of the Government.

### 11 CONCLUSION

12 In sum, the Court recommends the motion to unseal be GRANTED and the search  
13 warrant materials unsealed in a redacted form.<sup>4</sup> The names of the suspects should be redacted  
14 to protect the privacy interests of those individuals. *See also supra* n.3. The determination of  
15 whether further redaction is appropriate is contingent on a proper showing by the Government.

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17 3 The Court reaches this conclusion despite the fact that the Government did not identify  
18 protection of the privacy of the suspects as a compelling interest arguing against disclosure. *See Times*  
19 *Mirror Co.*, 873 F.2d at 1216 (finding absence of qualified right of public access to search warrant  
20 materials prior to indictment “reinforced by . . . the privacy interests of the individuals identified in the  
21 warrants and supporting affidavits[,]” explaining: “The Supreme Court has acknowledged that one of  
the reasons for maintaining the secrecy of grand jury proceedings is to ‘assure that persons who are  
accused but exonerated by the grand jury will not be held up to public ridicule.’ This concern applies  
with equal force here.”) (quoted and cited sources omitted). In addition, although also not addressed by  
the parties, photographs of the suspects and the names or nicknames of other individuals contained  
within the search warrant materials could also be subject to redaction for privacy purposes.

22 4 The Court also agrees with *The Stranger* as to an absence of justification for filing any of the  
briefing associated with this motion under seal.

01 A proposed order accompanies this Report and Recommendation.

02 DATED this 8th day of January, 2013.

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Mary Alice Theiler  
United States Magistrate Judge

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No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

vs.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE OLEJNIK  
AND MATTHEW DURAN)

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

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**APPENDIX E**

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## ***APPENDICES***

- A. Order Granting and Denying Motion to Unseal, 2/4/13
- B. Order Denying Reconsideration, 2/27/13
- C. Order Releasing Duran and Olejnik, 2/27/13
- D. Order (1/30/13) and Magistrate Report (1/8/13) re Search Warrant
- E. Motions to Unseal Olejnik and Duran Files
- F. Government's Opposition to Motion to Unseal
- G. Reply Regarding Motion to Unseal
- H. Motions for Reconsideration
- I. Declarations of Matthew Duran and Katherine Olejnik
- J. Declaration of Kimberly Gordon
- K. Unpublished Opinions and Orders from the 8<sup>th</sup> Circuit
- L. Pertinent Statutes and Rules

## APPENDIX E

THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re MATTHEW DURAN,  
Witness.

CAUSE NO. 12-GJ-00149

MOTION TO UNSEAL FILE

*Note on Motion Calendar: Nov. 16, 2012*

*ORAL ARGUMENT REQUESTED*

Index Newspapers LLC dba *The Stranger*, by and through its attorney, attorney, Neil M. Fox, a cooperating attorney with the National Lawyers Guild, seeks an order by this Court to unseal the file in the above-entitled case.

**1. FACTS IN SUPPORT OF MOTION**

A grand jury is currently sitting in the Western District of Washington investigating alleged criminal activities associated with anarchists in the Pacific Northwest. According to articles that have appeared in the press, based upon an unsealed search warrant affidavit, in April and May 2012, the FBI followed and surveilled suspected anarchists from Portland, Oregon, who allegedly traveled to Seattle where they participated in a protest in downtown Seattle on May Day. See M. O'Hagan & M. Carter, "Affidavit: Feds Trained Portland Anarchists, Link Them to Seattle's May Day," *Seattle Times*, Oct. 20, 2012; L. Pulkkinen,

1 "Agent: FBI Trailed Portland Anarchists Headed to May Day Riot," *Seattle Post-*  
2 *Intelligencer*, Oct. 18, 2012 (attached in Ex. 1). During the demonstration, individuals  
3 wearing black broke some windows of local businesses and also windows of the Nakamura  
4 Federal Courthouse. One person (Cody Ingram) was arrested for breaking the courthouse  
5 windows, pled guilty to a misdemeanor, and was sentenced to time served and ordered to pay  
6 \$500.00 in restitution. Ex. 2 (Complaint and Judgment in *United States v. Ingram*, MJ 12-  
7 230).

8 On July 25, 2012, in coordinated raids, carried out by the FBI Anti-Terrorism Task  
9 Force, federal law enforcement agents searched two homes and a storage shed in Portland,  
10 seizing clothing, phones and computers. The search warrant authorizing one of the searches  
11 directed law enforcement to seize "[a]nti-government or anarchist literature or material." Ex.  
12 3. Reports in the media have claimed that the FBI used flash grenades to stun the occupants  
13 during the searches. Ex. 1 at 16-22.

14 Parallel with the raids seeking anti-government literature, federal government  
15 subpoenas were served on a number of individuals, seeking testimony before the grand jury  
16 about anarchist activities in the Pacific Northwest. According to press accounts, the  
17 individuals themselves apparently were not suspected of causing the property damage in  
18 Seattle on May Day, but were asked questions about their acquaintances. Ex. 1. When at  
19 least two of the individuals refused to testify about First Amendment protected activities  
20 (Matthew Duran and Katherine Olejnik), they were given immunity, and when they persisted  
21 in maintaining their silence, they were found in contempt and jailed at the FDC-SeaTac, an  
22 incarceration the United States Attorney has labeled as "coercive." K. Murphy, Anarchists  
23 Targeted After Seattle's Violent May Day Protests," *Los Angeles Times*, Oct. 19, 2012 (Ex. 1  
24 at 9).

25 Mr. Duran and Ms. Olejnik filed recalcitrant witness appeals, under 28 U.S.C. §  
26 1826, but apparently the Ninth Circuit denied their appeals. At least one other individual,  
27 Leah Plante, also was found in contempt and jailed, but she has been released from custody.  
28

1 Both Mr. Duran and Ms. Olejnik have made public statements about their  
2 unwillingness to testify before the grand jury and have claimed that they are being persecuted  
3 for their political views. Ex. 1 at 10-11. Their cases have attracted much publicity both in  
4 the Pacific Northwest and throughout the world. Articles and news accounts about the  
5 incarceration of Mr. Duran and Ms. Olejnik can be found in the *Los Angeles Times*, *RT*  
6 *Television*, and *Al Jazeera*. Ex. 1.

7 Despite this public interest, the contempt proceedings in the district court in both cases  
8 have been sealed, and there have been claims over the Internet that portions of the contempt  
9 hearings have been closed to the public. Ex. 4. Counsel for both Mr. Duran and Ms. Olejnik  
10 have informed the undersigned counsel that their clients have no objection to the unsealing of  
11 the files in these cases.

## 12 2. STANDING AND PROCEDURAL MECHANISM

13 Brendan Kiley is a reporter with *The Stranger*, an independent news weekly in Seattle,  
14 owned by Index Newspapers, LLC. Mr. Kiley has written several stories about the grand jury  
15 investigation and the contempt findings. Ex. 5.

16 As will be explained below, there are two qualified rights of public access to judicial  
17 proceedings and records, under the First Amendment and the common law. *United States v.*  
18 *Business of Custer Battlefield Museum*, 658 F.3d 1188, 1192 (9<sup>th</sup> Cir. 2011). To vindicate the  
19 right of public access to judicial records, federal courts have traditionally granted third parties  
20 standing to litigate access to judicial records:

21 Though generally invoked by news organizations, the common law right of  
22 access to judicial records and documents "is a general right held by all  
23 persons." *In re EyeCare Physicians*, 100 F.3d at 517. It has been invoked, for  
24 example, by those with "a proprietary interest" in a document, by those who  
25 need a document "as evidence in a lawsuit," by citizens who "desire to keep a  
26 watchful eye on the workings of public agencies" and by news organizations  
27 seeking "to publish information concerning the operation of government."  
28 *Nixon*, 435 U.S. at 597-98

*Business of Custer Battlefield Museum*, 658 F.3d at 1192 n. 4.

Rather than starting a separate civil action, the Ninth Circuit has approved of a more  
informal procedure, by which members of the public who seek access to judicial records can  
simply file a petition or motion or file a request directed to the court that has control over the

1 records. *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 782-83 (9<sup>th</sup> Cir.  
2 1982), citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). See also Local  
3 CR 5(g)(6) (providing for motions to unseal by parties or an "intervenor").

4 Accordingly, Index Newspapers is filing this motion to unseal and to make available to  
5 the public, the court files involving the contempt proceedings against Mr. Duran and Ms.  
6 Olejnik.

### 7 3. ARGUMENT

8 As the Ninth Circuit noted last year in *Business of Custer Battlefield Museum*, there is  
9 a qualified public right of access to judicial records in criminal cases that arises under both the  
10 First Amendment and the common law. *Business of Custer Battlefield Museum*, 658 F.3d at  
11 1192, citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Press-Enterprise Co.*  
12 *v. Superior Court*, 478 U.S. 1, 8 (1986). To be sure, the right is qualified, and does not extend  
13 to all judicial documents that have traditionally been kept secret, such as grand jury transcripts  
14 and sealed search warrant materials<sup>1</sup> in the midst of a pre-indictment investigation.  
15 *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).<sup>2</sup>

16 On the other hand, the secrecy requirements involving grand jury transcripts and other  
17 pre-indictment materials do not extend so far as to cut-off public scrutiny of the "ministerial"  
18 aspects of a grand jury. *In re Special Grand Jury (for Anchorage, Alaska)*, *supra*. Similarly,  
19 concerns about secrecy cannot be applied to ban those called before grand juries from  
20 discussing their own testimony, and such a ban would violate the First Amendment.  
21 *Butterworth v. Smith*, 494 U.S. 624 (1990).

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24 <sup>1</sup> Because the search warrant that was briefly unsealed and released to the public, the "cat is out of the bag"  
25 and Index Newspapers will be filing a parallel motion to unseal that affidavit. See *In re Charlotte Observer*, 921 F.2d  
26 47 (4<sup>th</sup> Cir. 1990) (where court mistakenly named target of grand jury investigation in open court, information lost  
its secret character).

27 <sup>2</sup> The historic reason for the generalized secrecy surrounding grand jury investigations was to protect the  
28 grand jurors from the overreaching power of the Crown, and thus was a protection of liberty and freedom, rather than  
as a tool of government oppression. See generally *United States v. Smyth*, 104 F. Supp. 283, 289 & n.17 (N.D. Cal.  
1952) (explaining historic roots of secrecy of grand jury as protection against the Crown during the Stuart years).

1 Thus, generalized concerns about the secrecy of grand jury proceedings do not require  
2 that contempt proceedings associated with so-called recalcitrant witnesses be held behind  
3 closed doors. In *In re Oliver*, 333 U.S. 257 (1948), the Supreme Court has held  
4 unconstitutional a secret summary contempt procedure, in a grand jury-type proceeding, in  
5 Michigan:

6 The traditional Anglo-American distrust for secret trials has been  
7 variously ascribed to the notorious use of this practice by the Spanish  
8 Inquisition, [footnote omitted] to the excesses of the English Court of Star  
9 Chamber, [footnote omitted] and to the French monarchy's abuse of the *lettre*  
10 *de cachet*. [Footnote omitted] All of these institutions obviously symbolized a  
11 menace to liberty. In the hands of despotic groups each of them had become an  
12 instrument for the suppression of political and religious heresies in ruthless  
13 disregard of the right of an accused to a fair trial. Whatever other benefits the  
14 guarantee to an accused that his trial be conducted in public may confer upon  
15 our society, [footnote omitted] the guarantee has always been recognized as a  
16 safeguard against any attempt to employ our courts as instruments of  
17 persecution. The knowledge that every criminal trial is subject to  
18 contemporaneous review in the forum of public opinion is an effective restraint  
19 on possible abuse of judicial power.

20 333 U.S. at 268-70. See also *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982) (vacating contempt  
21 citation because of improper closure of contempt proceeding); *In re Fula*, 672 F.2d 279, 283  
22 (2d Cir. 1982) (same); *In re Grand Jury Matter*, 906 F.2d 78 (3d Cir. 1990) (same).

23 Accordingly, Fed. R.Crim. P. 6(e)(5) has an important limitation to its secrecy  
24 requirements: "Subject to any right to an open hearing in contempt proceedings, the court  
25 shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent  
26 necessary to prevent disclosure of matters occurring before a grand jury." The 1983 Advisory  
27 Committee notes to this rule explain that this language was included because of concerns  
28 about the First Amendment right to public access and to the Fifth and Sixth Amendment  
rights of the person found in contempt. See *In Re Grand Jury Matter*, 906 F.2d at 86.

To be sure, because the civil contempt proceeding for a recalcitrant witness is  
protected not by the Sixth Amendment's public trial provision, but by the Due Process Clause  
of the Fifth Amendment, a witness can waive an objection to the closure of the contempt  
proceedings by not objecting. *Levine v. United States*, 362 U.S. 610 (1960). However, even  
here, closure is not appropriate where there is a public interest in keeping the proceedings  
open:

1 This is not a case where it is or could be charged that the judge deliberately  
2 enforced secrecy in order to be free of the safeguards of the public's scrutiny;  
3 nor is it urged that publicity would in the slightest have affected the conduct of  
4 the proceedings or their result. Nor are we dealing with a situation where  
5 prejudice, attributable to secrecy, is found to be sufficiently impressive to  
6 render irrelevant failure to make a timely objection at proceedings like these.

362 U.S. at 619.

7 In contrast, this is a case where public scrutiny is needed to insure that First  
8 Amendment rights are not being abused. There have been allegations that federal law  
9 enforcement agents burst into private homes and searched for "anti-government" literature.  
10 There are other public allegations that the grand jury is being used as a tool of harassment,  
11 (i.e., Ex. 1 at 12-15) and that, based upon the briefly unsealed search warrant affidavit, the FBI  
12 was surveilling anarchists in the Pacific Northwest before windows were broken in downtown  
13 Seattle on May 1, 2012. Internationally, media accounts have compared the jailing of Mr.  
14 Duran and Ms. Olejnik to the incarceration in Russia of Pussy Riot members. J. Slattery,  
15 "America's Pussy Riot," *Al Jazeera*, Oct. 19, 2012 (Ex. 1 at 26-28).

Given these allegations, the public needs reassurance:

16 As for the historical need for secrecy to protect the grand jury from the  
17 Crown, the dynamics of modern federal prosecutions are different, with many  
18 citizens regarding the grand jury as weapon of the government rather than a  
19 shield from it. Shining some sunlight on the instant dispute reassures the public  
20 that someone is watching the watchers, [footnote omitted] and that this  
21 district's federal prosecutors are part of the solution, not part of the problem.

22 *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, 575-76 (W.D. Wisc. 2007).<sup>3</sup>

23 Accordingly, under both the common law right of access to judicial documents and the  
24 First Amendment, this Court should unseal the files in these cases and allow the public to  
25 have access to the court files regarding the contempt citations related to Matthew Duran and  
26 Katherine Olejnik, the transcripts of the contempt hearings, and any briefing.

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27 <sup>3</sup> The omitted footnote reads:

28 "*Qui custodiet ipsos custodes?*" -- Juvenal's Satires.

246 F.R.D. at 576 n.2.

1 To the extent the Government believes that any of these materials contain reference to  
2 sensitive matters that cannot be released to the public, the Government should redact those  
3 portions, subject to the approval of the Court. However, because the witnesses themselves  
4 have announced publicly their own positions about grand jury testimony, the witnesses and  
5 their attorneys are not bound by any requirements of secrecy, the contempt hearings are  
6 supposed to be public under *In re Oliver, supra*, and the Government has already released a  
7 key search warrant affidavit, the redactions should be kept to a minimum. As the D.C. Circuit  
8 said in a case involving the reporter Judith Miller:

9 Although not every public disclosure waives Rule 6(e) protections, one can  
10 safely assume that the "cat is out of the bag" when a grand jury witness -- in  
11 this case Armitage -- discusses his role on the CBS Evening News. [Citations  
omitted] We think the same is true with respect to the disclosures made by  
Novak, Cooper, and Rove's attorney.

12 *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007). *See also*  
13 *In re Oliver L. North*, 16 F.3d 1234, 1240-41, 1245 (D.C. Cir. 1994) (public interest in full  
14 disclosure of matters that have only been partially released previously -- "There must come a  
15 time, however, when information is sufficiently widely known that it has lost its character as  
16 Rule 6(e) material. The purpose in Rule 6(e) is to preserve secrecy. Information widely known  
17 is not secret.").

#### 18 4. CONCLUSION

19 For the foregoing reasons, the Court should unseal the files in *Duran* and *Olejnik*  
20 cases.

21 DATED this 2<sup>nd</sup>. day of November 2012.

22 Respectfully submitted,

23 /s/ Neil M. Fox  
24 NEIL M. FOX  
WSBA NO. 15277  
25 Attorney for Index Newspapers LLC dba *The Stranger*  
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**CERTIFICATION OF SERVICE**

I, Alexandra Fast, certify and declare that on November 5, 2012, I served the attached  
MOTION TO UNSEAL FILE on:

Counsel for the United States, Jenny Durkan and Michael Dion, by leaving a copy at  
the United States Attorney's Office, 700 Stewart St, Suite 5220, Seattle WA, 98101;

Counsel for Matthew Duran, by depositing a copy in the United States Mail with  
proper first-class postage attached in an envelope addressed to:

Kimberly Gordon  
Gordon & Saunders  
1111 Third Ave. Suite 2220  
Seattle WA 98101

I certify or declare under penalty of perjury that the foregoing is true and correct.

11/5/12 - SEATTLE, WA  
DATE AND PLACE

Alexandra Fast  
Alexandra Fast

Exhibit 1



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Sunday, October 28, 2012



## Agent: FBI tailed Portland anarchists headed to May Day riot

By LEVI PULKINEN, SEATTLEPI.COM STAFF  
Updated 4:39 p.m., Thursday, October 18, 2012

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Officers arrest a man that threw a glass jar and hit an officer in his face shield during a May Day rally on Tuesday, May 1, 2012 in downtown Seattle. The rally turned violent when black-clad protesters smashed windows and threw objects at police. One officer was hit in the head with a glass bottle. Photo: JOSHUA TRUJILLO / SEATTLEPI.COM



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As the investigation into the May Day riot continues, recently unsealed court documents show the FBI's interest in several suspects predated the political vandalism that swept downtown Seattle.

Asking for permission to search electronics seized at several Portland "squats," an FBI special agent outlined the allegations against six Portland anarchists suspected of traveling to Seattle for the May 1 demonstration.

Investigators contend the Portland residents were among the 50 or so black-clad protesters who smashed windows, clashed with police and attacked members of the media around downtown Seattle during the demonstration. An FBI surveillance team apparently followed the group north from Portland; investigators claim to have recovered text messages tying them to the violence.

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According to the special agent's statement, which was filed in U.S. District Court at Seattle and unsealed Thursday, five of the six protestors are suspected of damaging the William Kenzo Nakamura Courthouse during the May Day demonstrations. They were joined in the vandalism by seven other anarchists and several unaffiliated demonstrators.

Writing the court, the FBI agent suggested the protesters came to Seattle to destroy property.

"Although many anarchists are law-abiding, there is a history in the Pacific Northwest of some anarchists participating in property destruction and other criminal activity in support of their political philosophy," said the agent, who is assigned to the FBI Seattle office's terrorism task force.

The agent went on to name six Oregon residents suspected in the vandalism. All are anarchists known to Portland-area law enforcement; the FBI agent contends text messages and surveillance show they traveled to Seattle for the protest, and, in one case, described the day as "awesome."

None of the suspects identified in the recently unsealed search warrant have been charged publicly in the May Day vandalism. Seattlepi.com does not generally name suspects prior to charges being filed.

Well-publicized inquiries are currently before grand juries in Seattle and Portland, but no indictments against these suspects have been made public as yet.

Writing the court, the FBI agent contended Portland police have recovered clothing seen during the protests during the search of a residence associated with several of the suspects.

An FBI surveillance team followed five of the suspects north from Portland when they drove to Olympia the day before the May 1 riots, the FBI agent told the court. The surveillance team broke off after the group arrived in Olympia but text messages recovered by the FBI and rental car receipts indicate they arrived in Seattle the morning of May 1.

Requesting a warrant to examine 25 devices seized by investigators, the special agent asserted several vandals are suspected of destroying government property, crossing state lines to riot and conspiring to commit the same crimes.

Aware that some anarchists were preparing for "direct actions," police and federal officers prepared for vandalism around downtown Seattle, the agent told the court. In the riot that followed, a group of about 50 protesters dressed in black damaged banks, retail outlets and the Nakamura Courthouse, while also attacking police and members of the media.

Investigators contend 12 people dressed in black – what investigators describe as "black bloc" uniform – vandalized the courthouse, causing tens of thousands of dollars in damage. According to the FBI report, a vandal threw an incendiary device similar to a road flare at the courthouse.

Describing the vandals as "clearly coordinated," the agent told the court a wave of black-clad rioters would attack the building, then retreat to make way for another wave. While they were doing so, two other protesters unaffiliated with the anarchist group joined the destruction.

Having identified the Oregon suspects, investigators in Portland searched a Mississippi Avenue "squat" where several were believed to be living. The search was conducted as part of an investigation into vandalism of a Portland Key Bank in which one of the men is accused.

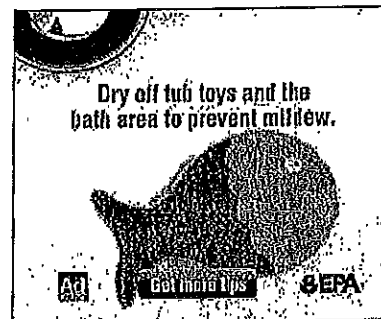
Text messages recovered in that search purportedly show the group planned to participate in a riot. They also show the protesters working out some basic logistics.

"I only cut the shirt in half because its not big enough," one suspect wrote. "If you can figure out two slightly small bandanas out of it, thatd be great."

In subsequent searches, investigators recovered other clothing they contend links the suspects to the vandalism. Investigators also seized 14 pieces of electronics and 11 CDs, which they've now thoroughly searched.

The search warrant was issued Oct. 3 by U.S. Magistrate Judge Mary Alice Theiler. The affidavit and warrant were unsealed Thursday.

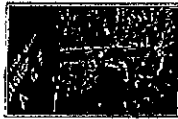
Check the Seattle 911 crime blog for more Seattle crime news. Visit seattlepi.com's home page for more Seattle news.



Levi Pulkkinen can be reached at 206-448-8348 or [levipulkkinen@seattlepi.com](mailto:levipulkkinen@seattlepi.com).  
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### Local News

Originally published Saturday, October 20, 2012 at 5:07 PM

## Affidavit: Feds trailed Portland anarchists, link them to Seattle's May Day

A federal affidavit says members of the FBI's Joint Terrorism Task Force tracked Portland anarchists to Seattle where they joined the May Day protest and allegedly attacked the federal courthouse.

By Maureen O'Hagan and Mike Carter

Seattle Times staff reporters

A grand-jury investigation. Five search warrants. Surveillance in two states and a review of hundreds of hours of videotape and photos. Not to mention the three witnesses jailed for refusing to testify.

That's the running toll so far in law enforcement's efforts to bring the weight of the federal criminal-justice system — including possible prison terms — on a group of black-clad vandals suspected of damaging a federal building in May in Seattle, according to a search-warrant affidavit.

The Oct. 3 affidavit, signed by a member of the FBI's Joint Terrorism Task Force, reveals the federal government began tracking a small group of dedicated anarchists in Portland in April. Agents followed members of the group as they first drove to Olympia in a rental car on April 30.

The crimes they are suspected of committing include conspiracy, destruction of government property and interstate travel with intent to riot, according to the 34-page document.

Authorities believe the anarchists were among about a dozen black-clad protesters who attacked the William Kenzo Nakamura U.S. Courthouse during the May Day protest, surging at the building with sticks, spray paint and at least one burning object, according to law enforcement.

The search warrant, which was mistakenly unsealed in U.S. District Court in Seattle on Thursday then quickly resealed, identifies six suspects, but none has been charged.

To Neil Fox, a criminal-defense lawyer who is president of the Seattle chapter of the National Lawyers Guild, the investigation is about much more than catching six vandals. He believes the damage to the courthouse is merely a "jurisdictional hook" to allow the feds to go after anarchists.

"I think there's a lot of bad feelings between law enforcement and the anarchists and they're using this as a tool in this longstanding battle," Fox said.

Emily Langlie, a spokeswoman for the U.S. Attorney's Office, declined to characterize the investigation.

May Day began with peaceful demonstrations in downtown Seattle, but shortly before noon a

swarm of protesters, dressed all in black, massed together and began striking out. They targeted Nike and banks; they slashed tires and broke windows and sprayed anti-capitalist graffiti as some made their way to the Nakamura courthouse. Afterward, members of the so-called "black bloc" protesters shed their dark clothing and blended into the crowd.

The search warrant says the courthouse building, on Spring Street and Sixth Avenue, sustained tens of thousands of dollars in damage, but the U.S. Attorney's Office could not provide a specific dollar amount. Destruction of government property in excess of \$1,000 is punishable by up to 10 years imprisonment.

Seattle police focused their investigation into incidents unrelated to the courthouse damage and arrested eight people. Charges were dropped in all but three cases. Those three all pleaded guilty; two are serving suspended sentences and one spent about two months in jail.

Meanwhile, the FBI set out to find those responsible for the courthouse damage. Agents reported spending long hours reviewing surveillance-camera footage, news video and still photos of the crowd that day, trying to identify suspects based on clues: the white strip around one suspect's waist, the "fringe" of a shirt, the shape of a backpack.

What the warrant makes clear is that state and federal agents were watching some members of the small group of Portland anarchists even before May Day. The affidavit says they were tracking members as early as April 9, when they and others were "all observed by FBI surveillance at an event" in Portland that day changing out of black clothing.

Three weeks later, agents watched the anarchists as they headed up for the protest, spending the night in Olympia.

The investigation picked up speed after the Portland Police Bureau conducted a search May 3 of a known anarchist "squat" — crash pad — where they recovered "distinctive clothing" from some of the alleged conspirators that was observed being worn by members of the black bloc protesters in Seattle.

That led to a trio of FBI searches July 25 in Portland — two homes and a storage shed — where they recovered clothing, phones and laptop computers, according to the federal affidavit temporarily unsealed last week.

"Although many anarchists are law abiding, there is a history in the Pacific Northwest of some anarchists participating in property destruction and other criminal activity in support of their philosophy," the affidavit states.

An additional search warrant related to the May Day protests was executed in July targeting an address in South Seattle.

Among the items seized in the searches were clothing and backpacks that match some of the six suspects' May Day attire. Authorities also seized five cellphones, six digital storage devices, two iPods and one camera. The unsealed affidavit reveals the FBI obtained a warrant to search the contents of those devices.

They've had a chance to examine several cellphones, the affidavit reveals. The affidavit cites text messages sent among some suspects discussing plans for the protest, and recapping their days afterward.

"We are all OK," a May 1 text about the protest from one activist reads. "It was awesome."

While the warrants were being executed, prosecutors also were bringing witnesses before a federal grand jury. Three witnesses wound up being held in civil contempt for refusing to testify, though one, Leah Lynn Plante of Portland, was released on Wednesday after a week.

6

Her lawyer declined to comment and she did not return a phone message.

Grand-jury proceedings are secret, and Langlie, the U.S. Attorney's Office spokeswoman, declined to comment on specifics.

Katherine Olejnik, a 23-year-old recent Evergreen College graduate living in Olympia, was among those jailed. Her father said his daughter has been an activist in social-justice causes since her youth. She is not suspected in the courthouse vandalism, court papers say. She was called in to testify Sept. 27 about someone she knows, according to her lawyer.

Even after Olejnik was given full immunity from prosecution by the judge, she declined to testify. U.S. District Court Judge Richard A. Jones said he had no choice but to send her to jail for up to 18 months, or until she changes her mind.

"What (prosecutors) decided to do is choose people and punish them for their association," said her attorney, Jenn Kaplan.

The U.S. Attorney's Office issued a general statement Sept. 13 about grand-jury proceedings, noting, "We do not investigate or seek to silence lawful free speech, or dissent. We do, however, investigate and enforce the law where speech crosses the line and becomes threats or acts of violence."

Matthew Duran, a roommate of Olejnik's who works in computer security, was jailed for civil contempt Sept. 13 after he, too, refused to testify before the grand jury. A longtime social-justice activist, he describes himself as an anarchist, according to his attorney, Kim Gordon. He is not suspected in the courthouse vandalism.

"One of our concerns was they were really targeting him because they perceived him to be associated with the anarchist community," Gordon said. "It's kind of a fishing expedition."

Appeals of Olejnik's and Duran's case are pending.

*Maureen O'Hagan: 206-464-2562 or [mohagan@seattletimes.com](mailto:mohagan@seattletimes.com)*

*News researcher Miyoko Wolf contributed to this report.*

7

**Los Angeles Times** | ARTICLE COLLECTIONS[← Back to Original Article](#)**Anarchists targeted after Seattle's violent May Day protests***Three activists are in federal custody because they won't talk. The secretive investigation has raised alarm among civil rights advocates.*

October 19, 2012 | By Kim Murphy, Los Angeles Times

SEATTLE — Early on the morning of July 25, residents of a neighborhood in northeast Portland, Ore., were awakened by the sound of a battering ram plowing through the front door of a small house. Inside, the sleepy young occupants stumbled out of bed as FBI agents rushed in with assault rifles.

Leah-Lynn Plante, a thin, tattooed woman who volunteers at a bookstore that specializes in anarchist literature, shivered in her underwear in the backyard as a SWAT team hauled out computers, clothing, books and artwork — looking, the agents said, for evidence of who participated in this year's May Day demonstrations in Seattle that saw smashed windows at banks and clashes with the police.

What bothered Plante was that they weren't just looking for sticks and black masks. The FBI search warrant also listed "anarchist" and "anti-government" literature and material among items to be seized.

"It was like something out of George Orwell's '1984.' It was absolutely horrendous," Plante, 24, said shortly before she was taken into custody Oct. 10 for failing to testify before a federal grand jury in Seattle about her friends in the anarchist movement.

Plante is one of three activists being held at the Federal Detention Center near Seattle-Tacoma International Airport in an investigation of anarchists in the Pacific Northwest that has led to subpoenas in Seattle, Olympia and Portland. The secretive probe has raised alarm among civil rights advocates who say witnesses are being asked to answer questions not only about their own activities May 1 — Plante says she wasn't even in Seattle — but what they know about certain groups or organizations.

The investigation in Seattle is one of several across the U.S. targeting anarchists. Last month, three self-described anarchists pleaded guilty to plotting to blow up a bridge south of Cleveland. Three purported anarchists were arrested in Chicago in May and accused of conspiring to burn down buildings with Molotov cocktails during the NATO summit there.

One person, caught on camera, has pleaded guilty to bashing the door of the federal appeals courthouse in Seattle on May Day, an incident that elevated at least that part of the mayhem to a federal crime. Authorities said they are investigating whether anyone crossed state lines to riot — also a violation of federal law.

The FBI, citing the secrecy of the grand jury process, has declined to discuss the Seattle investigation, though an affidavit mistakenly released to the Seattle Post-Intelligencer suggested that several Portland activists were monitored as they traveled to Olympia just before the May Day demonstrations. It said text messages monitored by federal authorities established that they were among the black-clad protesters who damaged a federal courthouse and clashed with police that day.

Anarchism as a political philosophy has deep roots in the Pacific Northwest, and that's one of the problems, civil rights advocates say: Many people who might never attack a courthouse may hand out pamphlets and attend meetings that call for upending the nation's system of money and power.

"Anytime the federal government is sending federal security officers into people's homes looking for anti-government literature, that raises all sorts of red flags," said Neil Fox, president of the Seattle chapter of the National Lawyers Guild, which has helped provide attorneys for those called in for questioning.

Authorities say they have long had trouble monitoring protest movements such as Occupy, which attract primarily peaceful demonstrators, but may include radical activists — the kind who don black clothing and cover their faces to attack banks, shops and other perceived symbols of capitalist excess.

"We can use the example in L.A. [The Occupy protest] started off being peaceful demonstrators exercising their 1st Amendment rights, and it was not a problem. But they stayed here [City Hall] 59 days, and over time, you could see the criminal element come into the movement, and it began to degrade very fast," said Michael Downing, head of the Los Angeles Police Department's counter-terrorism and criminal intelligence bureau.

"We saw anarchists, drug dealers, we saw weapons being moved in, rebar, bamboo pipes. It created an environment where people who really wanted to stay and exercise their rights weren't able to because it became unsafe," he said.

Back in Seattle, detained along with Plante are two activists from Olympia, Wash., who also refused to testify: Matthew Duran, 24, a computer technician, and his roommate, Katherine Olejnik, 23, a bartender.

Letters of support have flooded in to all three, and appeals urging their release have multiplied across the Internet. Duran, who grew up in Southern California advocating for the rights of migrant workers, said he had heard from people as far away as France and Italy since he went into custody Sept. 13.

Olejnuk, arrested in 2007 and 2008 at the ports of Olympia and Tacoma for trying to blockade war equipment bound for Iraq, said federal prosecutors who questioned her seemed to be trying to identify networks, not crimes.

"They weren't trying to figure out from me who did a certain thing. They wanted to know who knew who, who was connected to who," said Olejnuk, who has been held since Sept. 27. "They're asking us who believes in things."

Emily Langlie, a spokeswoman for the U.S. attorney's office in Seattle, which is coordinating the grand jury probe, said the order to incarcerate the three was merely an attempt, under civil contempt proceedings, to compel them to answer questions they are required by law to answer.

"It's not punitive," she said. "It's coercive."

*kim.murphy@latimes.com*

Anarchist probe: Jailed activists say they won't talk to feds

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**Monday, November 5, 2012 - 7:00pm**

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**Wednesday, November 7, 2012 - 8:30am**

- [Support Madryl Rally @ the Federal Courthouse](#)

**Saturday, November 10, 2012 - 3:00pm**

- [Who You Callin' Illegal?: Stop Dede's Deportation](#)

**Saturday, November 17, 2012 - 7:00pm**

- [Political Witchhunts, Then and Now: Panel Discussion and Workshop](#)

**Sunday, November 18, 2012 - 3:30pm**

- [Noise Demo at SeaTac Federal Prison](#)

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## Statement of Resistance to Grand Jury from Kteeo Olejnik

Fri, 09/28/2012 - 3:54am — Anonymous .  
 from [Say Nothing](#)

For me choosing to resist a grand jury is about humanity — I cannot and will not say something that could greatly harm a person's life and providing information that could lead to long term incarceration would be doing that.

For me choosing to resist a grand jury is about freedom of speech and association — I cannot and will not be a party to a McCarthyist policy that is asking individuals to condemn each other based on political beliefs.

The reasons above are why I am choosing to not comply. I apologize to those in my life who my being incarcerated is going to burden, and I thank you for understanding my decision.

For those unaware the folks being subpoenaed are being incarcerated for refusing to answer questions about others' political beliefs.

In Solidarity With All Those Resisting the Grand Jury,  
 Kteeo Olejnik

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## Committee to Stop FBI Repression

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### Matt Duran's Statement

Published on Sun, 2012-09-16 21:43

The Committee to Stop FBI Repression is circulating the following statement (<http://nopolliticalrepression.wordpress.com/2012/09/12/statement-in-opposition-to-state-grand-juries-and-in-support-of-the-resisters/>):

Friends and comrades,

My name is Matt Duran and I will do everything I can to resist this Grand Jury. I'm releasing this as it's come to my attention that the strategy my lawyer and I have been working under will more than likely not work; the prosecution wants to grant me immunity before I even have a chance to testify. I want to make it clear that I am in no way ever cooperating with the state now or ever. Anyone who knows me well enough to be a close friend knows that I will fight with my political allies and for them with every fiber of my being. If I ever did cooperate, it would bring an immeasurable amount of shame upon myself, my community, and my family as they have risked more in resistance than I have in my life so far.



This is not the first time that the State has attempted to kidnap me, extort money from me, and take me away from my family, loved ones, and comrades. The last time, the State even went so far as to create lies in order to put me away. Bearing this in mind as well as the institutional racism I face every day, I have long ago accepted that I am going to go to prison at some point in my lifetime. This compounded with the fact that I have such an amazing amount of support, to the degree that I don't even know what to do with it, allows me to know that I am going to make it no matter what is thrown at me.

People should know that this is more than likely not the end of this, the State will continue this Grand Jury well after my comrades and I locked up. Whatever happens, I want you to know that you are not alone and are more than capable of handling whatever is thrown at you. They would not be doing this if we were not successful in any respect; if we kept to our ivory towers debating what is more revolutionary and not actively creating conflict, we would not be facing this repression. Do not stop the struggle, keep organizing and fighting or they will have won. When the Haymarket massacre took place all those years ago and the martyrs were hung for their desire for a better life, the State attempted to crush all radicals. Clearly, this did not work then and it won't work now. If this was their desire, they have failed in every aspect of it as I have not seen anything other than flagrant disregard for them across the globe. Keep the struggle in your hearts and minds and do not bend to their will. They will never be able to destroy us no matter how hard they try. In solidarity,  
Matt Duran

//

COMMENT **An  
anti-  
anarchist witch-hunt**

**SOCIALISTWORKER.org**

<http://socialistworker.org/2012/10/17/anti-anarchist-witch-hunt>

Johnny Mao, Brit Schulte and Ben Silverman detail the case of three activists in the Pacific Northwest who are in jail for refusing to testify before a grand jury.

October 17, 2012

"I DO not look forward to what inevitably awaits me today, but I accept it...My convictions are unwavering and will not be shaken by their harassment. Today is October 10, 2012, and I'm ready to go to prison."

Thus wrote 24-year-old Leah-Lynn Plante in a statement [1] as she prepared to be jailed. Plante is the third anarchist activist in the Pacific Northwest to be put behind bars for refusing to testify before a federal grand jury. She could spend as much as 18 months in prison--the full length of the grand jury term.

Plante, along with Matthew Kyle Duran and Katherine "KteeO" Olejnik, have been imprisoned as part of the fallout from a series of raids on July 25 conducted by the FBI's Joint Terrorism Task Force--supposedly in response to instances of vandalism during this year's May Day protests in Seattle. The Task Force's warrant allowed agents to raid the homes of activists in three cities. The FBI insisted that residents hand over any "anti-government or anarchist literature," along with flags, black clothing, cell phones, hard-drives and address books.

"As if they had taken pointers from Orwell's 1984, they took books, artwork and other various literature as 'evidence,' as well as many other personal belongings, even though they seemed to know that nobody there was even in Seattle on May Day," wrote Plante.

Furthering the government fishing expedition, the three activists received subpoenas requiring them to testify in front of a grand jury, where they were asked questions regarding their political opinions and the political circles and individuals they associate with. This is a clear case of political leanings being used as proof of criminality. As Plante wrote, "They are trying to investigate anarchists and persecute them for their beliefs. This is a fishing expedition. This is a witch-hunt."

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MATT DURAN was the first activist to be imprisoned. On September 12, after refusing to testify, Duran was held in contempt of court and taken into federal custody, where he would spend the next three weeks in isolation at the Sea-Tac Federal Detention Center.

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Before refusing a second attempt to force him to testify on September 26, Duran reportedly experienced what is "normal" for dissenting activists under today's Obama administration: little access to a phone, no access to sunlight or fresh air, and no contact with visitors, fellow inmates or an attorney.

The presiding judge and prosecuting attorneys have complied with Duran's request to not set another grand jury hearing date until he requests one. On October 3, Duran finally was moved from isolation and into the general population section of the prison, where he is able to make phone calls and socialize with other inmates.

"Whatever happens, I want you to know that you are not alone and are more than capable of handling whatever is thrown at you," said Duran, in a public statement released on September 12. "Do not stop the struggle, keep organizing and fighting, or they will have won."

Katherine "KteeO" Olejnik was the second target of the state, and she also responded by refusing to testify.

On September 27, in the morning before her grand jury hearing, Olejnik and her attorney, Jennifer Kaplan, made a motion challenging the legality of the subpoenas. They argued that the government's subpoenas not only violate the First, Fourth and Fifth Amendments, but also breached the right to judicial oversight in an abuse of power. But Olejnik was still placed into federal custody and isolation, where she remains.

In a statement before her latest hearing, Olejnik explained:

For me choosing to resist a grand jury is about humanity--I cannot and will not say something that could greatly harm a person's life, and providing information that could lead to long-term incarceration would be doing that. For me choosing to resist a grand jury is about freedom of speech and association--I cannot and will not be a party to a McCarthyist policy that is asking individuals to condemn each other based on political beliefs.

Duran, Plante and Olejnik have not been accused of any criminal wrongdoing, but they have been held in contempt and jailed after refusing to testify, because the government offered them immunity from prosecution--stripping them of their legal right to refuse to testify.

Describing her opposition to the government's fishing expedition, Plante noted that a Freedom of Information Act request revealed that the grand jury was convened on March 2, 2012--two months before the actual protests.

The initial search warrants, first shown to activists in July, cited evidence linked to "destruction of federal property"--leading activists to believe that the FBI was looking for "evidence" about recent May Day protests. However, this new information reveals the extent to which the FBI have been investigating and

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monitoring political activists. Meanwhile, the grand jury subpoenas confirm the intent of the FBI: to attack, disrupt and neutralize political dissent.

As Plante stated after her second appearance and refusal to answer questions before the federal grand jury, "No, I will not answer their questions. I believe that these hearings are politically motivated. The government wants to use them to collect information that it can use in a campaign of repression. I refuse to have any part of it, I will never answer their questions, I will never speak."

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THE PERSECUTION of this new generation of radicals fits squarely into the U.S. government's tradition of squashing dissent through force and intimidation. With door-busting tactics that span generations, the U.S. government has made a habit of using the legal system against "supposed threats" to national security--from the Palmer Raids of the early 20th century to the McCarthyite witch-hunts and COINTELPRO spying and dirty tricks of the 1950s, '60s and '70s.

Recent raids have specifically targeted the Arab and Muslim communities, as well as antiwar activists. In late September of 2010, the FBI raided eight homes and offices of antiwar activists in Chicago and Minneapolis. Search warrants indicate the agents were looking for connections between activists and groups in Colombia and the Middle East. The warrants authorized agents to seize items such as electronics, videos, photographs, address books and mail.

Despite a Justice Department probe finding that the FBI improperly monitored activist groups and individuals from 2001 to 2006, these raids continued. Eight people were issued subpoenas to appear before a federal grand jury in Chicago. All have refused to testify.

While those activists haven't faced jail time for their refusal to testify, the jailing of Plante, Duran and Olejnik is a troubling indication of the ongoing erosion of civil liberties.

And of course, this disregard for civil liberties comes courtesy of the Obama administration, the same administration responsible for the National Defense Authorization Act, which allows the president to indefinitely detain U.S. citizens without trial.

Thankfully, activists have responded to each and every grand jury hearing with demonstrations across the country--locally in Seattle and Portland, and in cities as far as away as Oakland, Calif., and Minneapolis, Minn. In Seattle, four marathon vigils spanning 24 or 48 hours each were held in solidarity with the targeted activists just outside the federal courthouse.

One participant, Travis C., remarked upon the resilience of the grand jury resisters and the implications for future organizing:

I would say that those three activists are extremely brave individuals who aren't deserving of the treatment they are receiving from the state. Obviously it doesn't seem likely that we'll be able to spring them

from prison, but I think the next best thing is that we as a larger community can spread information about this.

If secret grand juries keep crushing social movements--because we forget about this history every time a new generation emerges--the next best thing would be to build a culture...of teaching about these grand juries. Solidarity forever to those three.

As Matthew Kyle Duran said in a statement before beginning his prison sentence in early September, the fight is not over:

When the Haymarket massacre took place all those years ago and the martyrs were hung for their desire for a better life, the state attempted to crush all radicals. Clearly, this did not work then, and it won't work now. If this was their desire, they have failed in every aspect of it, as I have not seen anything other than flagrant disregard for them across the globe.

=====

### What you can do

Visit the Committee Against Political Repression [2] for updates about the case. You can also donate [3] to help the three with their legal defense fund.

Write to the imprisoned activists. Make sure that your name and return address, as well as the activists' full names and inmate numbers, are included on the envelope and all pages of the letter (Remember that your letter will be read by prison officials. For tips on how to write to a prisoner for the first time, see "How to write your first letter to someone in prison." [4]):

-- Katherine Olejnik #42592-086, FDC SeaTac, P.O. Box 13900, Seattle, WA 98198

-- Matthew Kyle Duran #42565-086, FDC SeaTac, P.O. Box 13900, Seattle, WA 98198

-- Leah-Lynn Plante #42611-086, FDC SeaTac, P.O. Box 13900, Seattle, WA 98198

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[1] <http://leahxvx.tumblr.com/post/33298924637>

[2] <http://socialistworker.org/nopoliticalrepression.wordpress.com>

[3] <http://nopoliticalrepression.wordpress.com/donate/>

[4] <http://www.prettyqueer.com/2012/05/04/how-to-write-your-first-letter-to-someone-in-prison/>

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## Portland Mercury

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NEWS - CITY

August 07, 2012

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## Fear of a Black Bloc Planet

### FBI Raid Portland Homes, Looking for Anarchist Materials

by Sarah Mirk @sarahmirk and Nathan Gilles



DENNISON WILLIAMS was in bed when the agents banged on his front door shouting, "FBI!" Next he heard a boom and saw the light of a flash grenade.

"I'm upstairs and unarmed!" he shouted. Agents carrying assault rifles handcuffed him while over a dozen officers from the Joint Terrorism Task Force (JTTF) searched his house, seizing his phone, computer, and black clothes. As they left, Williams was issued a subpoena to appear in front of a grand jury in Seattle on Thursday, August 2.

Williams' house on NE 8th and Buffalo was one of three searched in Portland last Wednesday, July 25, as part of a coordinated JTTF raid targeting lefty political activists in Washington and Oregon. Officers issued grand jury subpoenas to at least five people that morning in Portland, Seattle, and Olympia.

The FBI is mum about what alleged crimes prompted the bi-state searches and subpoenas; the search warrants are sealed, and this week's grand jury hearing itself isn't public. But Williams provided the *Mercury* with a redacted copy of the search warrant for his home, which shows the agents were looking for numerous items (including "anti-government or anarchist literature," black clothing, and flags) that could be related to the federal crimes of destruction of government property and interstate travel with intent to riot.

Williams isn't certain what the grand jury is investigating, specifically, but thinks he's being called in to provide information against other activists.

"It's related to political opposition, it's related to political dissent," says Williams. "They're trying to create a wedge within people who are resisters. They're specifically pursuing anarchists."

The subpoenas and searches are likely related to an ongoing Seattle police investigation of this year's May Day protests. While the protests included thousands of peaceful people, several individuals did smash windows at Nike, American Apparel, and the city's federal courthouse. Seattle police have been trying for months to identify and prosecute suspects for that window smashing.

On July 10, Seattle police staged a raid very similar to Portland's at an Occupy collective house in South Seattle, deploying a SWAT team that charged into the home, taking political pamphlets and black clothes. Seattle police say that raid was specifically gathering evidence about the "May Day Mayhem" protest and noted on their website at the time, "There may be more search warrants in the future."

In some ways, the recent raids aren't surprising. The investigation fits into the recent history of the feds prioritizing the pursuit of left wing activist groups. Starting in the late '90s, the FBI has investigated environmentally driven property destruction as "eco-terrorism," including the 1998 arson of a Vail, Colorado, resort for which four people associated with the Oregon-based Earth Liberation Front (ELF) were indicted. The



Subpoenaed activists  
Leah-Lynne Plante and  
Dennison Williams



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following year's counter terrorism report calls the arson of a Seattle Gap store "terrorism," blaming the damage on "anarchists." Weeks after the Gap-burning, the World Trade Organization protests stormed Seattle, and anarchists, along with "eco-terrorists," replaced right-wing militiamen as the new domestic boogey men.

ELF is now mostly gone, thanks to several highly publicized trials that legally branded the group as terrorists. But this year, the FBI has pursued several big left-wing cases in the Midwest. Following the recent May Day protests, officers of JTTF arrested five self-proclaimed anarchists in Ohio plotting to blow up a bridge. As with Portland's "Christmas Tree Bomber," Mohamed Mohamud, the bureau provided faux bombs to the accused. On May 19, police working closely with the FBI arrested three anarchists in Chicago planning to blow up President Obama's reelection headquarters.

Mayor Sam Adams' office notes that JTTF officers involved in Portland's raid were not working within Portland's JTTF program, but came from some other jurisdiction. The program that mandates collaboration between the city's police bureau and the FBI has been controversial this past year as city council weighed whether or not to join the task force. After working out an agreement with the American Civil Liberties Union, city council unanimously agreed to rejoin the group in April 2011.

Whether the charges brought forward in the grand jury hearing in Seattle this week will be labeled terrorism or merely federally prosecutable window smashing remains to be seen.

In the meantime, the accused and their supporters are keeping their lips as tight as the FBI's.

"I'm not going to cooperate with the grand jury," says Williams. "They're a method of intimidating people."

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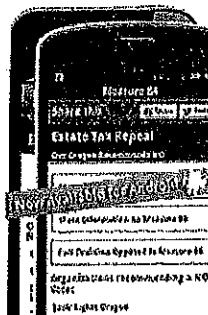
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## Portland FBI raids: one home vacant, one formerly housed activists

Published: Wednesday, July 25, 2012, 11:35 AM Updated: Thursday, July 26, 2012, 10:00 AM



By The Oregonian



Enlarge

Mike Zacchino, The Oregonian

PORTLAND, OREGON -- July 25, 2012 -- Law enforcement officials served a warrant and removed evidence from a house at 6846 N. Greenwich. Mike Zacchino/The Oregonian

FBI raids homes in north and northeast Portland gallery (14 photos)

Heavily armed FBI agents raided three Portland homes at daybreak Wednesday, serving search warrants for what FBI officials would only describe as an "ongoing violent crime investigation."

One home raided by FBI agents had been vacant for years but showed signs of recent activity, and one had once been occupied by young political activists whose lease was not renewed, neighbors said.

A third home was long vacant before three people in their 20s moved in last fall.

Beth Anne Steele, a spokeswoman for the FBI, said agents served the search warrants at three North and Northeast Portland homes as part of an "ongoing

violent crime" investigation.

The warrants were served at 4820 N.E. 31st Ave., 7129 N.E. Eighth Ave., and 6846 N. Greenwich Ave.

No arrests were made.

"The warrants are sealed, and I anticipate they will remain sealed," Steele said.

Some residents in the area of Northeast Alberta Street awakened to the sound of a helicopter circling overhead.

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Rosa Aguilar, who owns the home and rents it out, said she believed that agents were not looking for the current tenants but a group that moved out more than a year ago. Aguilar said she did not renew the group's lease because she had received so many complaints about them.

FBI agents raided three homes--two in NE Portland, one in North Portland--early Wednesday morning, part of an ongoing investigation into a violent crime. The federal search warrants have been sealed and will remain sealed.

Puanani Leal, who has lived in the neighborhood three years, described the former tenants as anarchists who ran an information booth at Alberta Street's Last Thursday event. She said large numbers of

people were in and out of the house while the group was living there.

She was home when the FBI arrived this morning.

"I just heard lots of pounding at 6 o'clock, and I got up and I saw the whole thing," Leal said. "I saw them screaming to get in. They were using the battering ram, and then finally the door just opened."

She said the current occupants came out and agents very quickly let them go.

Near the 7129 N.E. Eighth Ave. home, neighbors said no one has been living in the house for several years. In recent months, neighbors noticed activity -- a light on inside, groups of people in their early 20s coming and going. They didn't cause any trouble but seemed to be living in the house.

Then, a month ago, an officer in a patrol car was seen checking out the home.

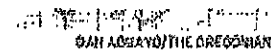
Neighbors said they heard multiple loud bangs around 6 a.m. Wednesday, followed by yelling.

By 10:30 a.m., the FBI had left. The rundown home appeared to be empty but for a chair and a desk and a roll of paper towels visible from a window. The grass was overgrown, but the grass in a side yard looked trampled down.

At the location on North Greenwich, the FBI was finishing up processing evidence around 11 a.m. At the one-story blue gray home, agents carted out paper evidence bags sealed in red tape.

Agents examined yard debris. They took pictures inside the house and photographed a white van parked in the driveway.

Next-door neighbor Juan Martinez Jr., 25, said two men and a woman, all who



[View full size](#)

appeared in their 20s, moved into the house around September and came over to introduce themselves. They were good neighbors and hired him to mow their front lawn, he said.

"They mainly kept to themselves. They never really bothered anybody ... I didn't have a problem with them," Martinez said.

The house hadn't been occupied for years before the three moved in, he said.

Martinez said he woke up about 8 a.m. to his bulldog barking and a swarm of FBI cops outside, piercing the calm of the normally quiet neighborhood. "I couldn't believe it," he said. "I was really in shock. "

A neighbor who lives across the street from the home, Bob Weeks, said there had been a lot of activity and "junk cars" parked there.

"They never made a lot of noise," Weeks said. "They were pretty quiet."

According to public records, lenders had initiated foreclosure proceedings against the Northeast Eighth Avenue and North Greenwich properties.

A notice of default and other documents filed in November 2011 indicate the owner of the house at 7129 N.E. Eighth, Marla Mendoza, was nearly \$50,000 behind in mortgage payments. The notice states that the property was to be auctioned off on March 30.

Documents filed in February indicate the owner of the house at 6846 N. Greenwich Ave., Kajoria Shepherd, was about \$47,500 behind in mortgage payments. That property was to be auctioned off about a month ago, on June 22.

Records with Multnomah County do not show whether either house was sold.

-- The Oregonian

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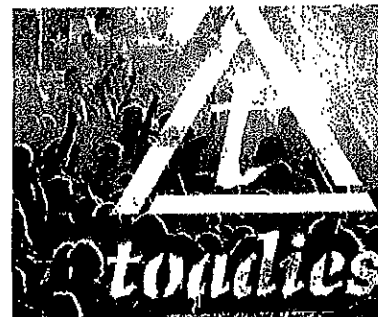
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FRIDAY, JULY 27, 2012

# **CRIME BREAKING: Interview and Documents from FBI Raid Show Feds are Targeting Anarchists**

POSTED BY SARAH MIRK ON FRI, JUL 27, 2012 AT 4:14 PM

The first interview with any of the Portlanders who were served grand jury subpoenas as FBI agents searched their homes on Wednesday, July 25, shines some light on what authorities may be hoping to achieve with the raids.

Dennison Williams was in bed at his house on NE 8th Avenue on Wednesday morning when he heard a bang and someone shout, "FBI!" Then came a loud crash, which turned out to be agents breaking down his front door, and Williams heard a bang and a saw a flash of light—the agents throwing flash grenades. Williams started yelling from his bed that he was upstairs and unarmed.

"I was scared," he said. "The police in this town have a history of shooting people, I was worried they would accidentally shoot me."

According to Williams, FBI officers entered his room with assault rifles and kept them aimed at him while they handcuffed him. They put him in a chair for about 30 minutes while they searched his house. Williams says there were about 15 FBI officers in the house, plus one Portland police officer on the street outside. According to the property receipt Williams received from the officers, the feds seized several items, including his computer, phone, hard-drive, two thumb drives, and various clothes (including black jeans, black t-shirt, and a black bandana). They then served him a subpoena to appear at a grand jury in Seattle next Thursday, August 2nd.

Williams is not sure exactly what the grand jury is meeting about, but that likely they want to ask him about other people. The FBI has said only that the raids are part of an ongoing "violent crime" investigation.

"It's related to political opposition, it's related to political dissent," says Williams. "They're trying to create a wedge within people who are resisters... They're specifically pursuing anarchists."

The FBI search warrant states that they are looking to seize items which may be evidence regarding the crimes of conspiracy to destroy government property, interstate travel with intent to riot, and conspiracy to travel interstate with intent to riot. Those items include: Clothing and related items worn during commission of offenses; paint; sticks and flags similar to those used or carried during the commission of the offenses, and material for making flags; anti-government or anarchist literature, documentation or communications related to the offenses, flares, computers or electronic storage media of any kind.

On July 10th, Seattle police officers staged a similar raid on the house of some Occupy Mayday protesters in Seattle. On the day Williams' house and two other houses in Portland were searched, the FBI served grand jury subpoenas to people in Olympia and Seattle, as well. Williams was not sure how many people were served subpoenas, but thinks it is somewhere around seven people, and says he "will not cooperate" with the grand jury. Anyone who refuses to testify when subpoenaed can potentially face jail time.



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[http://www.salon.com/2012/10/11/third\\_northwest\\_activist\\_jailed\\_for\\_staying\\_silent/](http://www.salon.com/2012/10/11/third_northwest_activist_jailed_for_staying_silent/)

THURSDAY, OCT 11, 2012 8:18 PM UTC

## Third Northwest activist jailed for staying silent

**Leah-Lynn Plante was remanded into federal custody for refusing to speak to a grand jury**

BY NATASHA LENNARD



Leah-Lynn Plante (becausewemust.org)

"Today is October 10th, 2012, and I am ready to go to prison," announced 24-year-old Leah-Lynn Plante yesterday. By Thursday morning, the Portland activist was in custody and could remain incarcerated in a U.S. federal prison for 18 months, although she has not been charged with a crime.

Along with two others in the Pacific Northwest, Plante was remanded into federal custody for her refusal to provide a grand jury testimony regarding activists in the region. Matt Duran and Kteeo Olejnik were jailed in previous weeks for, like Plante, refusing to cooperate with a grand jury. All

three are now being held in U.S. federal prison, not because they are being punished for crime, but, as the National Lawyers Guild's executive director Heidi Boghosian told me earlier this year, "to coerce cooperation."

Writing for Truth-Out in August about the Northwest grand juries and those resisting cooperation, I noted that grand juries "are among the blackest boxes in the federal judiciary system." The closed-door procedures are rare instances in which an individual loses the right to remain silent. As was the case with the Northwest grand juries resisters, the grand jury can grant a subpoenaed individual personal immunity; Fifth Amendment rights against self-incrimination are therefore protected, but silence is not. In these instances, refusal to speak can be considered civil contempt. Non-cooperators can be jailed for the 18-month length of the grand jury.

"The arbitrary issuing of subpoenas to activists and pressuring them to divulge information about others in secret proceedings extends to arresting them when they decide to resist," NLG's Boghosian told me Thursday, commenting that the grand jury subpoena process has a "star chamber quality."

Lawyers, scholars and activists alike have long complained about the use of federal grand juries as tools for political repression. The case of the Northwest grand jury resisters is now well-known in activist and anarchist circles around the country. As I wrote in August:

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The Seattle grand jury subpoenas were served in late July, when the FBI and a Joint Terrorist Task Force conducted a series of raids on activist homes and squats in Portland, Olympia and Seattle with warrants seeking out computers, phones, black clothing and "anarchist literature." The FBI has stated only that the grand jury pertains to "violent crime," but it is believed to relate to property damage in Seattle during this year's May Day protests...

Will Potter, author of "Green Is the New Red," who has long covered the state persecution of environmental activists and anarchists, noted in a recent interview... "I think what's most indicative of what's going on though is that specific call for agents to seize 'anarchist literature' as some kind of evidence of potential illegal activity." He added that the convening of a grand jury is "especially troubling because grand juries have been used historically against social movements as tools of fishing expeditions, and they're used to seek out information about people's politics and their political associations."

Facing a number of months in prison, Plante remained steadfast in her refusal to speak to the grand jury. Aware that she would likely face jail time, given the previous incarceration of two other resisters, Plante gave a public statement the morning of her grand jury hearing Wednesday. She detailed the depression and fear triggered by the threat of jail time, but said, "I never once considered co-operation and never would. It is against everything I believe in. On my right arm I have a tattoo reading 'strive to survive causing least suffering possible.' This is something I live by every single day and will continue to live by whether I am in a cage or not." Plante is being held at the Federal Detention Center Sea Tac in Seattle.

Since news of the Seattle grand jury and its resisters emerged a few months ago, a host of protests, rallies, acts of graffiti and sabotage have taken place across the country to express solidarity with the Northwest anarchists. Large banners have been illegally dropped in cities from New York to Atlanta, while police vehicles and substations have been graffitied and vandalized in Oakland, Calif., San Francisco, Illinois and elsewhere. The Committee Against Political Repression put out a petition to the U.S. attorney, with nearly 400 organizations signed on, stating opposition to the treatment of the subpoenaed activists.

Watch the video of Plante's statement below (via Sparrowmedia.net):

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*Natasha Lennard is an assistant news editor at Salon, covering non-electoral politics, general news and rabble-rousing. Follow her on Twitter @natashalennard, email nlennard@salon.com.*

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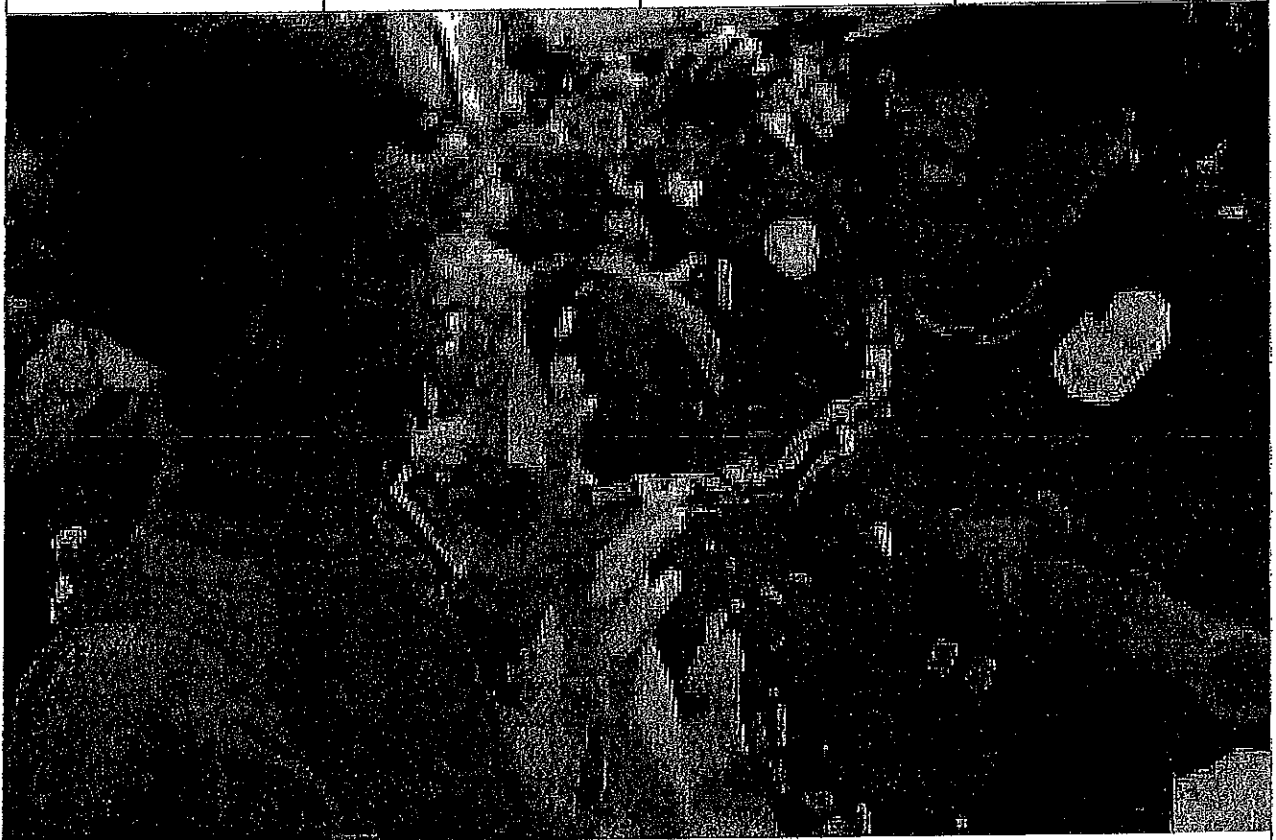


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## America's Pussy Riot

Last updated: 19 October 2012

We are quick to loathe Putin's demand to control freedom of speech, but turn a blind eye to Obama's "act of repression".

In July, I reported on a violent "thought crime" raid in Seattle, Washington, at the home of Occupy-affiliated activists. As I wrote then, "Most of America was not awake when a **SWAT team burst in the front doors of an apartment in Seattle on the morning of July 10, 2012.** Four local activists struggled to dress; but, they say, after the agents stormed in, they grabbed them physically. The activists reported that these agents tied their hands at the wrists, while holding automatic rifles poised against them."

Vandalism had occurred in a protest in May; but the sight of several black-clad individuals engaging in vandalism against property hardly justified, many would say, the severe repression that followed.

Many scoffed at that time at the notion of a "thought crime" arrest in the US and insisted that the victims of the militarised SWAT team must have done something to deserve the response. But the early reports turn out to be an exaggeration. Those peaceful activists, including 24-year-old Leah-Lynn

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Plante, are now being held in Federal prison for refusing to testify about other protesters to a Federal Grand Jury.

The warrants issued for the original raid specifically targeted these activists for the colours they chose to wear - the original raid identified their black sweatshirts as one of the reasons for them to be subjected to arrest.

The raid also targeted the literature which they chose to read in their homes (anarchist literature). Their home and lives were invaded, in violation of First and Fourth Amendment protections; and they are now being judged by a government which has recently defined even peaceful anarchists, in a newly released FBI presentation, as **"Criminals seeking an Ideology to justify their activities"**.

### **Unconstitutional weapon**

After the raids, the activists received subpoenas to face a Federal Grand Jury. Because one cannot retain the right to remain silent - that is, the right not to be forced to incriminate others - a Grand Jury proceeding can be used as one of the most draconian and unconstitutional weapons in the Department of Justice's arsenal against peaceful activists.

In other words, if you choose to remain silent in a Grand Jury, you may face 18 months in jail. As Natasha Lennard, a long-time Occupy reporter, **notes in her excellent continuing coverage of the case:**

"The closed-door procedures are rare instances in which an individual loses the right to remain silent. As was the case with the Northwest grand juries resisters, the grand jury can grant a subpoenaed individual personal immunity; Fifth Amendment rights against self-incrimination are therefore protected, but silence is not. In these instances, refusal to speak can be considered civil contempt. Non-co-operators can be jailed for the 18-month length of the grand jury."

Since the Seattle raid, the globe has been swept with outrage when the Russian activists Pussy Riot were jailed for similar expressions of their freedom of speech. Especially here in America, observers found the punitive role of Putin and the corruption of the Russian justice system to be intolerable. Many notables, from human rights groups to the rock star Madonna, stood up for the punk band with the rallying cry "Free Pussy Riot!"

**"While Pussy Riot faced years in jail for patently absurd charges, the Seattle Three are facing up to 18 months in jail without any charges whatsoever."**

But in contrast, what is happening in our own back yard in Seattle has received almost no reporting, and no protest, not any similar outrage. They may not have ad ready symbols, like colourful masks and punk music, but the three activists now in prison are our very own Pussy Riot - America.

While Pussy Riot faced years in jail for patently absurd charges, the Seattle Three are facing up to 18 months in jail without any charges whatsoever. Lennard writes:

"The two Portland-based activists, Leah-Lynn Plante and Dennison Williams, publicly announced late last month that they had been subpoenaed to appear in front of a federal grand jury in Seattle and that they would refuse to co-operate. During a grand jury hearing on August 2, Plante did just this - offering her name and birthdate only - and has been summoned to return for another hearing on August 30, where she again intends to say nothing. Meanwhile, it is believed a handful of other activists are fighting to quash subpoenas served to them with the shared intention of non-co-operation."

### **System of inequality**

27

Leah-Lynn Plante knew she would go to jail for doing the right thing - resisting a Grand Jury - as did her other friends from the raid. She created a video to let the world know what was happening to free speech in America.

**Her inspiring statement** is exemplary of what it means to be an American, to be courageously dedicated to **freedom**: "No, I will not answer their questions," she remarks. "I believe that these hearings are politically motivated. The government wants to use them to collect information that it can use in a campaign of repression. I refuse to have any part of it."

We need a single standard for championing those arrested for free speech "violations". How can we cry out for Pussy Riot's freedom in Moscow - and ignore the injustice unfolding in Seattle? Why are we so quick to loathe Putin's demand to control freedom of speech, but we turn a blind eye to President Obama's same act of repression?

There is no moral justification.

This campaign of fear, the chilling effect of such raids, is intended **shamelessly to intimidate** those who would protest the increasingly entrenched system of inequality in America. This campaign seeks to equate **protest with anarchism**, and in turn to equate peaceful anarchism - "anarchism" which can mean something as simple and non-threatening as a belief in grassroots-level social organisation - with **terrorism**.

In Seattle as in Moscow: if you aren't free to think, to read, to communicate; then does it really matter that you are physically free?

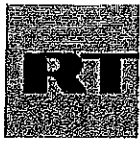
**Jennifer Slattery is a former private investigator from NYC and a lifelong human rights activist.**

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QUESTION MORE.

USA Third anarchist jailed for refusing to testify before secret grand jury

## Third anarchist jailed for refusing to testify before secret grand jury

Published: 11 October, 2012, 20:58  
Edited: 11 October, 2012, 20:58



A third self-described anarchist from the Pacific Northwest has been jailed by federal officials for refusing to speak before a secretive grand jury that the accused have called a politically-motivated modern-day witch-hunt.

Leah-Lynn Plante, a mid-20s activist from Seattle, Washington, was ushered out of court by authorities on Wednesday after refusing for a third time to answer questions forced on her by a grand jury — a panel of prosecutors convened to determine if an indictment can be issued for a federal crime.

Plante was one of a handful of people targeted in a series of raids administered by the FBI and the Joint Terrorism Task Force on July 26 of this year which the feds say were in conjunction with an investigation into acts of vandalism that occurred during May Day protests in Seattle nearly two months prior. As part of their probe, search warrants were issued at multiple residences of activists in the area, including Plante's, demanding that dwellers provide agents with "anti-government or anarchist literature" in their homes and any flags, flag-making material, cell phones, hard drives, address books, and black clothing.

*"As if they had taken pointers from Orwell's 1984, they took books, artwork and other various literature as 'evidence' as well as many other personal belongings even though they seemed to know that nobody there was even in Seattle on May Day," Plante recalls in a post published this week to her Tumblr page.*

Only one week after the raid, Neil Fox of the National Lawyers Guild told Seattle Times that raids like this are create a "chilling effect" by going after lawful, constitutionally-allowed private possessions.

*"It concerns us any time there are law-enforcement raids that target political literature, First Amendment-protected materials," Fox said.*

This week Plante still maintains her innocence, now she has reason to believe that the raid that has left her suffering from post-traumatic stress syndrome may have been more than an investigation into an activity, but an ideology. Plante says a Freedom of Information Act request she filed in the months after her apartment door was broken down by armed officials

29

reveals that the grand jury investigating her was first convened in March, two months before the vandalism she is being accused of even occurred.

*"They are trying to investigate anarchists and persecute them for their beliefs. This is a fishing expedition. This is a witch hunt," she says this week.*

On the day of her third meeting with the grand jury on Wednesday, Plante wrote on her blog that she'd almost certainly be jailed on charges of contempt for refusing once again to testify about herself but said she was willing to face the consequences for exercising her right to remain silent.

*"I do not look forward to what inevitably awaits me today, but I accept it," she writes. "My convictions are unwavering and will not be shaken by their harassment. Today is October 10th, 2012 and I am ready to go to prison."*

Hours later, her Tumblr was updated with a note authored by one of her supporters confirming that Plante *"was thrown into prison for civil contempt"* after her court date. Plante is now the third anarchist to be imprisoned in the last month for refusing to answer questions about their belief and behavior before a grand jury.

Last month, Plante spoke openly about the grand jury before refusing their questioning for only her second time. *"I believe that these hearings are politically motivated,"* she wrote in a September 16 statement. *"The government wants to use them to collect information that it can use in a campaign of repression. I refuse to have any part of it, I will never answer their questions, I will never speak."*

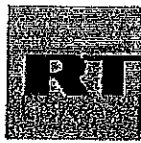
*"While I hate the very idea of prison, I am ready to face it in order to stay true to my personal beliefs. I know that they want to kidnap me and isolate me from my friends and my loved ones in an effort to coerce me to speak. It will not work. I know that if I am taken away, I will not be alone."*

Katherine "KteeO" Olejnik, a fellow anarchist from the Seattle area, was taken into federal custody on September 28 for refusing to cooperate with a grand jury, a decision she said was based on humanity and her First Amendment protections.

*"I cannot and will not say something that could greatly harm a person's life, and providing information that could lead to long term incarceration would be doing that,"* Olejnik wrote before being booked. *"I cannot and will not be a party to a McCarthyist policy that is asking individuals to condemn each other based on political beliefs."*

On the No Political Repression blog, a support of Olejnik writes that she was prohibited from taking notes during her time on the stand, during which she says she resisted questioning.

Days before her imprisonment began, Matt Duran was also jailed for contempt. According to his attorneys, Duran was not only imprisoned by placed in solitary confinement, denied intimate contact with his lawyer, denied visitor requests forms, personal dietary requirements and sunlight an fresh air.

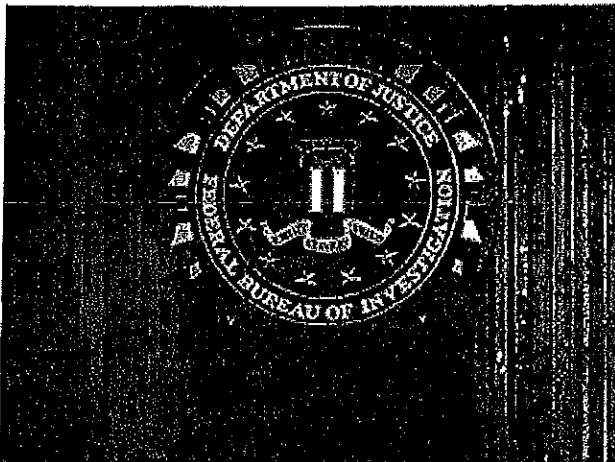


QUESTION MORE.

USA FBI releases documents that confirm they spy on anarchists

## FBI releases documents that confirm they spy on anarchists

Published: 22 October, 2012, 23:55  
Edited: 22 October, 2012, 23:55



Two anarchists remain locked up as prosecutors attempt to coerce the testimonies they've been subpoenaed to give about acts of vandalism in the Pacific Northwest. In the meantime, though, the FBI has accidentally blown the cover off its own case.

Ever since Leah Plante, Katherine "KleeO" Olejnik and Matt Duran were asked to testify before a federal grand jury earlier this year, all three self-identified anarchists have been adamant about remaining silent. For refusing to speak, federal prosecutors have since put the trio of twenty-something activists behind bars over contempt of court charges, with Plante being awarded her freedom only in recent days. As her colleagues continue their imprisonment, though — where they could remain for the entirety of the 18-month investigation — the FBI has failed to provide to the press or public alike any information as to why they've targeted the known activists or what role they could play in unraveling a greater conspiracy.

On Thursday, legal documents intended to be cloaked indefinitely were accidentally unsealed in US District Court in Seattle for a moment, finally offering a small bit of insight as to why the FBI has been targeting adherents to a specific ideology and intensifying what some have equated to a politically-motivated witch-hunt aimed at anarchists.

The Seattle Times reports that an affidavit dated October 3 was momentarily made available during last week's court proceedings, revealing to those in attendance that the investigation into Plante and her peers dates back to earlier this year when the FBI first began spying on a group of suspected anarchists they believed were conspiring to commit acts of violence and destruction.

Beginning as early as April 9, the FBI was conducted surveillance on alleged anarchists from Portland whom soon after planned to travel to Seattle to participate in the city's May 1, 2012 day of action activities held in coordination with other locales across the country. The feds followed a group of six suspects across state lines from Portland, Oregon into Olympia, Washington in the days before the May Day activities and drafted an indictment that could eventually lead them to charge the group with conspiracy, destruction of government property and interstate travel with intent to riot, according to the 34-page document viewed by the Times. So far, though, none of the six suspects have been formally charged with any crimes.

31

*"Although many anarchists are law abiding, there is a history in the Pacific Northwest of some anarchists participating in property destruction and other criminal activity in support of their philosophy," the affidavit reads, according to the newspaper.*

That's where the Pacific Northwest Three fit in: investigators had hoped that by subpoenaing Plante, Olejnik and Duran to testify, they'd learn more about anarchists in the region who may have been vocal about any attempts to wreak havoc during the May Day protests.

According to the search warrant unsealed this week, the government claims that tens of thousands of dollars in damages resulted from the May 1 actions in Seattle, largely due to attacks on the William Kenzo Nakamura U.S. Courthouse and a few private businesses in the vicinity. Video footage obtained from the scene has been endlessly analyzed by FBI detectives who have in the weeks and months since tried to build a case to file charges against the suspects, none of whom are reported to include the three persons asked to testify. That investigation has led to filing not just subpoenas against the Pacific Northwest Three, but executing no fewer than five search warrants in July that aimed to recover cell phones, computers, clothing and literature from Plante, her peers and others believed to be in cahoots with any local anarchists.

In addition to being met with silence from the Northwest Three, the trove of "evidence" uncovered by the authorities has so far left them unable to release an indictment targeting their suspects. Instead, they have been left with cell phones that, according to the unsealed affidavit, contain text messages describing the May Day protest as "awesome" but nothing more remotely noteworthy, or at least not enough to file charges.

While Plante has since been freed from prison where she was held in solitary confinement for refusing to comply with the grand jury, both Olejnik and Duran remain behind bars as investigators wait to see if they'll be willing to speak.

*"What (prosecutors) decided to do is choose people and punish them for their association," Jenn Kaplan, an attorney for Olejnik, tells the Seattle Times. To the paper, a counsel for Olejnik adds that the grand jury investigation specifically sought answers from the anarchist about someone she knows.*

Before being imprisoned and released, Plante said that a Freedom of Information Act request she filed revealed that the grand jury was first convened in March, two months before the vandalism she is being questioned about even occurred. Before being held in contempt of court, Plante wrote, *"The government wants to use [grand juries] to collect information that it can use in a campaign of repression. I refuse to have any part of it, I will never answer their questions, I will never speak."*

An attorney for Duran adds that while their client isn't being suspected or accused of the May 1 vandalism in Seattle, the associations that exist within the community are enough to keep him under the FBI's radar. The intended result, many fear, is a chilling effect on a community of likeminded individuals that could soon enshroud other groups of activists and outspoken youths.

*"One of our concerns was they were really targeting him because they perceived him to be associated with the anarchist community," Gordon says. "It's kind of a fishing expedition."*

Exhibit 2

Magistrate Judge Donohue

FILED  
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MAY 03 2012  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NO 12-230  
DOCKET NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

CODY R. INGRAM,

Defendant.

COMPLAINT for VIOLATIONS  
of Title 18, United States Code, Section  
1361

BEFORE, James P. Donohue, United States Magistrate Judge, Seattle, Washington.

The undersigned complainant, Geoffrey Maron, Special Agent, Federal Bureau of Investigation, being duly sworn, states:

COUNT ONE

(Destruction of Government Property)

On or about May 1, 2012, Seattle, within the Western District of Washington, CODY R. INGRAM did willfully injure and commit a depredation, and did attempt to injure and commit a depredation, against property of the United States and a department and agency thereof, that is, the General Services Administration, to wit, property at the William Kenzo Nakamura United States Courthouse, 1010 Fifth Avenue, Seattle, Washington.

All in violation of Title 18, United States Code, Section 1361 and Section 2.

39

1 And the complainant states that this Complaint is based on the following information:

2 **Background**

3 1. I have been a Special Agent ("SA") of the Federal Bureau of Investigation ("FBI")  
4 since 2003. I am trained and experienced in investigating a wide variety of violations of federal  
5 criminal law. I am currently assigned to the FBI's Seattle office, and I work on the Joint  
6 Terrorism Task Force ("JTTF").

7 2. The information in this affidavit is based on my direct knowledge and information  
8 provided by other law enforcement sources. This affidavit does not include everything that I  
9 learned during the investigation, but rather only includes enough information to show probable  
10 cause.

11 **The Nakamura United States Courthouse**

12 3. I am investigating the vandalism and destruction of United States Government  
13 property at the William Kenzo Nakamura United States Courthouse, 1010 Fifth Avenue, Seattle,  
14 Washington (the "Nakamura Courthouse"). I have spoken with Donna Sweeney of the United  
15 States General Services Administration ("GSA"). The GSA is a federal agency that acts as the  
16 landlord for federal government property. The GSA is responsible for managing and  
17 maintaining federal buildings. Ms. Sweeney is the GSA property manager, and is responsible for  
18 managing GSA properties to include the Nakamura Courthouse. According to Ms. Sweeney, the  
19 Nakamura Courthouse is, and has always been, federal property owned by the United States  
20 Government.

21 **The May 1, 2012, Vandalism Of The Nakamura Courthouse**

22 4. Large public "May Day" demonstrations and marches took place in Seattle on May  
23 1, 2012. At other recent demonstrations, suspected anarchists have rioted and destroyed  
24 property. On May 1, 2012, I and other officers were responsible for preventing and responding  
25 to any criminal activity.

26 5. From my own observations, and from other law enforcement sources, I know that a  
27 crowd of demonstrators reached the Nakamura Courthouse at roughly 12:50 p.m. The  
28 Courthouse was vandalized during the demonstration. Several doorpanes and windows were

1 broken, and paint was thrown on the building.

2 6. I have seen video of the vandalism of the Nakamura Courthouse that was taken by  
3 a local television station. The video shows several unidentified people dressed in black (known  
4 as "black bloc" attire) running up to the doors on the Sixth Avenue side of the Courthouse. The  
5 "black bloc" vandals batter the doors with objects. The "black bloc" vandals then run back into  
6 the crowd of demonstrators. A man in dark shirt then runs up to a door and batters it with a pole.  
7 As the man in the dark shirt turns and heads back to the crowd, CODY R. INGRAM runs up to  
8 the building. I have met INGRAM and I recognize him as the man in the video. INGRAM is a  
9 thin white man with long dreadlocks, and is wearing pants, a dark sweatshirt, and a cap in the  
10 video. As INGRAM approaches the building, he picks up a stout stick that is lying on the  
11 ground. INGRAM uses the stick to deliver half a dozen or so sharp jabs to a glass doorpane.  
12 The doorpane itself is hidden from view due to the camera angle. INGRAM then turns and  
13 walks back to the crowd of demonstrators, still carrying the stick.

14 7. From watching the video, I can tell what doors INGRAM struck. I have been to  
15 the Nakamura Courthouse and confirmed that those doorpanes are broken. I have also seen that  
16 the Courthouse is clearly marked as a federal Government building. The following appears  
17 directly over the doors that were vandalized, in very large letters:

18 WILLIAM KENZO NAKAMURA  
19 UNITED STATES COURT HOUSE  
20 U.S. COURT OF APPEALS

21 8. INGRAM was arrested by Seattle Police Department ("SPD") Officer Keith  
22 Swank. According to Officer Swank's report, he was on bicycle patrol at about 12:53 p.m. when  
23 he heard a report over his radio that people were breaking windows at the Nakamura  
24 Courthouse. The suspects were described as white men in dark clothes. As Officer Swank  
25 approached the Courthouse, he saw INGRAM on Sixth Avenue carrying a long stick with a flag  
26 on it. Officer Swank rode up to INGRAM, identified himself, and ordered INGRAM to stop.  
27 INGRAM turned and clenched his fists, as if about to fight the officer. Officer Swank got off  
28 his bicycle. INGRAM ran north on Sixth Avenue. Other officers caught up with INGRAM and

1 stopped him.

2 9. Even after being stopped, INGRAM refused to drop his stick. Officers tried to  
3 take the stick away and INGRAM struggled with them. Officer Swank pulled INGRAM to the  
4 ground by his hair. INGRAM kept struggling. Eventually the officers cuffed him. INGRAM  
5 continued to resist as officers put him in a police van.

6  
7 **INGRAM's Post-Arrest Statements**


8 10. JTTF Task Force Officer ("TFO") Rik Hall and I interviewed INGRAM on the  
9 night of May 1, 2012. INGRAM was in custody at the King County Jail on state charges. We  
10 identified ourselves as federal agents and read INGRAM his *Miranda* rights. INGRAM said that  
11 he understood his rights and was willing to answer questions.

12 11. INGRAM told us that he lived in Vermont. INGRAM said that he had travelled  
13 across the country with his dog to participate in Seattle's May Day demonstrations. INGRAM  
14 said that he was a schizophrenic but claimed that he did not need to take medications because his  
15 dog was a "service dog." INGRAM said that received a citation in Oregon while on his way to  
16 Seattle. INGRAM said that, on May 1, 2012, he joined a group of demonstrators that was  
17 forming at Seattle's Westlake Park. INGRAM left his dog and his backpack with two people he  
18 knew only as "Scarecrow" and "Wolf," whom he had met earlier in the week. INGRAM then  
19 joined a group of marchers. The marchers eventually reached the Nakamura Courthouse.

20 12. INGRAM admitted to breaking a window at the Nakamura Courthouse. INGRAM  
21 claimed that the window was already damaged or "spidered" when he struck it. From the media  
22 video, it is possible that one of the black-clad vandals may have struck the window before  
23 INGRAM did. INGRAM claimed that he broke the "spidered" window because he wanted to  
24 keep people from getting hurt. From my review of the video, I saw no signs that INGRAM was  
25 cleaning up broken glass or doing anything else that would keep people from getting hurt.  
26 INGRAM repeatedly said, "I broke the window." INGRAM said that he was anti-Government  
27 and was angry at the Government. INGRAM said that the Government needs to be replaced  
28 rather than changed.

1        13. On May 2, 2012, INGRAM was released from state custody and taken into federal  
2 custody. According to the FBI agents who took him into custody, INGRAM made similar  
3 statements to what he had told me. INGRAM claimed that he did not know that the building he  
4 damaged was a federal courthouse.

5        14. Based on the foregoing, I respectfully submit that CODY R. INGRAM committed  
6 the crime alleged in Count 1, above, incorporated herein by reference.

7  
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10          
GEOFFREY MARON, Complainant  
Special Agent, Federal Bureau of Investigation

11        Based on the Complaint and Affidavit sworn to before me, and subscribed in my  
12 presence, the Court hereby finds that there is probable cause to believe the defendant committed  
13 the offense set forth in the Complaint.

14  
15        Sworn to before me and subscribed in my presence, this 3rd day of May, 2012.

16  
17          
18 HON. JAMES P. DONOHUE  
UNITED STATES MAGISTRATE JUDGE  
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## UNITED STATES DISTRICT COURT

Western District of Washington

UNITED STATES OF AMERICA

V.

CODY INGRAM

## JUDGMENT IN A CRIMINAL CASE

Case Number: 2:12CR00129JPD-001

USM Number: 41545-086

Dennis Carroll  
Defendant's Attorney

## THE DEFENDANT:

☒ pleaded guilty to count(s) 1☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.☐ was found guilty on count(s) \_\_\_\_\_  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 1361 and 2 Class A Misdemeanor	Destruction of Government Property	5/1/2012	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) \_\_\_\_\_☐ Count(s) \_\_\_\_\_ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Michael Dion  
Assistant United States AttorneyJUNE 13, 2012  
Date of Imposition of JudgmentJames P. Donohue  
Signature of JudgeThe Honorable James P. Donohue  
United States Magistrate Judge13 June 2012  
Date

39

DEFENDANT: CODY INGRAM  
CASE NUMBER: 2:12CR00129JPD-001

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: time served, with no supervision to follow.

- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at \_\_\_\_\_ a.m. ☐ p.m. on \_\_\_\_\_.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on \_\_\_\_\_.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

40

AO 245B (Rev. 06/05) Judgment in a Criminal Case  
 Sheet 5 — Criminal Monetary Penalties

Judgment — Page 3 of 4

DEFENDANT: CODY INGRAM  
 CASE NUMBER: 2:12CR00129JPD-001

### CRIMINAL MONETARY PENALTIES

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 25	\$ Waived	\$ <del>3,000</del> 500.00

☐ The determination of restitution is deferred until \_\_\_\_\_. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
General Services Administration Richard Beseler, Field Office Mgr. 700 Stewart St. Seattle, WA 98101	3,000	<del>3,000</del> 500.00	

TOTALS	\$ 3000	\$ <del>3000</del> 500.00
--------	---------	---------------------------

☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ The court finds that the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

41

DEFENDANT: CODY INGRAM  
CASE NUMBER: 2:12CR00129JPD-001

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

☒ PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

☒ During the period of imprisonment, no less than 25% of their inmate gross monthly income or \$25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

☒ During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

☐ During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

42

**Exhibit 3**

UNITED STATES DISTRICT COURT

for the  
District of Oregon

Certified to be a true and correct  
copy or original filed in this District.  
Dated JUL 23 2012

By Moran, Clerk of Court  
US District Court of Oregon  
By Deputy Clerk [Signature]

Pages: 1 Through 1

Case No. 12-MC-268 A

In the Matter of the Search of  
(Briefly describe the property to be searched  
or identify the person by name and address)

7129 NE 8th Avenue, Portland, Oregon, more fully  
described in Attachment A.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search  
of the following person or property located in the \_\_\_\_\_ District of \_\_\_\_\_ Oregon  
(Identify the person or describe the property to be searched and give its location):  
7129 NE 8th Avenue, Portland, Oregon, more fully described in Attachment A, attached hereto and incorporated  
herein.

The person or property to be searched, described above, is believed to conceal (Identify the person or describe the  
property to be seized):

The information and items set forth in Attachment B which is attached hereto and incorporated herein by this reference.

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or  
property.

YOU ARE COMMANDED to execute this warrant on or before

August 3, 2012  
(not to exceed 14 days)

☒ in the daytime 6:00 a.m. to 10 p.m.

☐ at any time in the day or night as I find reasonable cause has been  
established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property  
taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the  
place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an  
inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge

Duty Magistrate Judge  
(name)

☐ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay  
of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be  
searched or seized (check the appropriate box) ☐ for \_\_\_\_\_ days (not to exceed 30).

☐ until, the facts justifying, the later specific date of

Date and time issued: July 20, 2012 3:05  
pm

[Signature]  
Judge's signature

City and state: Portland, Oregon

Dennis J. Hubel, United States Magistrate Judge  
Printed name and title

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**ATTACHMENT A**  
**PLACES TO BE SEARCHED**

The places to be searched are:

a. 7129 NE 8th Avenue, Portland, Oregon: This is a two level off-white house with turquoise trim, a white fence around the front yard, and an enclosed garage. The house is located on the corner of 8th Avenue and NE Buffalo;

b. [REDACTED] and, Oregon: This is a single level light purple house with dark purple trim and a multi-level water feature in the front yard which appeared to be non-functional;

c. [REDACTED] Portland, Oregon: This is a single level grey home with white trim and windows on two sides of the house located at a higher position, indicating a possible attic or second level; and

d. a [REDACTED]

e. a 1993, white, Chevy Astro van with Oregon license plate [REDACTED] and

f. The persons of [REDACTED] and [REDACTED] to the extent that any visible relevant articles of clothing (including but not limited to clothes, shoes, backpacks, and accessories) may be seized.

**ATTACHMENT B**  
**ITEMS TO BE SEIZED**

The items to be seized are the following items or materials that may be evidence of the commission of, the fruits of, or property which has been used as the means of committing federal criminal violations of Destruction of government property, in violation of 18 U.S.C. § 1361; Conspiracy to destroy government property, in violation of 18 U.S.C. § 371; Interstate travel with intent to riot, in violation of 18 U.S.C. § 2101; and Conspiracy to travel interstate with intent to riot, in violation of 18 U.S.C. § 371, namely:

- a. Clothing and related articles worn during commission of the offenses, including but not limited to: black clothing, backpacks, face coverings, shoes;
- b. Paint (green, red, black, grey, and blue/purple);
- c. Sticks and flags similar to those used or carried during the commission of the offenses, and material for making flags;
- d. Anti-government or anarchist literature or material;
- e. Documentation and communications related to the offenses, including but not limited to notes, diagrams, letters, diary and journal entries, address books, and other documentation in written or electronic form;
- f. Indicia of residency or indicia of possession of relevant items;
- g. Flares or similar incendiaries; and
- h. Computers, cellular phones, mobile communication and storage devices, and electronic storage media of any form. The seizure of computers is authorized, but not the search of computers.

Exhibit 4

4.7

Search

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**Monday, November 5, 2012 - 7:00pm**

- [Northwest Grand Jury Panel Discussion](#)

**Wednesday, November 7, 2012 - 8:30am**

- [Support Maddy! Rally @ the Federal Courthouse](#)

**Saturday, November 10, 2012 - 3:00pm**

- [Who You Callin' Illegal?: Stop Dede's Deportation](#)

**Saturday, November 17, 2012 - 7:00pm**

- [Political Witchhunts, Then and Now: Panel Discussion and Workshop](#)

**Sunday, November 18, 2012 - 3:30pm**

- [Noise Demo at SeaTac Federal Prison](#)

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## Home

## Report from Matt Duran's September 26th Hearing

Fri, 09/28/2012 - 4:17pm — Anonymous  
 from [Committee Against Political Repression](#)

Matt Duran had a hearing on the 26th. He is still being held at SeaTac FDC on contempt of court for an undetermined amount of time. He could potentially be held until March of 2014.

Here's a summary of what happened on the 26th: Friends and Supporters arrived and went through security at the Federal Courthouse about 10 minutes before court began. Court proceedings were held on the 13th floor with Judge Richard Jones.

Judge Jones began the morning with an explanation of the policies around open v. closed contempt hearings. He explained that the beginning of Matt's hearing is not technically a contempt hearing, but a chance for Matt to state his intentions around whether or not he will be providing the court with information or if he will continue to resist their coercion. This means that the first portion of the hearing was specifically addressing the Grand Jury proceedings and could not be accessible to the public. He continued to explain that, once Matt stated his intentions, and if he continued to resist the court's wishes, the hearing then turned into a contempt hearing and would become public.

Judge Jones went on to explain and apologize for the "miscommunication" during Matt's initial Grand Jury appearance. During his initial appearance on September 13th, those who were attempting to get through security and up to the contempt hearing were repeatedly told that the hearing was closed and that no one would be any further than the lobby of the courthouse. He admitted that the original contempt hearing on September 13th should have functioned identically to the way that day would go.

At that time, Judge Jones notified Matt's friends and supporters that the first portion of the hearing would be specifically discuss the Grand Jury and proceeded to excused the public, closing the hearing.

Friends and Supporters hung out just beyond the doors and the hearing was open again approximately 3 minutes later. Matt, once again, kept true to his word, to his principles and to his loved ones, and did not answer any questions.

Once allowed back in, Matt's lawyer took the floor to explain Matt's current conditions and intentions. Here is an abridged and bullet-point list of issues and information brought up by Matt's lawyer in court —

Matt is in Solitary Confinement (the Secure Housing Unit) which means ...

- + he has very little access to phone
- + he has been denied the ability to initiate contact with attorney
- + he has been denied visitor request forms
- + he has been denied vegan food (has access to vegetarian options and commissary items)
- + he has no way of socializing within the prison
- + he has no access to sunlight, fresh air or an untinted window to the outdoors

Even under these conditions, Matt has no intention of changing his mind or strategy. Matt's lawyer explained that Matt will be at peace no matter where he is within the prison. She said that he would like to socialize and play chess with other inmates, but is content where he is. He has a clock radio and a couple of romance novels the prison gave him upon arrival. She went on to describe the kinds of support Matt has been getting while in prison. Matt has received an overwhelming number of letters from all over the world, some from friends and most from strangers, who support and respect him for his convictions. Recently, a few publishers have

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[Rise Like Lions](#)  
[Seattle Solidarity Network](#)  
[The Wildcat](#)  
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[Wormwood Press](#)

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written him offering to send him books for free and he has begun to receive reading material from many sources. She also cited that, during the transport to the Prison, an inmate in the vehicle with Matt complimented him and respected him because "...most people are in here because they were informed on by other people...". Matt's lawyer demonstrated how resilient, driven, focused and principled Matt is and will continue to be. She also argued that, because of Matt's steadfast commitment to silence, his detainment was punitive.

The Prosecution (the government) took the floor after Matt's lawyer's statements. They explained that Matt's conditions and treatment were normal and the same as all prisoners at the Federal Detention Center at SeaTac. They also asserted that because Matt's lawyer did not have representation from FDC SeaTac, Matt's detainment conditions could not be corroborated. He also argued that, because Matt is getting worldwide support "...he must be doing fine..." The Prosecution made clear that, even though statements of non-compliance were made by Matt and on behalf of Matt, a statement of non-compliance would not be enough to prove that incarceration had moved from coercive to punitive. He also made it known that congress passed the law ruling that someone can be held for no more than 18 months in civil contempt as a coercive strategy for a reason. The Prosecution explained that the full coercive effects of imprisonment had not been felt by Matt due to the short term of detainment and that a second hearing date for 6-8 months out to reassess his incarceration was reasonable. The Prosecution made that suggestion then rested.

Matt's lawyer took the floor and suggested that the court not set another hearing date, while reserving herself and her client the privilege of coming forward to request a date.

The Prosecution agreed with this suggestion.

Judge Jones ruled to not set another hearing date and to keep Matt Duran detained.  
Please keep writing to Matt!

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Exhibit 5

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October 16, 2012

FEATURES

## No Right to Remain Silent

A Thlrd Northwest Activist Who Hasn't Been Accused of a Crime Is Sent to Federal Prison

by BRENDAN KILEY

Last week, Portland resident Leah-Lynn Plante spent the first of what could be more than 500 nights in prison for refusing to testify before a federal grand jury about people she *might* know who *might* have been involved with the political vandalism in Seattle on May Day.

That's a lot of nights for a couple of nights.

Plante has not been charged with a crime. In fact, the court granted her immunity, meaning she could not invoke her Fifth Amendment right against self-incrimination. Lawyers for two other grand-jury resisters—Matt Duran and Katherine Olejnik—have argued that the jury's questions about their acquaintances and housemates violate the First and Fourth Amendments. The court has decided that their silence is not protected by the First, Fourth, or Fifth Amendments.

But if Plante, Duran, and Olejnik continue to remain silent, they could be imprisoned until the expiration of this grand jury. Grand jury hearings are secret, but during Plante's open contempt-of-court hearing, Judge Richard A. Jones said they could be incarcerated until March of 2014.

At Plante's hearing, around 40 supporters and activists—mostly dressed in black—sat in the federal courtroom while extra security, from the US Marshals and the Department of Homeland Security, stood by. As federal marshals prepared to take her away, Judge Jones reminded Plante that "you hold the keys to your freedom" and that she could be released at any time if she chose to "exercise your right to provide testimony."

It was an odd turn of phrase—the same judge who, that morning, legally blocked her from exercising her right to remain silent was sending her to federal detention for not exercising a "right." The 40 or so supporters in the courtroom stood solemnly as she was led away. "I love you," Plante said to the crowd as marshals escorted her through a back door. "We love you!" some people in the crowd said. The lawmen looked tense for a moment, their eyes bright and their jaws clenched, ready for action. Then everyone walked out quietly, without incident.

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The only federal defendant to be sentenced for a May Day-related crime so far—damaging a door of a federal courthouse during the smashup—was arrested in early May and sentenced, in mid-June, to time served.

Which brings up a pointed question: Why was the only federally identified May Day vandal sentenced to time served (about a month), while people granted immunity from prosecution—Plante says government attorneys don't dispute that she wasn't even in Seattle on May Day—are looking down the barrel of 18 months in federal custody? Why is a person who *might* know something about a crime, but who steadfastly insists she has her right to remain silent, facing more severe punishment (about 18 times more severe) than the person who was sentenced for actually committing that crime?

Minutes before Plante's hearing, her attorney, Peter Mair sat, brow furrowed, in the courthouse lobby. Mair worked for years as a federal prosecutor—he's indicted the Speaker of the House of Representatives, has prosecuted mobsters, and is familiar with how grand juries work.

But given the way government attorneys are using grand juries now, he said, "you could indict a ham sandwich. Defense attorneys are not allowed in, other witnesses are not allowed in... They're going to send this poor girl off to prison for a year and a half. And the great irony is that the one guy who pleaded guilty to the crime served—what? Forty days?"

He reiterated what many other lawyers in the course of this story have argued—that the grand jury system was originally included in the Bill of Rights to avoid frivolous government indictments. But, he said, federal prosecutors have been using that system as a tool for investigation and intimidation since the Nixon administration: "They used it to chase dissidents."

Jenn Kaplan, an attorney who represented Olejnik, also showed up at Plante's hearing because she was "curious" to see how it would pan out. "Theoretically, the grand jury serves an important function as a jury of peers to find probable cause," she said, "instead of the US Attorney using it to indict anyone at will without having to publicly demonstrate why to anybody."

The system has become, she said, "a constitutional bypass around the Fourth and Fifth Amendments, allowing the government access to evidence they wouldn't otherwise have." It is also a useful tool to intimidate people, she said, creating a chilling effect on political activism. If simply knowing someone who might be suspected of political vandalism puts you at risk of a subpoena and 18 months in jail, it gives you a strong disincentive to associate with such people. She also cited an article in a Northwestern University law journal about the history of grand juries that states:

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The fundamental principles of free association and political freedom under the First Amendment, coupled with the historic right against self-incrimination codified in the Fifth Amendment, establish a "political right of silence." This right should bar the government from compelling cooperation with the grand jury under threat of imprisonment in an investigation involving political beliefs, activities, and associations.

In the end, Kaplan said, it is "far too drastic to bring someone before a grand jury" just because that someone might know someone who might have committed an act of vandalism.

Once Plante had been led away, her supporters walked out of the courtroom. A few looked a little teary. Then they milled around the elevators and on the front lawn of the courthouse, talking about going somewhere to get some food and maybe a drink. One mentioned an FBI special agent who, before the final hearing started, had spoken with her and some of her friends while they waited in the antechamber. I saw him at the end of their conversation, crouching on the carpet while the rest sat on a bench. As I approached, she was quietly asking him: "How do you feel about the way the warrants were executed? People hog-tied in their underwear?" Perhaps sensing new ears listening to the conversation, the agent stood up, walked away, and leaned against a wall until the courtroom opened.

In the end, the quietly tense saga between activists, lawyers, judges, and cops was a symphony of incongruity. Nearly everyone involved seemed to believe they were doing the right thing and executing their duty to their larger community. It was a collision course of ideals: Nobody was there for fun, or for greed, or for anything so simple as selfishness.

The guards at the security check to the courthouse—which activists and I shuffled through several times, emptying our pockets, taking off our shoes, putting our bags through the scanner—said that day didn't seem particularly busy. "You should see Thursdays," one said. "Bankruptcy hearings." Those days, he said, were jammed with people.

"How long have those bankruptcy days been so busy?" I asked.

"Oh, you know," he said. "For three or four years—since the big crash. Lot of people hurting from that. Lot of people hurting."

The day after Plante was sent to prison, activists in Portland organized a "grand jury resisters solidarity march," during which they smashed out the windows of four banks: Chase, Umpqua, US Bank, and Wells Fargo. \*

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August 7, 2012

NEWS

## Political Convictions?

Federal Prosecutors in Seattle Are Dragging Activists Into Grand Juries, Citing Their Social Circles and Anarchist Reading Materials

by BRENDAN KILEY

On Thursday, August 2, at roughly 12:45 p.m., a small woman with long black hair and a red cardigan sweater stood on the lawn of Seattle's federal courthouse, surrounded by a few friends and around 75 protesters. On the steps behind her, a few dozen law-enforcement officers watched as she nervously spoke into a megaphone, announcing that she would not cooperate with the federal grand jury proceedings taking place inside. She said she would go into the courthouse, give the jury only her name and date of birth, and refuse to answer any further questions. "Under no circumstances," she said, speaking for herself and another recipient of a subpoena, "will we talk about other people."

The woman, a 24-year-old from Portland named Leah-Lynn Plante, was prepared to go to jail for refusing to talk about who may have been involved in the politically motivated vandalism in downtown Seattle on May Day, when activists smashed out the windows of several banks and stores—including Wells Fargo and Niketown—as well as a federal courthouse door.

Refusal to testify before a federal grand jury can result in jail time for contempt of court. (Video journalist Josh Wolf, for example, served seven and a half months in 2006 and 2007 for refusing to cooperate with a grand jury and turn over his footage of a protest in San Francisco.)

In a follow-up interview with *The Stranger*, Plante said she wasn't even in Seattle on May 1 and is neither a witness to nor a perpetrator of any related crimes. She is, however, a self-declared anarchist and thinks the FBI singled her out because of her political beliefs and social affiliations.

"We support the efforts of all those who will be resisting this grand jury," she said quietly into the megaphone on the courthouse lawn. The crowd cheered.

"We love you, Leah!" somebody shouted. Plante smiled wanly. Then she walked up the courthouse steps past the line of officers, hugged two friends, wiped some tears from her eyes, and pushed her way through the revolving glass door. She was headed to a courtroom where she was not allowed to have an attorney to represent her or a judge to mediate—just a jury listening to a

prosecutor who is looking for an indictment. (Because grand jury proceedings are secret, the US Department of Justice was unable to comment on any elements of this story.)

Plante had been summoned to Seattle by a federal subpoena, delivered to her in the early hours of July 25, when the FBI raided her home—one of several raids in Seattle and Portland in the past couple of months. FBI agents, she said, smashed through her front door with a battering ram with assault rifles drawn, "looking paramilitary." According to a copy of the warrant, agents were looking for black clothing, paint, sticks, flags, computers and cell phones, and "anti-government or anarchist literature."

The warrants for the related raids used similar language. One warrant for an early morning raid at a Seattle home also listed black clothing, electronics, and "paperwork—anarchists in the Occupy movement." In effect, witnesses in Portland and Seattle say, federal and local police burst into people's homes while they were sleeping and held them at gunpoint while rummaging through their bookshelves, looking for evidence of political leanings instead of evidence of a crime. (For the record, I executed a quick search of my home early this morning and found black clothing, cans of paint, sticks, cloth, electronics, and "anarchist literature.")

"When I see a search warrant that targets political literature, I get nervous," said attorney Neil Fox, president of the Seattle chapter of the National Lawyers Guild. (The Seattle chapter released a statement urging the FBI and the US Attorney to end the raids and drop the grand jury subpoenas.) Raids like those can have a chilling effect on free speech, he said, and a long-term "negative effect on the country—you want to have robust discussions about political issues without fear." He also has concerns about the scope of the warrants: "'Anti-government literature' is so broad," he said. "What does that include? Does that include the writings of Karl Marx? Will that subject me to having my door kicked in and being dragged in front of a grand jury?"

Grand juries, Fox explained, were originally conceived as a protection for citizens against overzealous prosecutors and are enshrined in the Fifth Amendment of the US Constitution. A petite jury—the more familiar kind, from 6 to 12 people—determines innocence or guilt during a trial. A grand jury is larger, from 16 to 23 people, meets with a prosecutor but no defense attorneys, and determines whether there's enough evidence to indict someone for a federal crime.

Nowadays, Fox said, grand juries are often used by prosecutors and investigators who have run out of leads. But grand juries are secret, so it's difficult to know what the prosecutor is really doing. And the effects of raids and subpoenas like the ones in Seattle and Portland may be more about putting on the dramatic public spectacle of dragging people through the mud than investigating a crime.

Doug Honig, communications director at ACLU of Washington, echoed Fox's concerns: "If it's not carefully conducted, it can end up becoming a fishing expedition looking into people's political views and political associations."

Journalist Will Potter, author of *Green Is the New Red*, who has written extensively about US law enforcement and its relationships with political dissidents from the 1990s onward, said such investigations don't just incidentally chill free speech—in some cases, he believes, they're *trying* to do that.

"Sometimes, law enforcement believes this knocking-down-the-door, boot-on-the-throat intimidation is part of a crime-prevention strategy," he said. But a more pernicious goal may be social mapping. The anarchist books and cans of spray paint can be sexy items to wave around a courtroom, he said, but "address books, cell phones, hard drives—that's the real gold."

During the raid at her home, Plante said, some of the agents were initially hyperaggressive, but seemed "confused" by finding nothing more sinister than five sleepy young people. "It seemed like what they expected was some armed stronghold," she said. "But it's just a normal house, with normal stuff in the pantry, lots of cute animals, and everyone here was docile and polite."

"That's a really important point," Potter said when I mentioned that detail. "There's a huge disconnect between what the FBI and local police are being told and trained for, and what the reality is. There are presentations about ominous, nihilistic, black-clad, bomb-throwing, turn-of-the-century caricatures—the reality is that many anarchists are just organizing gathering spaces, free libraries, free neighborhood kitchens."

He directed me to a 2011 PowerPoint presentation from the FBI's "domestic terrorism operations unit"—posted on his blog—that described the current anarchist movement as "criminals seeking an ideology to justify their activities." Following that logic, the very presence of anarchist literature could be construed as evidence that someone has motivations to commit a crime. And it makes attorneys, journalists, and others who care about First Amendment protections nervous about a law-enforcement practice that conflates political beliefs with criminal activity.

Forty-five minutes after Plante pushed through the revolving door at the courthouse, she reemerged. She smiled shyly while the crowd of protesters cheered. Plante told the crowd that she gave the grand jury her name and her date of birth, refused to answer any other questions, and was released.

But Plante's ordeal isn't over—the court issued another subpoena for her to return on August 30. Whether she cooperates, and whether she faces jail time for noncooperation, remains to be seen.

★

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THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re KATHERINE OLEJNIK,  
Witness.

CAUSE NO. 12-GJ-00145

MOTION TO UNSEAL FILE

*Note on Motion Calendar: Nov. 16, 2012*

*ORAL ARGUMENT REQUESTED*

Index Newspapers LLC dba *The Stranger*, by and through its attorney, attorney, Neil M. Fox, a cooperating attorney with the National Lawyers Guild, seeks an order by this Court to unseal the file in the above-entitled case.

**1. FACTS IN SUPPORT OF MOTION**

A grand jury is currently sitting in the Western District of Washington investigating alleged criminal activities associated with anarchists in the Pacific Northwest. According to articles that have appeared in the press, based upon an unsealed search warrant affidavit, in April and May 2012, the FBI followed and surveilled suspected anarchists from Portland, Oregon, who allegedly traveled to Seattle where they participated in a protest in downtown Seattle on May Day. *See* M. O'Hagan & M. Carter, "Affidavit: Feds Trailed Portland Anarchists, Link Them to Seattle's May Day," *Seattle Times*, Oct. 20, 2012; L. Pulkkinen, "Agent: FBI Trailed Portland Anarchists Headed to May Day Riot," *Seattle Post-*

1 *Intelligencer*, Oct. 18, 2012 (attached in Ex. 1). During the demonstration, individuals  
2 wearing black broke some windows of local businesses and also windows of the Nakamura  
3 Federal Courthouse. One person (Cody Ingram) was arrested for breaking the courthouse  
4 windows, pled guilty to a misdemeanor, and was sentenced to time served and ordered to pay  
5 \$500.00 in restitution. Ex. 2 (Complaint and Judgment in *United States v. Ingram*, MJ 12-  
6 230).

7 On July 25, 2012, in coordinated raids, carried out by the FBI Anti-Terrorism Task  
8 Force, federal law enforcement agents searched two homes and a storage shed in Portland,  
9 seizing clothing, phones and computers. The search warrant authorizing one of the searches  
10 directed law enforcement to seize "[a]nti-government or anarchist literature or material." Ex.  
11 3. Reports in the media have claimed that the FBI used flash grenades to stun the occupants  
12 during the searches. Ex. 1 at 16-22.

13 Parallel with the raids seeking anti-government literature, federal government  
14 subpoenas were served on a number of individuals, seeking testimony before the grand jury  
15 about anarchist activities in the Pacific Northwest. According to press accounts, the  
16 individuals themselves apparently were not suspected of causing the property damage in  
17 Seattle on May Day, but were asked questions about their acquaintances. Ex. 1. When at  
18 least two of the individuals refused to testify about First Amendment protected activities  
19 (Matthew Duran and Katherine Olejnik), they were given immunity, and when they persisted  
20 in maintaining their silence, they were found in contempt and jailed at the FDC-SeaTac, an  
21 incarceration the United States Attorney has labeled as "coercive." K. Murphy, *Anarchists*  
22 *Targeted After Seattle's Violent May Day Protests*, *Los Angeles Times*, Oct. 19, 2012 (Ex. 1  
23 at 9).

24 Mr. Duran and Ms. Olejnik filed recalcitrant witness appeals, under 28 U.S.C. §  
25 1826, but apparently the Ninth Circuit denied their appeals. At least one other individual,  
26 Leah Plante, also was found in contempt and jailed, but she has been released from custody.

27 Both Mr. Duran and Ms. Olejnik have made public statements about their  
28 unwillingness to testify before the grand jury and have claimed that they are being persecuted

1 for their political views. Ex. 1 at 10-11. Their cases have attracted much publicity both in  
2 the Pacific Northwest and throughout the world. Articles and news accounts about the  
3 incarceration of Mr. Duran and Ms. Olejnik can be found in the *Los Angeles Times*, *RT*  
4 *Television*, and *Al Jazeera*. Ex. 1.

5 Despite this public interest, the contempt proceedings in the district court in both cases  
6 have been sealed, and there have been claims over the Internet that portions of the contempt  
7 hearings have been closed to the public. Ex. 4. Counsel for both Mr. Duran and Ms. Olejnik  
8 have informed the undersigned counsel that their clients have no objection to the unsealing of  
9 the files in these cases.

## 10 2. STANDING AND PROCEDURAL MECHANISM

11 Brendan Kiley is a reporter with *The Stranger*, an independent news weekly in Seattle,  
12 owned by Index Newspapers, LLC. Mr. Kiley has written several stories about the grand jury  
13 investigation and the contempt findings. Ex. 5.

14 As will be explained below, there are two qualified rights of public access to judicial  
15 proceedings and records, under the First Amendment and the common law. *United States v.*  
16 *Business of Custer Battlefield Museum*, 658 F.3d 1188, 1192 (9<sup>th</sup> Cir. 2011). To vindicate the  
17 right of public access to judicial records, federal courts have traditionally granted third parties  
18 standing to litigate access to judicial records:

19 Though generally invoked by news organizations, the common law right of  
20 access to judicial records and documents "is a general right held by all  
21 persons." *In re EyeCare Physicians*, 100 F.3d at 517. It has been invoked, for  
22 example, by those with "a proprietary interest" in a document, by those who  
23 need a document "as evidence in a lawsuit," by citizens who "desire to keep a  
24 watchful eye on the workings of public agencies" and by news organizations  
25 seeking "to publish information concerning the operation of government."  
26 *Nixon*, 435 U.S. at 597-98

27 *Business of Custer Battlefield Museum*, 658 F.3d at 1192 n. 4.

28 Rather than starting a separate civil action, the Ninth Circuit has approved of a more  
informal procedure, by which members of the public who seek access to judicial records can  
simply file a petition or motion or file a request directed to the court that has control over the  
records. *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 782-83 (9<sup>th</sup> Cir.

1 1982), citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). See also Local  
2 CR 5(g)(6) (providing for motions to unseal by parties or an "intervenor").

3 Accordingly, Index Newspapers is filing this motion to unseal and to make available to  
4 the public, the court files involving the contempt proceedings against Mr. Duran and Ms.  
5 Olejnik.

### 6 3. ARGUMENT

7 As the Ninth Circuit noted last year in *Business of Custer Battlefield Museum*, there is  
8 a qualified public right of access to judicial records in criminal cases that arises under both the  
9 First Amendment and the common law. *Business of Custer Battlefield Museum*, 658 F.3d at  
10 1192, citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Press-Enterprise Co.*  
11 *v. Superior Court*, 478 U.S. 1, 8 (1986). To be sure, the right is qualified, and does not extend  
12 to all judicial documents that have traditionally been kept secret, such as grand jury transcripts  
13 and sealed search warrant materials<sup>1</sup> in the midst of a pre-indictment investigation.  
14 *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).<sup>2</sup>

15 On the other hand, the secrecy requirements involving grand jury transcripts and other  
16 pre-indictment materials do not extend so far as to cut-off public scrutiny of the "ministerial"  
17 aspects of a grand jury. *In re Special Grand Jury (for Anchorage, Alaska)*, *supra*. Similarly,  
18 concerns about secrecy cannot be applied to ban those called before grand juries from  
19 discussing their own testimony, and such a ban would violate the First Amendment.  
20 *Butterworth v. Smith*, 494 U.S. 624 (1990).

21 Thus, generalized concerns about the secrecy of grand jury proceedings do not require  
22 that contempt proceedings associated with so-called recalcitrant witnesses be held behind  
23

---

24 <sup>1</sup> Because the search warrant that was briefly unsealed and released to the public, the "cat is out of the bag"  
25 and Index Newspapers will be filing a parallel motion to unseal that affidavit. See *In re Charlotte Observer*, 921 F.2d  
26 47 (4<sup>th</sup> Cir. 1990) (where court mistakenly named target of grand jury investigation in open court, information lost  
its secret character).

27 <sup>2</sup> The historic reason for the generalized secrecy surrounding grand jury investigations was to protect the  
28 grand jurors from the overreaching power of the Crown, and thus was a protection of liberty and freedom, rather than  
as a tool of government oppression. See generally *United States v. Smyth*, 104 F. Supp. 283, 289 & n.17 (N.D. Cal.  
1952) (explaining historic roots of secrecy of grand jury as protection against the Crown during the Stuart years).

1 closed doors. In *In re Oliver*, 333 U.S. 257 (1948), the Supreme Court has held  
2 unconstitutional a secret summary contempt procedure, in a grand jury-type proceeding, in  
3 Michigan:

4         The traditional Anglo-American distrust for secret trials has been  
5 variously ascribed to the notorious use of this practice by the Spanish  
6 Inquisition, [footnote omitted] to the excesses of the English Court of Star  
7 Chamber, [footnote omitted] and to the French monarchy's abuse of the *lettre*  
8 *de cachet*. [Footnote omitted] All of these institutions obviously symbolized a  
9 menace to liberty. In the hands of despotic groups each of them had become an  
10 instrument for the suppression of political and religious heresies in ruthless  
11 disregard of the right of an accused to a fair trial. Whatever other benefits the  
12 guarantee to an accused that his trial be conducted in public may confer upon  
13 our society, [footnote omitted] the guarantee has always been recognized as a  
14 safeguard against any attempt to employ our courts as instruments of  
15 persecution. The knowledge that every criminal trial is subject to  
16 contemporaneous review in the forum of public opinion is an effective restraint  
17 on possible abuse of judicial power.

18 333 U.S. at 268-70. See also *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982) (vacating contempt  
19 citation because of improper closure of contempt proceeding); *In re Fula*, 672 F.2d 279, 283  
20 (2d Cir. 1982) (same); *In re Grand Jury Matter*, 906 F.2d 78 (3d Cir. 1990) (same).

21         Accordingly, Fed. R.Crim. P. 6(e)(5) has an important limitation to its secrecy  
22 requirements: "Subject to any right to an open hearing in contempt proceedings, the court  
23 shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent  
24 necessary to prevent disclosure of matters occurring before a grand jury." The 1983 Advisory  
25 Committee notes to this rule explain that this language was included because of concerns  
26 about the First Amendment right to public access and to the Fifth and Sixth Amendment  
27 rights of the person found in contempt. See *In Re Grand Jury Matter*, 906 F.2d at 86.

28         To be sure, because the civil contempt proceeding for a recalcitrant witness is  
protected not by the Sixth Amendment's public trial provision, but by the Due Process Clause  
of the Fifth Amendment, a witness can waive an objection to the closure of the contempt  
proceedings by not objecting. *Levine v. United States*, 362 U.S. 610 (1960). However, even  
here, closure is not appropriate where there is a public interest in keeping the proceedings  
open:

       This is not a case where it is or could be charged that the judge deliberately  
enforced secrecy in order to be free of the safeguards of the public's scrutiny;  
nor is it urged that publicity would in the slightest have affected the conduct of

1 the proceedings or their result. Nor are we dealing with a situation where  
2 prejudice, attributable to secrecy, is found to be sufficiently impressive to  
render irrelevant failure to make a timely objection at proceedings like these.

3 362 U.S. at 619.

4 In contrast, this is a case where public scrutiny is needed to insure that First  
5 Amendment rights are not being abused. There have been allegations that federal law  
6 enforcement agents burst into private homes and searched for "anti-government" literature.  
7 There are other public allegations that the grand jury is being used as a tool of harassment,  
8 (i.e., Ex. 1 at 12-15) and that, based upon the briefly unsealed search warrant affidavit, the FBI  
9 was surveilling anarchists in the Pacific Northwest before windows were broken in downtown  
10 Seattle on May 1, 2012. Internationally, media accounts have compared the jailing of Mr.  
11 Duran and Ms. Olejnik to the incarceration in Russia of Pussy Riot members. J. Slattery,  
12 "America's Pussy Riot," *Al Jazeera*, Oct. 19, 2012 (Ex. 1 at 26-28).

13 Given these allegations, the public needs reassurance:

14 As for the historical need for secrecy to protect the grand jury from the  
15 Crown, the dynamics of modern federal prosecutions are different, with many  
16 citizens regarding the grand jury as weapon of the government rather than a  
shield from it. Shining some sunlight on the instant dispute reassures the public  
that someone is watching the watchers, [footnote omitted] and that this  
district's federal prosecutors are part of the solution, not part of the problem.

17 *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, 575-76 (W.D. Wisc. 2007).<sup>3</sup>

18 Accordingly, under both the common law right of access to judicial documents and the  
19 First Amendment, this Court should unseal the files in these cases and allow the public to  
20 have access to the court files regarding the contempt citations related to Matthew Duran and  
21 Katherine Olejnik, the transcripts of the contempt hearings, and any briefing.

22 To the extent the Government believes that any of these materials contain reference to  
23 sensitive matters that cannot be released to the public, the Government should redact those  
24 portions, subject to the approval of the Court. However, because the witnesses themselves  
25

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26 <sup>3</sup> The omitted footnote reads:

27 "*Qui custodiet ipsos custodes?*" -- Juvenal's Satires.

28 246 F.R.D. at 576 n.2.

1 have announced publicly their own positions about grand jury testimony, the witnesses and  
2 their attorneys are not bound by any requirements of secrecy, the contempt hearings are  
3 supposed to be public under *In re Oliver, supra*, and the Government has already released a  
4 key search warrant affidavit, the redactions should be kept to a minimum. As the D.C. Circuit  
5 said in a case involving the reporter Judith Miller:

6 Although not every public disclosure waives Rule 6(e) protections, one can  
7 safely assume that the "cat is out of the bag" when a grand jury witness -- in  
8 this case Armitage -- discusses his role on the CBS Evening News. [Citations  
omitted] We think the same is true with respect to the disclosures made by  
Novak, Cooper, and Rove's attorney.

9 *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007). *See also*  
10 *In re Oliver L. North*, 16 F.3d 1234, 1240-41, 1245 (D.C. Cir. 1994) (public interest in full  
11 disclosure of matters that have only been partially released previously -- "There must come a  
12 time, however, when information is sufficiently widely known that it has lost its character as  
13 Rule 6(e) material. The purpose in Rule 6(e) is to preserve secrecy. Information widely known  
14 is not secret.").

#### 15 4. CONCLUSION

16 For the foregoing reasons, the Court should unseal the files in *Duran* and *Olejnik*  
17 cases.

18 DATED this 2nd day of November 2012.

19 Respectfully submitted,

20 /s/ Neil M. Fox

21 NEIL M. FOX  
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1 **CERTIFICATION OF SERVICE**

2 I, Alexandra Fast, certify and declare that on November 5, 2012, I served the attached  
3 MOTION TO UNSEAL FILE on:

4 Counsel for the United States, Jenny Durkan and Michael Dion, by leaving a copy at  
the United States Attorney's Office, 700 Stewart St, Suite 5220, Seattle WA, 98101;

5 Counsel for Katherine Olejnik, by a copy at the offices of Jennifer Kaplan, 2003  
6 Western Ave. Suite 330, Seattle WA 98121.

7 I certify or declare under penalty of perjury that the foregoing is true and correct.

8 11/5/12 - SEATTLE, WA  
9 DATE AND PLACE

Alexandra Fast  
Alexandra Fast

No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

vs.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE OLEJNIK  
AND MATTHEW DURAN)

---

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

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**APPENDICES F-G**

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## *APPENDICES*

- A. Order Granting and Denying Motion to Unseal, 2/4/13
- B. Order Denying Reconsideration, 2/27/13
- C. Order Releasing Duran and Olejnik, 2/27/13
- D. Order (1/30/13) and Magistrate Report (1/8/13) re Search Warrant
- E. Motions to Unseal Olejnik and Duran Files
- F. Government's Opposition to Motion to Unseal
- G. Reply Regarding Motion to Unseal
- H. Motions for Reconsideration
- I. Declarations of Matthew Duran and Katherine Olejnik
- J. Declaration of Kimberly Gordon
- K. Unpublished Opinions and Orders from the 8<sup>th</sup> Circuit
- L. Pertinent Statutes and Rules

## APPENDIX F

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE KATHERINE OLEJNIK,

Witness

NO. GJ12-145

**OPPOSITION TO MOTION TO  
UNSEAL FILE**

**FILED UNDER SEAL**

**I. INTRODUCTION**

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Michael Dion and John T. McNeil, Assistant United States Attorneys, files this opposition to the motion filed by Index Newspapers LLC dba *The Stranger*, to unseal the file in this matter. *The Stranger* seeks access to materials related to the contempt proceedings of grand jury witness Katherine Olejnik. The Court properly sealed the filings in this case, and conducted closed hearings, because matters occurring before the grand jury were disclosed in those filings and hearings. Accordingly, the file should remain sealed.

1 **II. BACKGROUND**

2 Katherine Olejnik was subpoenaed to appear before the grand jury as part of an  
3 ongoing investigation. A contempt hearing was held on September 27, 2012. The Court  
4 closed the part of the hearing where matters occurring before the grand jury were  
5 discussed. When that part of the hearing was over, the Court opened the courtroom and  
6 allowed the public to be present when it announced the consequences of the contempt and  
7 detained Ms. Olejnik.

8 **III. ANALYSIS**

9 **A. The General Rule Is That Grand Jury Matters Are Not Public**

10 Federal Rule of Criminal Procedure 6(e)(5) provides that hearings on matters  
11 involving the grand jury should be "closed to the extent necessary to prevent disclosure of  
12 matters occurring before the grand jury." Fed.R.Cr.P. 6(e)(5). Rule 6(e)(6) provides in  
13 pertinent part that records "relating to grand jury proceedings shall be kept under seal . . ."  
14 Fed.R.Cr.P. 6(e)(6).

15 The secrecy requirement applies not only to actual transcripts of grand jury  
16 proceedings, but to summaries or other discussions of those proceedings. *See U.S.*  
17 *Industries, Inc. v. United States District Court*, 345 F.2d 18, 20-21 (9th Cir. 1965)  
18 (secrecy requirements in Rule 6(e) apply to government sentencing memorandum  
19 containing the substance of testimony before the grand jury, not just the actual  
20 transcripts), *cert. denied*, 382 U.S. 814 (1965); *United States v. Hogan*, 489 F.Supp. 1035,  
21 1039 (W.D.Wa. 1980) (secrecy requirements in Rule 6(e) apply to presentence report  
22 containing summaries of grand jury testimony).

23 *The Stranger* argues that it has a First Amendment and common law right of  
24 access to the file in this case. Because these grounds are analytically distinct, they will be  
25 discussed in order.

1                   1.     First Amendment Right of Access

2             The Ninth Circuit has established a three-part substantive balancing test to  
3 evaluate a First Amendment right of access claim. *Seattle Times v. United States District*  
4 *Court*, 845 F.2d 1513 (9th Cir. 1988); *Press-Enterprise Co. v. Superior Court (Press*  
5 *Enterprise I)*, 464 U.S. 501, 510 (1984) (where a First Amendment right of access to  
6 criminal proceedings exists, it can only be overcome by a compelling governmental  
7 interest narrowly tailored to serve that interest). Before this balancing test applies, the  
8 Court first must find as a threshold matter that a "qualified First Amendment right of  
9 public access" applies to the proceedings or materials in question. *See Press Enterprise*  
10 *Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 9 (1986) (proceeding must pass a  
11 two-part test to determine if a qualified right of access exists; because such a right is not  
12 absolute, however, it may then be overcome by overriding interests); *Times Mirror Co. v.*  
13 *United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) (courts must first find a qualified First  
14 Amendment right of access).

15             Under the First Amendment, the press has received a qualified right of access to  
16 some, but not all, criminal proceedings. To make this determination, the Supreme Court  
17 in *Press-Enterprise II* held that a district court must first evaluate whether a qualified  
18 right of access attaches to a particular proceeding. *Id.* at 8-9. That determination  
19 involves consideration of two "complementary" concerns: (1) whether the place and  
20 proceeding in question has historically been open to the press and public, and (2) whether  
21 public access plays a significant positive role in the functioning of the particular process  
22 in question. *Id.* The Ninth Circuit has stated that "[a]lthough *Press Enterprise II*  
23 concerned access to judicial proceedings themselves, we have previously indicated that  
24 the two-part analysis applies as well to documents . . . ." *Times Mirror Co. v. United*  
25 *States*, 873 F.2d at 1213 n.4 (emphasis in original).

1 With respect to the first *Press Enterprise II* factor, documents reflecting what  
2 occurred before the grand jury are prime examples of the type of matters to which the  
3 public and press have never enjoyed a historical right of access. The grand jury context  
4 presents an unusual setting where privacy and secrecy are the norm. *See Douglas Oil Co.*  
5 *v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *In re Sealed Case*, 151 F.3d 1059,  
6 1069-71 (D.C. Cir.1998). The grand jury's function depends on "maintain[ing] the  
7 secrecy of the grand jury proceedings[.]" *United States v. Procter & Gamble Co.*, 356  
8 U.S. 677, 681 (1958). As the Court noted in *Douglas Oil*, "[s]ince the 17th century, grand  
9 jury proceedings have been closed to the public, and records of such proceedings have  
10 been kept from the public eye." 441 U.S. at 218 n. 9. *See also Press Enterprise II*, 478  
11 U.S. at 9 ("it takes little imagination to recognize that there are some kinds of government  
12 operations that would be totally frustrated if conducted openly. A classic example is . . .  
13 our grand jury system").

14 As a result, courts have routinely barred the press and public from access to  
15 materials revealing what occurred before the grand jury. As the First Circuit noted,  
16 "[c]ourts have . . . held that no right of access applies to some . . . types of proceedings  
17 and documents. The paradigmatic example is the grand jury, whose proceedings are  
18 conducted in secret." *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003);  
19 *see In re Sealed Case*, 199 F.3d 522, 525-26 (D.C. Cir. 2000) (rejecting press  
20 organizations' requests for public docketing of grand jury ancillary proceedings); *In re*  
21 *Grand Jury Subpoena*, 103 F.3d 234, 242-43 (2d Cir. 1996) (press had no right of access  
22 to sealed records from hearing to compel disclosure of surveillance information that  
23 revealed grand jury material); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509-10  
24 (1st Cir.1989) (newspaper had no First Amendment right of access to grand jury records  
25 in "no bill" investigations, noting that "[t]he public has no right to attend grand jury  
26 proceedings, and therefore, has no right to grand jury records"); *In re Subpoena to Testify*

1 *Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1563-64 (11th  
2 Cir.1989) (newspapers had no First Amendment right to documents prepared for or  
3 testimony given in grand jury proceedings or related proceedings).

4 2. Common Law Right Of Access

5 Although *The Stranger* cites a common law right of access, the common law right  
6 of access has never applied to documents that disclose matters occurring before the grand  
7 jury. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) the Court  
8 recognized that the public has a common law right "to inspect and copy public records  
9 and documents, including judicial records and documents." *Id.* at 597 (emphasis added).  
10 However, "the right to inspect and copy judicial records is not absolute. Every court has  
11 supervisory power over its own records and files. . . ." *Id.* at 598.

12 Citing *Nixon*, the Ninth Circuit has recognized "that the press and public have  
13 historically had a common law right of access to most pretrial documents . . . though not  
14 to some, such as *transcripts of grand jury proceedings*." *Associated Press v. United*  
15 *States District Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) (emphasis added). Indeed, in  
16 *In re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982), the  
17 Court held that the public had a common law right of access to the ministerial records of  
18 the grand jury, but that right extended only to those portions of the ministerial records  
19 which did not compromise the long-standing rule of grand jury secrecy. *Id.* at 780-81. In  
20 *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1988), the Court reiterated  
21 that "grand jury" proceedings "are not accessible to the public under a common law  
22 theory." *Id.* at 1219.

23 It is equally clear that there is no right of access to "the substance of [grand jury]  
24 testimony as well as actual transcripts . . . ." *In re Motions of Dow Jones & Co.*, 142 F.3d  
25 496, 500 (D.C. Cir.), *cert. denied*, 525 U.S. 820 (1998) (citations and quotations omitted).  
26 *Accord U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18, 20-21 (9th Cir.

1 1965), *cert. denied*, 382 U.S. 814 (1965). In *Dow Jones & Co.*, the court held that certain  
2 press organizations did not have a common law right of access to pleadings and hearings  
3 that were ancillary to the grand jury investigation of President Clinton. *Id.* at 504. Citing  
4 the Ninth Circuit's opinion in *Times Mirror Co.*, 873 F.2d at 1219, the *Dow Jones & Co.*  
5 court noted that the common law right of access is not absolute, and specifically does not  
6 cover "documents which have traditionally been kept secret for important policy reasons,"  
7 such as grand jury materials. *Id.* Moreover, the court found that, if such a common law  
8 right of access to grand jury materials had ever existed, it had been supplanted by the  
9 restrictions on grand jury material in the Federal Rules of Criminal Procedure. *Id.*

10 **B. There Is No Public Right Of Access To Contempt Proceedings That**  
11 **Disclose Grand Jury Material**

12 Consistent with the authority discussed above, a contempt hearing must be closed,  
13 in whole or in part, when necessary to prevent disclosure of substantive grand jury  
14 information. Fed. R. Crim. P. 6(e)(5); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3rd  
15 Cir. 1990).

16 Rule 6(e)(5) recognizes a limited exception for contempt hearings, and states that  
17 the closure must be "[s]ubject to any right by to an open hearing in a contempt  
18 proceeding[.]" This does not mean that a contempt hearing must be completely open and  
19 public. Rather, the Supreme Court has held that, to the extent that the hearing will delve  
20 into the specifics of the Grand Jury investigation, it may properly be closed. *Levine v.*  
21 *United States*, 362 U.S. 610, 618 (1960) (no right to open hearing while court is  
22 reviewing questions posed by Grand Jury); *see also United States v. Smith*, 123 F.3d 140,  
23 149 n.13 (3rd Cir. 1997) ("[T]here is no requirement that the entire proceeding, including  
24 the questions that the contemnor refused to answer, be made public."). "All that must be  
25 accessible to the public, upon the contemnor's request, is the 'final stage' of the contempt  
26  
27  
28

1 proceedings," at which the witness is held in contempt and the sentence is passed. *Smith*,  
2 123 F.3d at 149 n. 13 (quoting *Levine*).

3 In this case, the Court followed precisely the procedure outlined in *Smith* and  
4 *Levine*. The filings, which discussed the general nature, as well as some specifics, of the  
5 grand jury investigation, were properly sealed. The Court closed the part of the hearing  
6 where the transcript of the witness's grand jury appearance was read into the record and  
7 other grand jury matters were discussed. The Court opened the hearing for the "final  
8 stage," namely the announcement of contempt and the confinement of the witness.


9 **IV. CONCLUSION**

10 *The Stranger* asserts an interest in covering this matter. There is also, however, a  
11 public interest in secret grand jury proceedings, which has been the norm for hundreds of  
12 years. This Court followed a well-established procedure designed to preserve the secrecy  
13 of the grand jury. The motion to unseal the file should be denied.

14  
15 DATED this 13th day of November, 2012.

16 Respectfully submitted,

17 JENNY A. DURKAN  
18 United States Attorney

19  
20   
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE MATTHEW DURAN,  
Witness

NO. GJ12-149

**OPPOSITION TO MOTION TO  
UNSEAL FILE**

**FILED UNDER SEAL**

**I. INTRODUCTION**

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1 **II. BACKGROUND**

2 Matthew Duran was subpoenaed to appear before the grand jury as part of an  
3 ongoing investigation. A contempt hearing was held on September 13, 2012. The Court  
4 closed the part of the hearing where matters occurring before the grand jury were  
5 discussed. When that part of the hearing was over, the Court opened the courtroom and  
6 allowed the public to be present when it announced the consequences of the contempt and  
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8 **III. ANALYSIS**

9 **A. The General Rule Is That Grand Jury Matters Are Not Public**

10 Federal Rule of Criminal Procedure 6(e)(5) provides that hearings on matters  
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14 Fed.R.Cr.P. 6(e)(6).

15 The secrecy requirement applies not only to actual transcripts of grand jury  
16 proceedings, but to summaries or other discussions of those proceedings. *See U.S.*  
17 *Industries, Inc. v. United States District Court*, 345 F.2d 18, 20-21 (9th Cir. 1965)  
18 (secrecy requirements in Rule 6(e) apply to government sentencing memorandum  
19 containing the substance of testimony before the grand jury, not just the actual  
20 transcripts), *cert. denied*, 382 U.S. 814 (1965); *United States v. Hogan*, 489 F.Supp. 1035,  
21 1039 (W.D.Wa. 1980) (secrecy requirements in Rule 6(e) apply to presentence report  
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3 evaluate a First Amendment right of access claim. *Seattle Times v. United States District*  
4 *Court*, 845 F.2d 1513 (9th Cir. 1988); *Press-Enterprise Co. v. Superior Court (Press*  
5 *Enterprise I)*, 464 U.S. 501, 510 (1984) (where a First Amendment right of access to  
6 criminal proceedings exists, it can only be overcome by a compelling governmental  
7 interest narrowly tailored to serve that interest). Before this balancing test applies, the  
8 Court first must find as a threshold matter that a "qualified First Amendment right of  
9 public access" applies to the proceedings or materials in question. *See Press Enterprise*  
10 *Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 9 (1986) (proceeding must pass a  
11 two-part test to determine if a qualified right of access exists; because such a right is not  
12 absolute, however, it may then be overcome by overriding interests); *Times Mirror Co. v.*  
13 *United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) (courts must first find a qualified First  
14 Amendment right of access).

15           Under the First Amendment, the press has received a qualified right of access to  
16 some, but not all, criminal proceedings. To make this determination, the Supreme Court  
17 in *Press-Enterprise II* held that a district court must first evaluate whether a qualified  
18 right of access attaches to a particular proceeding. *Id.* at 8-9. That determination  
19 involves consideration of two "complementary" concerns: (1) whether the place and  
20 proceeding in question has historically been open to the press and public, and (2) whether  
21 public access plays a significant positive role in the functioning of the particular process  
22 in question. *Id.* The Ninth Circuit has stated that "[a]lthough *Press Enterprise II*  
23 concerned access to judicial proceedings themselves, we have previously indicated that  
24 the two-part analysis applies as well to documents . . . ." *Times Mirror Co. v. United*  
25 *States*, 873 F.2d at 1213 n.4 (emphasis in original).

1 With respect to the first *Press Enterprise II* factor, documents reflecting what  
2 occurred before the grand jury are prime examples of the type of matters to which the  
3 public and press have never enjoyed a historical right of access. The grand jury context  
4 presents an unusual setting where privacy and secrecy are the norm. See *Douglas Oil Co.*  
5 *v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *In re Sealed Case*, 151 F.3d 1059,  
6 1069-71 (D.C. Cir.1998). The grand jury's function depends on "maintain[ing] the  
7 secrecy of the grand jury proceedings[.]" *United States v. Procter & Gamble Co.*, 356  
8 U.S. 677, 681 (1958). As the Court noted in *Douglas Oil*, "[s]ince the 17th century, grand  
9 jury proceedings have been closed to the public, and records of such proceedings have  
10 been kept from the public eye." 441 U.S. at 218 n. 9. See also *Press Enterprise II*, 478  
11 U.S. at 9 ("it takes little imagination to recognize that there are some kinds of government  
12 operations that would be totally frustrated if conducted openly. A classic example is . . .  
13 our grand jury system").

14 As a result, courts have routinely barred the press and public from access to  
15 materials revealing what occurred before the grand jury. As the First Circuit noted,  
16 "[c]ourts have . . . held that no right of access applies to some . . . types of proceedings  
17 and documents. The paradigmatic example is the grand jury, whose proceedings are  
18 conducted in secret." *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003);  
19 see *In re Sealed Case*, 199 F.3d 522, 525-26 (D.C. Cir. 2000) (rejecting press  
20 organizations' requests for public docketing of grand jury ancillary proceedings); *In re*  
21 *Grand Jury Subpoena*, 103 F.3d 234, 242-43 (2d Cir. 1996) (press had no right of access  
22 to sealed records from hearing to compel disclosure of surveillance information that  
23 revealed grand jury material); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509-10  
24 (1st Cir.1989) (newspaper had no First Amendment right of access to grand jury records  
25 in "no bill" investigations, noting that "[t]he public has no right to attend grand jury  
26 proceedings, and therefore, has no right to grand jury records"); *In re Subpoena to Testify*

1 *Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1563-64 (11th  
2 Cir.1989) (newspapers had no First Amendment right to documents prepared for or  
3 testimony given in grand jury proceedings or related proceedings).

## 4 2. Common Law Right Of Access

5 Although *The Stranger* cites a common law right of access, the common law right  
6 of access has never applied to documents that disclose matters occurring before the grand  
7 jury. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) the Court  
8 recognized that the public has a common law right "to inspect and copy public records  
9 and documents, including judicial records and documents." *Id.* at 597 (emphasis added).  
10 However, "the right to inspect and copy judicial records is not absolute. Every court has  
11 supervisory power over its own records and files. . . ." *Id.* at 598.

12 Citing *Nixon*, the Ninth Circuit has recognized "that the press and public have  
13 historically had a common law right of access to most pretrial documents . . . though not  
14 to some, such as *transcripts of grand jury proceedings*." *Associated Press v. United*  
15 *States District Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) (emphasis added). Indeed, in  
16 *In re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982), the  
17 Court held that the public had a common law right of access to the ministerial records of  
18 the grand jury, but that right extended only to those portions of the ministerial records  
19 which did not compromise the long-standing rule of grand jury secrecy. *Id.* at 780-81. In  
20 *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1988), the Court reiterated  
21 that "grand jury" proceedings "are not accessible to the public under a common law  
22 theory." *Id.* at 1219.

23 It is equally clear that there is no right of access to "the substance of [grand jury]  
24 testimony as well as actual transcripts . . ." *In re Motions of Dow Jones & Co.*, 142 F.3d  
25 496, 500 (D.C. Cir.), *cert. denied*, 525 U.S. 820 (1998) (citations and quotations omitted).  
26 *Accord U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18, 20-21 (9th Cir.

1 1965), *cert. denied*, 382 U.S. 814 (1965). In *Dow Jones & Co.*, the court held that certain  
2 press organizations did not have a common law right of access to pleadings and hearings  
3 that were ancillary to the grand jury investigation of President Clinton. *Id.* at 504. Citing  
4 the Ninth Circuit's opinion in *Times Mirror Co.*, 873 F.2d at 1219, the *Dow Jones & Co.*  
5 court noted that the common law right of access is not absolute, and specifically does not  
6 cover "documents which have traditionally been kept secret for important policy reasons,"  
7 such as grand jury materials. *Id.* Moreover, the court found that, if such a common law  
8 right of access to grand jury materials had ever existed, it had been supplanted by the  
9 restrictions on grand jury material in the Federal Rules of Criminal Procedure. *Id.*

10 **B. There Is No Public Right Of Access To Contempt Proceedings That**  
11 **Disclose Grand Jury Material**

12 Consistent with the authority discussed above, a contempt hearing must be closed,  
13 in whole or in part, when necessary to prevent disclosure of substantive grand jury  
14 information. Fed. R. Crim. P. 6(e)(5); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3rd  
15 Cir. 1990).

16 Rule 6(e)(5) recognizes a limited exception for contempt hearings, and states that  
17 the closure must be "[s]ubject to any right by to an open hearing in a contempt  
18 proceeding[.]" This does not mean that a contempt hearing must be completely open and  
19 public. Rather, the Supreme Court has held that, to the extent that the hearing will delve  
20 into the specifics of the Grand Jury investigation, it may properly be closed. *Levine v.*  
21 *United States*, 362 U.S. 610, 618 (1960) (no right to open hearing while court is  
22 reviewing questions posed by Grand Jury); *see also United States v. Smith*, 123 F.3d 140,  
23 149 n.13 (3rd Cir. 1997) ("[T]here is no requirement that the entire proceeding, including  
24 the questions that the contemnor refused to answer, be made public."). "All that must be  
25 accessible to the public, upon the contemnor's request, is the 'final stage' of the contempt  
26  
27  
28

1 proceedings," at which the witness is held in contempt and the sentence is passed. *Smith*,  
2 123 F.3d at 149 n. 13 (quoting *Levine*).

3 In this case, the Court followed precisely the procedure outlined in *Smith* and  
4 *Levine*. The filings, which discussed the general nature, as well as some specifics, of the  
5 grand jury investigation, were properly sealed. The Court closed the part of the hearing  
6 where the transcript of the witness's grand jury appearance was read into the record and  
7 other grand jury matters were discussed. The Court opened the hearing for the "final  
8 stage," namely the announcement of contempt and the confinement of the witness.


9 **IV. CONCLUSION**

10 *The Stranger* asserts an interest in covering this matter. There is also, however, a  
11 public interest in secret grand jury proceedings, which has been the norm for hundreds of  
12 years. This Court followed a well-established procedure designed to preserve the secrecy  
13 of the grand jury. The motion to unseal the file should be denied.

14  
15 DATED this 13th day of November, 2012.

16 Respectfully submitted,

17 JENNY A. DURKAN  
18 United States Attorney

19  
20   
21 MICHAEL DION  
22 Assistant United States Attorney  
23 United States Attorney's Office  
24 700 Stewart Street, Suite 5220  
25 Seattle, WA 98101-1271  
26 Telephone: (206) 553-7729  
27 Fax: (206) 553-0755  
28 E-mail: michael.dion@usdoj.gov

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re KATHERINE OLEJNIK,

Witness.

CAUSE NO. 12-GJ-00145

*THE STRANGER'S* REPLY MEMORANDUM  
REGARDING MOTION TO UNSEAL FILE

The Government takes grand jury secrecy to unheard of extremes. By filing its "Opposition to Unseal File" under seal, the Government seeks even to keep the very litigation to unseal these proceedings shielded from the public view.<sup>1</sup> Yet, there is no hint in the Government's pleadings of any sensitive grand jury matters, and thus there is no legitimate basis to keep the public's eyes from the filings related to unsealing the file.

In the case relied upon by the Government -- *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9<sup>th</sup> Cir. 1965) -- the Ninth Circuit warned against applying grand jury secrecy for the sole purpose of keeping matters secret:

<sup>1</sup> The Government apparently did not even initially serve its pleadings on counsel for Mr. Duran and Ms. Olejnik.

1 [I]t must be kept in mind that, in making a determination of when to permit a  
2 disclosure of grand jury proceedings, we are to examine, not only the need of  
3 the party seeking disclosure, but also the policy considerations for grand jury  
4 secrecy as they apply to the request for disclosure there under consideration.  
5 In other words, if the reasons for maintaining secrecy do not apply at all in a  
6 given situation, or apply to only an insignificant degree, the party seeking  
disclosure should not be required to demonstrate a large compelling need. This  
view of the necessity for a court to perform such a weighing process is amply  
demonstrated, we believe, by the remarks of Mr. Justice Brennan in his  
dissenting opinion in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S.  
395, 403, 79 S.Ct. 1237, 1242, 3 L.Ed.2d 1323 (1959):

7 Grand jury secrecy is, of course, not an end in itself. Grand jury  
8 secrecy is maintained to serve particular ends. But when  
9 secrecy will not serve those ends or when the advantages gained  
10 by secrecy are outweighed by a countervailing interest in  
disclosure, secrecy may and should be lifted, for to do so in such  
a circumstance would further the fair administration of criminal  
justice.

11 345 F.2d at 21-22.

12 Toward this end, even the rules related to grand jury secrecy are flexible. Local CrR  
13 6(j) states that “[m]otions practice in connection with Grand Jury proceedings and process  
14 issued in aid of such proceedings shall be accorded the secrecy protections as set forth in  
15 Fed.R.Crim.P. 6(e).” Fed.R.Crim.P. 6(e), however, does not place a blanket secrecy  
16 requirement on *all* matters related to grand juries. The only provisions mandating secrecy are  
17 contained in Rule 6(e)(2)(B), which is restricted to specific persons (i.e. grand jurors,  
18 interpreters, court reporters, attorneys for the Government). Moreover, Rule 6(e)(3)(E) gives  
19 the Court the power to authorize disclosure even of grand jury matters. Rule 6(e)(6) then  
20 narrows the scope of the secrecy requirement:

21 *Sealed Records.* Records, orders, and subpoenas relating to grand-jury  
22 proceedings must be kept under seal *to the extent and as long as necessary to*  
*prevent the unauthorized disclosure of a matter occurring before a grand jury.*

23 Emphasis added.

24 Local CR 5(g) further provides:

25 (2) There is a strong presumption of public access to the court’s files.  
26 With regard to dispositive motions, this presumption may be overcome only on  
27 a compelling showing that the public’s right of access is outweighed by the  
28 interests of the public and the parties in protecting the court’s files from public  
review. With regard to nondispositive motions, this presumption may be  
overcome by a showing of good cause under Rule 26(c). . . .

1 (6) Files sealed based on a court order shall remain sealed until the  
2 court orders unsealing upon stipulation of the parties, motion by any party or  
3 intervenor, or by the court after notice to the parties. Any party opposing the  
4 unsealing must meet the required showing pursuant to 5(g)(2) that the interests  
5 of the parties in protecting files, records, or documents from public review  
6 continue to outweigh the public's right of access.

7 Thus, the rules set up a procedure by which there is a presumption that court records  
8 related to grand juries should be filed under seal, but that upon a motion to unseal the  
9 documents, the burden shifts to the Government to demonstrate that sealing is still required.  
10 Moreover, as in other contexts where parties have wanted to shield matters from public  
11 scrutiny, narrowly tailored redaction is the preferred remedy over wholesale sealing. *See, e.g.,*  
12 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984) (closure or sealing  
13 orders must explain why closure or sealing was necessary and why less restrictive alternatives  
14 were not appropriate); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (approving of  
15 redaction of plea agreement to excise grand jury materials); *In re New York Times*, 828 F.3d  
16 110, 116 (2d Cir. 1987) (wholesale sealing of motion papers was more extensive than  
17 necessary to protect fair trial rights). The Government's pleadings do not satisfy the burden  
18 necessary to justify sealing the entire file in this case.

19 In particular, there are many matters related to the instant case that either are not  
20 covered by the secrecy provisions of Rule 6 or for which there is no longer a necessity to keep  
21 the matters shielded from the public's eyes.

22 1. For instance, Ms. Olejnik filed several motions that were litigated before she  
23 ever entered the grand jury chamber -- a motion to quash the grand jury subpoena, a motion  
24 challenging the constitutionality of 18 U.S.C. § 6003, a motion joining a response filed by  
25 Matthew Duran (the witness in 12-GJ-00149), and a motion requesting open proceedings  
26 during the motion to quash and contempt hearings. Ex. 1. Because these motions were  
27 litigated before Ms. Olejnik could have obtained information from the grand jury, there is no  
28 basis to shield from the public her motions, the Government's responses and the court  
proceedings related to these motions.

2. As for the contempt hearing, the Government claims that a portion of this  
hearing was open to the public. *Opposition to Motion to Unseal* at 7. If this is in fact the

1 case, then there could be no reason to seal court records and transcripts related to that portion  
2 of the hearing.

3 3. Moreover, while the Government may be constrained by Rule 6 to keep  
4 substantive grand jury matters secret, Rule 6 places no such restrictions on Ms. Olejnik or her  
5 attorney -- "No obligation of secrecy may be imposed on any person except in accordance  
6 with Rule 6(e)(2)(B)." Rule 6(e)(2)(A).<sup>2</sup> See *United States v. Sells Engineering*, 463 U.S.  
7 418, 425 (1983) ("Witnesses are not under the prohibition unless they also happen to fit into  
8 one of the enumerated classes."); *Butterworth v. Smith*, 494 U.S. 624 (1990) (Florida rule  
9 banning witnesses from disclosing grand jury testimony violated First Amendment). Even if  
10 under some extreme circumstances, a court could impose a secrecy restriction on a grand jury  
11 witness, see *In re Grand Jury Proceedings*, 814 F.2d 61, 68-70 (1<sup>st</sup> Cir 1987) (surveying law),  
12 not only have such circumstances not been presented here, but the Court never imposed any  
13 type of gag order on Ms. Olejnik or her lawyer.<sup>3</sup> Thus, there is no basis to seal either Ms.  
14 Olejnik's pleadings or anything she or her counsel may have said during the contempt hearing.  
15 To the extent that Ms. Olejnik's statements and pleadings are duplicative of information  
16 submitted by the Government, the Government's pleadings and statements at the contempt  
17 hearing should not be sealed, there no longer being a necessity to seal them.

18 4. Finally, the proceedings surrounding the unsealing of this file is of a public  
19 nature and should not be sealed. The Government has not placed any sensitive grand jury  
20 information into its pleadings and thus there is no basis for the Government to try to hide from  
21 the public its attempts to keep other information secret.

22  
23  
24  
25  
26 <sup>2</sup> The 1944 Notes of the Advisory Committee for this rule state: "The rule does not impose any obligation  
27 of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on  
28 witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure  
to counsel or to an associate."

<sup>3</sup> Ms. Olejnik has given formal consent to the unsealing of the file in this case. Ex. 2.

1        There is a strong public interest in this case. Two young people are imprisoned  
2 indefinitely because they have refused to testify. People from around the country and around  
3 the world have questioned the Government's motives, and, as noted in prior briefing,  
4 comparisons have been drawn between Mr. Duran and Ms. Olejnik and the Russian punk  
5 rock group "Pussy Riot." The lack of transparency and the secrecy surrounding these matters  
6 -- where even the Government attempts to keep secret its response to a motion to unseal the  
7 files -- can only breed distrust and suspicion.<sup>4</sup> Only by opening up the files (with certain  
8 selected portions redacted if need be) can the public's concerns be addressed.

9        Accordingly, the Court should grant the motion to unseal this file, and the Government  
10 should have the burden of demonstrating what portions should be redacted.

11        Finally, because of the public interest in this matter, the Court should schedule oral  
12 argument in an open hearing on the issue of whether this file should be unsealed.

13        DATED this 16th day of November 2012.

14        Respectfully submitted,

15        /s/ Neil M. Fox  
16        NEIL M. FOX  
17        WSBA NO. 15277  
18        Attorney for Index Newspapers LLC dba *The Stranger*  
19        Law Office of Neil Fox, PLLC  
20        2003 Western Ave. Suite 330  
21        Seattle WA 98121

22        Telephone: 206-728-5440  
23        Fax: 206-448-2252  
24        e-mail: nf@neilfoxlaw.com

25        <sup>4</sup> As the Supreme Court once noted:

26        And an enforced silence, however limited, solely in the name of preserving the dignity of the  
27 bench, would probably engender resentment, suspicion, and contempt much more than it would  
28 enhance respect.

*Bridges v. California*, 314 U.S. 252, 270-71 (1941).

**CERTIFICATION OF SERVICE**

I, Alexandra Fast, certify and declare that on November 16, 2012, I served the attached REPLY MEMORANDUM on:

Counsel for the United States, Jenny Durkan and Michael Dion, by leaving a copy at the United States Attorney's Office, 700 Stewart St, Suite 5220, Seattle WA, 98101;

Counsel for Katherine Olejnik, by leaving a copy at the offices of Jennifer Kaplan, 2003 Western Ave. Suite 330, Seattle WA 98121.

I certify or declare under penalty of perjury that the foregoing is true and correct.

11/16/2012-SEATTLE, WA  
DATE AND PLACE

Alex Fast  
Alexandra Fast

EXHIBIT 1

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

In Re Grand Jury Subpoena,

Katherine Olejnik,

Subpoenaed Party.

Cause No. 12-GJ-145

DECLARATION OF JENNIFER  
KAPLAN

Jennifer Kaplan declares and certifies as follows:

1. My name is Jennifer Kaplan. I am competent to be a witness and I have personal knowledge of the facts set forth below.
2. I am counsel for Katherine Olejnik in the above-captioned case.
3. I have been served with a copy of the motion filed by The Stranger to unseal the above-captioned case, as well as the government's reply.
4. I have filed several documents in the above-captioned case. They include a motion to quash Ms. Olejnik's grand jury subpoena, filed jointly with Matthew Duran in Cause No. 12-GJ-148; a motion challenging the constitutionality of 18 U.S.C. § 6003; a motion joining a response filed by Mr. Duran; and motion requesting open proceedings for Ms. Olejnik's motion to quash and contempt hearings.
5. All of the documents that I filed in this case were filed prior to my client's appearance before the grand jury. Therefore, none of these documents contain material derived from what transpired in the grand jury chambers.

1 6. I filed these documents under seal only because that is the procedure required by  
2 the court clerk. My client and I would have preferred for these records to be  
3 unsealed from the outset.

4 I declare under penalty of perjury of the laws of the United States that the  
5 foregoing is true and correct to the best of my knowledge.

6 Dated this 15<sup>th</sup> day of November, 2012 at Seattle, WA.

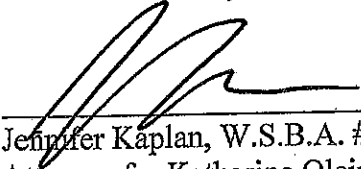
7   
8 \_\_\_\_\_  
9 Jennifer Kaplan, W.S.B.A. #40937  
10 Attorney for Katherine Olejnik  
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EXHIBIT 2

JUDGE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

In Re Grand Jury Subpoena,

Katherine Olejnik,

Subpoenaed Party.

Cause No. 12-GJ-145

DECLARATION OF KATHERINE  
OLEJNIK

Katherine Olejnik declares and certifies as follows:

1. My name is Katherine Olejnik. I am competent to be a witness and I have personal knowledge of the facts set forth below.
2. I am currently in custody at the SeaTac Federal Detention Center in Seattle, Washington after being found in civil contempt for refusing to answer questions before a Grand Jury in the above-referenced cause number.
3. My attorney has explained to me that motions have been filed to unseal my case and to unseal the search warrant affidavit associated with cause number MJ12-534, and what the effects of unsealing these records would be.
4. I have no objection to the unsealing of cause number GJ12-145 or MJ12-534.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 11 of November, 2012 at Seattle, WA.

  
Katherine Olejnik

DECLARATION OF KATHERINE  
OLEJNIK - 1

**Gilbert H. Levy**  
Attorney at Law  
2003 Western Avenue, Ste 330  
Seattle, Washington 98121  
(206) 443-0670 Fax: (206) 448-2252

Exhibit 3 -- Proposed Order

THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re KATHERINE OLEJNIK,

Witness.

CAUSE NO. 12-GJ-00145

[Proposed] ORDER UNSEALING FILE

CLERK'S ACTION REQUIRED

THIS MATTER having come on for hearing upon *The Stranger's* motion to unseal the file in this case, and the Court having reviewed the file and the response of the United States, now, therefore,

IT IS ORDERED that the Clerk's Office unseal the file in the instant case and allow it to be accessed by the public via PACER.

DONE IN OPEN COURT this \_\_\_\_ day of November 2012.

The Hon. Richard Jones

THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re MATTHEW DURAN,  
Witness.

CAUSE NO. 12-GJ-00149

*THE STRANGER'S* REPLY MEMORANDUM  
REGARDING MOTION TO UNSEAL FILE

The Government takes grand jury secrecy to unheard of extremes. By filing its "Opposition to Unseal File" under seal, the Government seeks even to keep the very litigation to unseal these proceedings shielded from the public view.<sup>1</sup> Yet, there is no hint in the Government's pleadings of any sensitive grand jury matters, and thus there is no legitimate basis to keep the public's eyes from the filings related to unsealing the file.

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<sup>1</sup> The Government apparently did not even initially serve its pleadings on counsel for Mr. Duran and Ms. Olejnik.

1 [I]t must be kept in mind that, in making a determination of when to permit a  
2 disclosure of grand jury proceedings, we are to examine, not only the need of  
3 the party seeking disclosure, but also the policy considerations for grand jury  
4 secrecy as they apply to the request for disclosure there under consideration.  
5 In other words, if the reasons for maintaining secrecy do not apply at all in a  
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disclosure, secrecy may and should be lifted, for to do so in such  
a circumstance would further the fair administration of criminal  
justice.

11 345 F.2d at 21-22.

12 Toward this end, even the rules related to grand jury secrecy are flexible. Local CrR  
13 6(j) states that "[m]otions practice in connection with Grand Jury proceedings and process  
14 issued in aid of such proceedings shall be accorded the secrecy protections as set forth in  
15 Fed.R.Crim.P. 6(e)." Fed.R.Crim.P. 6(e), however, does not place a blanket secrecy  
16 requirement on *all* matters related to grand juries. The only provisions mandating secrecy are  
17 contained in Rule 6(e)(2)(B), which is restricted to specific persons (i.e. grand jurors,  
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19 the Court the power to authorize disclosure even of grand jury matters. Rule 6(e)(6) then  
20 narrows the scope of the secrecy requirement:

21 *Sealed Records.* Records, orders, and subpoenas relating to grand-jury  
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*prevent the unauthorized disclosure of a matter occurring before a grand jury.*

23 Emphasis added.

24 Local CR 5(g) further provides:

25 (2) There is a strong presumption of public access to the court's files.  
26 With regard to dispositive motions, this presumption may be overcome only on  
27 a compelling showing that the public's right of access is outweighed by the  
28 interests of the public and the parties in protecting the court's files from public  
review. With regard to nondispositive motions, this presumption may be  
overcome by a showing of good cause under Rule 26(c). . . .

...

1 (6) Files sealed based on a court order shall remain sealed until the  
2 court orders unsealing upon stipulation of the parties, motion by any party or  
3 intervenor, or by the court after notice to the parties. Any party opposing the  
4 unsealing must meet the required showing pursuant to 5(g)(2) that the interests  
5 of the parties in protecting files, records, or documents from public review  
6 continue to outweigh the public's right of access.

7 Thus, the rules set up a procedure by which there is a presumption that court records  
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9 documents, the burden shifts to the Government to demonstrate that sealing is still required.  
10 Moreover, as in other contexts where parties have wanted to shield matters from public  
11 scrutiny, narrowly tailored redaction is the preferred remedy over wholesale sealing. *See, e.g.,*  
12 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984) (closure or sealing  
13 orders must explain why closure or sealing was necessary and why less restrictive alternatives  
14 were not appropriate); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (approving of  
15 redaction of plea agreement to excise grand jury materials); *In re New York Times*, 828 F.3d  
16 110, 116 (2d Cir. 1987) (wholesale sealing of motion papers was more extensive than  
17 necessary to protect fair trial rights). The Government's pleadings do not satisfy the burden  
18 necessary to justify sealing the entire file in this case.

19 In particular, there are many matters related to the instant case that either are not  
20 covered by the secrecy provisions of Rule 6 or for which there is no longer a necessity to keep  
21 the matters shielded from the public's eyes.

22 1. For instance, the undersigned counsel has been informed that Mr. Duran  
23 apparently filed several motions that were litigated before he ever entered the grand jury  
24 chamber -- including a motion to quash the grand jury subpoena. Because these motions were  
25 litigated before Mr. Duran could have obtained information from the grand jury, there is no  
26 basis to shield from the public his motions, the Government's responses and the court  
27 proceedings related to these motions.

28 2. As for the contempt hearing, the Government claims that a portion of this  
hearing was open to the public. *Opposition to Motion to Unseal* at 7. While this may in fact  
be in dispute, with members of the public claiming that portions of this hearing were not open  
to the public (*Motion to Unseal* at Ex. 4 (p. 48)), still, under the Government's theory, if the

1 contempt hearing was partially open, then there could be no reason to seal court records and  
2 transcripts related to that portion of the hearing. The fact that some in the community believe  
3 that the hearing was in fact closed is another reason to rectify that problem by now unsealing  
4 the portions of the file and transcripts that relate to that hearing.

5 3. Moreover, while the Government may be constrained by Rule 6 to keep  
6 substantive grand jury matters secret, Rule 6 places no such restrictions on Mr. Duran or his  
7 attorney -- "No obligation of secrecy may be imposed on any person except in accordance  
8 with Rule 6(e)(2)(B)." Rule 6(e)(2)(A).<sup>2</sup> See *United States v. Sells Engineering*, 463 U.S.  
9 418, 425 (1983) ("Witnesses are not under the prohibition unless they also happen to fit into  
10 one of the enumerated classes."); *Butterworth v. Smith*, 494 U.S. 624 (1990) (Florida rule  
11 banning witnesses from disclosing grand jury testimony violated First Amendment). Even if  
12 under some extreme circumstances, a court could impose a secrecy restriction on a grand jury  
13 witness, see *In re Grand Jury Proceedings*, 814 F.2d 61, 68-70 (1<sup>st</sup> Cir 1987) (surveying law),  
14 not only have such circumstances not been presented here, but the Court never imposed any  
15 type of gag order on Mr. Duran or his lawyers. Thus, there is no basis to seal either Mr.  
16 Duran's pleadings or anything he or his counsel may have said during the contempt hearing.  
17 To the extent that Mr. Duran's statements and pleadings are duplicative of information  
18 submitted by the Government, the Government's pleadings and statements at the contempt  
19 hearing should not be sealed, there no longer being a necessity to seal them.

20 4. Finally, the proceedings surrounding the unsealing of this file is of a public  
21 nature and should not be sealed. The Government has not placed any sensitive grand jury  
22 information into its pleadings and thus there is no basis for the Government to try to hide from  
23 the public its attempts to keep other information secret.

---

26  
27 <sup>2</sup> The 1944 Notes of the Advisory Committee for this rule state: "The rule does not impose any obligation  
28 of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on  
witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure  
to counsel or to an associate."

1        There is a strong public interest in this case. Two young people are imprisoned  
2 indefinitely because they have refused to testify. People from around the country and around  
3 the world have questioned the Government's motives, and, as noted in prior briefing,  
4 comparisons have been drawn between Mr. Duran and Ms. Olejnik and the Russian punk  
5 rock group "Pussy Riot." The lack of transparency and the secrecy surrounding these matters  
6 -- where even the Government attempts to keep secret its response to a motion to unseal the  
7 files -- can only breed distrust and suspicion.<sup>3</sup> Only by opening up the files (with certain  
8 selected portions redacted if need be) can the public's concerns be addressed.

9        Accordingly, the Court should grant the motion to unseal this file, and the Government  
10 should have the burden of demonstrating what portions should be redacted.

11        Finally, because of the public interest in this matter, the Court should schedule oral  
12 argument in an open hearing on the issue of whether this file should be unsealed.

13        DATED this 16th day of November 2012.

14        Respectfully submitted,

15        /s/ Neil M. Fox

16        NEIL M. FOX

17        WSBA NO. 15277

18        Attorney for Index Newspapers LLC dba *The Stranger*

19        Law Office of Neil Fox, PLLC

20        2003 Western Ave. Suite 330

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25        <sup>3</sup> As the Supreme Court once noted:

26        And an enforced silence, however limited, solely in the name of preserving the dignity of the  
27 bench, would probably engender resentment, suspicion, and contempt much more than it would  
28 enhance respect.

*Bridges v. California*, 314 U.S. 252, 270-71 (1941).

***CERTIFICATION OF SERVICE***

I, Alexandra Fast, certify and declare that on November 16, 2012, I served the attached REPLY MEMORANDUM on:

Counsel for the United States, Jenny Durkan and Michael Dion, by leaving a copy at the United States Attorney's Office, 700 Stewart St, Suite 5220, Seattle WA, 98101;

Counsel for Matthew Duran, by depositing a copy in the United States Mail with proper first-class postage attached in an envelope addressed to:

Kimberly Gordon  
Gordon & Saunders  
1111 Third Ave. Suite 2220  
Seattle WA 98101

and by emailing a copy to Kimberly Gordon at kim@gordonsaunderslaw.com.

I certify or declare under penalty of perjury that the foregoing is true and correct.

11/16/12-SEATTLE, WA  
DATE AND PLACE

Alex Fast  
Alexandra Fast

Exhibit 1 -- Proposed Order

THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re MATTHEW DURAN,  
Witness.

CAUSE NO. 12-GJ-00149

[Proposed] ORDER UNSEALING FILE

*CLERK'S ACTION REQUIRED*

THIS MATTER having come on for hearing upon *The Stranger's* motion to unseal the file in this case, and the Court having reviewed the file and the response of the United States, now, therefore,

IT IS ORDERED that the Clerk's Office unseal the file in the instant case and allow it to be accessed by the public via PACER.

DONE IN OPEN COURT this \_\_\_\_ day of November 2012.

The Hon. Richard Jones

No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

vs.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE OLEJNIK  
AND MATTHEW DURAN)

---

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

---

**APPENDICES H-L**

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## *APPENDICES*

- A. Order Granting and Denying Motion to Unseal, 2/4/13
- B. Order Denying Reconsideration, 2/27/13
- C. Order Releasing Duran and Olejnik, 2/27/13
- D. Order (1/30/13) and Magistrate Report (1/8/13) re Search Warrant
- E. Motions to Unseal Olejnik and Duran Files
- F. Government's Opposition to Motion to Unseal
- G. Reply Regarding Motion to Unseal
- H. Motions for Reconsideration
- I. Declarations of Matthew Duran and Katherine Olejnik
- J. Declaration of Kimberly Gordon
- K. Unpublished Opinions and Orders from the 8<sup>th</sup> Circuit
- L. Pertinent Statutes and Rules

## APPENDIX H

THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re KATHERINE OLEJNIK  
Grand Jury Witness,

In re MATTHEW DURAN,  
Grand Jury Witness.

CASE NOS. 12-GJ-00145  
12-GJ-00149

MOTION FOR RECONSIDERATION AND  
MOTION TO ALTER OR AMEND A  
JUDGMENT

NOTED FOR: February 15, 2013

COMES NOW Index Newspapers LLC *dba The Stranger*, by and through its attorney,  
Neil M. Fox, and moves this Court for an order reconsidering and altering and amending its  
Order filed on February 4, 2013, related to the unsealing of the contempt portions of the  
above-note d files (the "Order") (attached as App. A). This motion is based upon Local Civil  
Rule 7 and Fed. R. Civ. Proc. 59(e).

**1. The Court's Factual Rendition is Partly Erroneous**

On February 4, 2013, the Court issued an order granting in part and denying in part  
*The Stranger's* motion to unseal the public portions of the files in these cases. The Court's  
ruling, in part, was based on its factual determination that the contempt hearings were open to  
the public:

Each of the facts the court has just recounted was disclosed during  
portions of each witness's contempt hearings that were open to the public.  
Nothing has prevented or will prevent anyone from publicizing those facts.

1 The Stranger, like any other member of the public, is entitled to access the  
2 transcripts of the public portions of these hearings.

3 Order at 2.

4 With all due respect, the record contains evidence that the public was excluded from at  
5 least one of the hearings. On November 16, 2012, the attorney for Mr. Duran, Ms. Kimberly  
6 Gordon, filed a declaration in No. 12-GJ-00149 that recounted how the public was actually  
7 excluded not only from the first hearing on September 13, 2012, related to her client's motion  
8 to quash the grand jury subpoena, but also from a later hearing that same day involving  
9 contempt proceedings. It appears that the Court attempted to open the contempt hearing after  
10 recitation of the transcript from the grand jury appearance. However, members of the public,  
11 who were initially excluded from entering the courtroom by armed guards and locked doors,  
12 were apparently never told that the hearing had been opened and were thus denied access to  
13 the courtroom during the public portions of the hearing. A copy of Ms. Gordon's Declaration  
14 that was previously filed is attached in Ex. 1.

15 Accordingly, the Court should amend the Order and include the un rebutted facts that  
16 members of the public were not allowed into the courtroom for all of the pertinent hearings  
17 that did not involve grand jury secrets.

18 **2. The Court's Remedy Should Be Altered**

19 The Court recognizes that at least the contempt portions of the proceedings in these  
20 cases cannot be closed to the public. However, the Court's remedy is to authorize that only  
21 *The Stranger* be allowed to obtain the transcripts of the contempt portions of the hearings.  
22 The Court rejected a remedy that partially unseals the file, opening up to public viewing  
23 matters that are not covered by Rule 6. Thus, the docket, even in a redacted form, is still  
24 shielded from public view; the transcripts of the motions to quash which could contain no  
25 grand jury information (since they took place before the grand jury appearance) can never be  
26 obtained by the public; witness' briefing which the Court recognizes can be freely  
27 disseminated cannot be obtained from the clerk's office; and even the Government's attempts  
28 to litigate this motion in secret is still under seal.

The Court's reasoning was that the files contain:

1 a mix of secret grand jury material, grand jury material that may have lost its  
2 secrecy, legal argument, banal information, and more. It is perhaps possible to  
3 assess every document in these files to redact secret grand jury material and  
4 divulge the remainder. The result would likely be an incomplete and  
5 sometimes indecipherable "court file" that would be as likely to mislead the  
6 public as to enlighten it. Nonetheless, neither the court nor the Government  
7 has an obligation to sift through these grand jury proceedings to determine  
8 what is secret and what is not.

9 Order at 11.

10 With all due respect, this conclusion constitutes manifest error.

11 In similar situations, courts have in fact required the Government and/or the court  
12 clerk's office to review files and to segregate or redact secret grand jury material and divulge  
13 the remainder. For instance, in a case involving a witness in the so-called "Whitewater"  
14 scandal, Susan McDougal, the 8<sup>th</sup> Circuit specifically directed:

15 OIC [Office of Independent Counsel], working with our Clerk of Court, to  
16 substitute for our current sealed file a public file, redacted to exclude portions  
17 of the record that disclose substantive grand jury proceedings, supplemented by  
18 a filing under seal that contains all redacted portions of the briefs and record on  
19 appeal. After an unsealed public file has been created in this fashion, counsel  
20 for McDougal may challenge by motion OIC's decision as to the portions of  
21 our file which should remain under seal.

22 *In re Grand Jury Subpoena (Susan McDougal)*, 97 F.3d 1090, 1095 (8<sup>th</sup> Cir. 1996). Years  
23 later, Ms. McDougal complained that the clerk's office in the district court had in fact sealed  
24 too much and again asked for the file to be unsealed, the 8<sup>th</sup> Circuit rejected her arguments:

25 McDougal claims that the clerk of court has sealed the entire file, or at least  
26 more than Judge Wright or this court ordered. Based on the record it appears  
27 that neither the district court nor this court intended to seal the entire record  
28 related to the civil contempt proceeding. The sealed docket for Whitewater  
grand jury case number 96-0003 designates relatively few documents as "under  
seal" or "sealed." Instead, the majority lack a designation or are classified as  
"public access." It nevertheless appears that all or at least most of the  
documents have been placed under seal. McDougal did not, however, request  
the district court to undertake an in camera review of the sealed record to  
determine if any materials were sealed in error and should be made accessible  
or if all must remain under seal. That would have been the appropriate place to  
initiate such a request rather than in the court of appeals.

29 *United States v. McDougal*, 559 F.3d 837, 841 (8<sup>th</sup> Cir. 2009). See also *In re Grand Jury*  
30 *Proceedings, CF*, No. 09-3938 (8<sup>th</sup> Cir. 2/25/10 & 3/31/10) (unpublished) & *In the Matter of*  
31 *the Appearance and Testimony of a Grand Jury Witness*, 3:09mc0004 (S.D. Iowa, 3/19/10)

1 (unpublished); Ex. 2 (involving grand jury recalcitrant witness appeal where the court ordered  
2 that the file be partially opened to the public).

3 The Court cites to *In re Sealed Case*, 199 F.3d 522 (D.C. 2000). However, that case  
4 simply upheld a district court's denial of a press request for a generic rule requiring public  
5 docketing of *all* ancillary grand jury related matters. Yet, there was, at least, a local rule in the  
6 District of Columbia that provided a mechanism of unsealing grand jury matters. D.C.  
7 District Local Criminal Rule 6.1 provided:

8 papers, orders and transcripts of hearings subject to this rule, or portions  
9 thereof, may be made public by the court on its own motion or on motion of  
10 any person upon a finding that continued secrecy is not necessary to prevent  
11 disclosure of matters occurring before the grand jury.

12 199 F.3d at 524.

13 The D.C. Circuit believed that this rule allowed the media to request a redacted public  
14 docket in any specific case, which would then allow for the exercise of discretion on a case-  
15 by-case basis where:

16 the District Court must duly consider the request and, if it denies the request,  
17 offer some explanation. The District Court's explanation must bear some  
18 logical connection to the individual request. In other words, it must rest on  
19 something more than the administrative burdens that justified the denial of  
20 across-the-board docketing, and it must be more substantial than, say, an  
21 arguable possibility of leaks.

22 199 F.3d at 527.

23 Thus, the Court's concern here about the possible burdens is misplaced. It is not  
24 uncommon, as the cited cases reflect, to allow for the partial unsealing of grand jury contempt  
25 files and the redaction of key documents that the Government believes contain grand jury  
26 secrets.

27 Moreover, to the extent the Court recognizes that the witnesses here are free to share  
28 their briefing, it does not make any sense, given their consent, to continue to seal *their*  
29 briefing from the public. In fact, the Ninth Circuit recently noted the 3d Circuit decision  
30 relied upon by this Court, *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997), and  
31 distinguished it on the basis that once "secret" materials are in the hands of third persons,  
32 there no longer is an interest in secrecy:

1 In *United States v. Smith*, after the government publicly released a  
2 sentencing memorandum that contained allegations of criminal conduct against  
3 uncharged individuals, the district court sealed the sentencing memorandum  
4 and denied a motion by various newspapers for access to the sentencing  
5 memorandum and the sealed briefs. 123 F.3d 140, 143, 145 (3d Cir. 1997).  
6 Consistent with our disposition of this case, the Third Circuit held that a  
7 motion by newspapers to access the released sentencing memorandum was  
8 moot because the newspapers "already possess[ed] it," and rejected the  
9 newspapers' claim to access the briefs because such access would "disclose  
10 additional confidential material." *Id.* at 146, 154. The court added, however,  
11 that "[e]ven if the dissemination by members of the public continues," an order  
12 barring further disclosure of the material in the sentencing memorandum "will  
13 at least narrow that dissemination." *Id.* at 155. This statement is dictum and  
14 does not undermine our commonsense conclusion that once a fact is widely  
15 available to the public, a court cannot grant any "effective relief" to a person  
16 seeking to keep that fact a secret. We doubt, because of the information's  
17 availability on the internet, that enjoining further disclosure by the parties will  
18 "narrow [any further] dissemination."

19 *Doe v. Reed*, 697 F.3d 1235, 1239-40 (9<sup>th</sup> Cir. 2012).

20 Because the Court's Order in these cases recognizes that any grand jury secrets in the  
21 hands of third parties (i.e. the witnesses, their attorneys) can be freely disseminated, the  
22 Government's argument for secrecy loses force and thus further secrecy is not required.

23 The Court's blanket order in these cases also includes the very litigation over the  
24 unsealing motions. Thus, members of the public would not be able to know that its  
25 Government wishes to conduct its business in secret, and has argued to extend secrecy even to  
26 motions designed to lift the veil of secrecy. At least, in the parallel motion to unseal the  
27 search warrant affidavit, Magistrate Judge Mary Alice Theiler's Report and Recommendation  
28 (12-MJ-534) noted that the Government had failed to provide any justification to keep its  
briefing under seal (p.12 n.4) (Ex. 3). Similarly, here, there is no justification for keeping the  
litigation over unsealing in a sealed file.

Finally, the fact that members of the public were actually illegally excluded from at  
least one of the contempt hearings in these cases (Ex. 1) illustrates the need for an order that  
not only gives *The Stranger* access to the transcripts of that hearing, but also gives *the public*  
access to the information necessary to obtain the transcripts. The Court's current order does  
not unseal the docket and file in a way that anyone else, other than *The Stranger*, could even  
discover the information necessary to order the transcripts. Any other concerned member of  
the public, including those who were turned away by security forces at the locked doors of the

1 courtroom, would have difficulties even to find out the name of the court reporters involved,  
2 since that information is not accessible to members of the public. Other members of the  
3 public should not have to intervene and file pleadings to be able to gain access to the  
4 information that *The Stranger* has obtained.

5       **3.     Conclusion**

6       Accordingly, the Court should grant reconsideration and alter or amend its Order. The  
7 Court should unseal the dockets in these two cases, and have portions redacted where  
8 necessary. The Government should propose which documents in the file should be redacted  
9 and sealed, and which should be unsealed, and provide justifications for its proposals.

10       DATED this 15<sup>th</sup> day of February 2013.

11       Respectfully submitted,

12       \_\_\_\_\_  
13       /s/ Neil M. Fox  
14       NEIL M. FOX  
15       WSBA NO. 15277  
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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,

CASE NO. 12-GJ-145

Grand Jury Witness,

IN RE MATTHEW DURAN,

CASE NO. 12-GJ-149

Grand Jury Witness.

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,<sup>1</sup> 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 <sup>1</sup> 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.<sup>2</sup> 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

25 <sup>2</sup> The Stranger attempts to place the burden on the Government to justify the sealing of these  
26 files, relying on Local Civil Rule 5(g). That rule applies only in proceedings to which there is a  
27 presumption of public access. Local Criminal Rule 6(j)(2) authorizes the filing under seal of "all  
28 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.<sup>3</sup> 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.<sup>4</sup> 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 <sup>3</sup> 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.

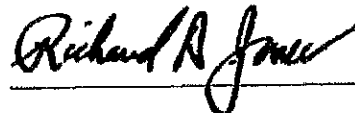
26 <sup>4</sup> Ms. Olejnik and Mr. Duran have filed declarations in which they consent to the disclosure of  
27 anything in these court files. Grand jury secrecy, however, is not theirs to waive. As the court  
28 has already noted, grand jury secrecy allows the grand jury to investigate without alerting  
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.

18  
19   
20

21 The Honorable Richard A. Jones  
22 United States District Court Judge  
23  
24  
25  
26  
27  
28

**Exhibit 1**

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NOV 16 2012

The Honorable Richard A. Jones

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In Re Grand Jury Subpoena of  
Matthew Duran,  
Subpoenaed Party.

Cause No. GJ12-149

DECLARATION OF KIMBERLY GORDON  
RE: MOTION TO UNSEAL FILE

I, Kimberly N. Gordon hereby declare under penalty of perjury of the laws of the State of Washington that the following is true and correct to the best of my knowledge:

1. My name is Kimberly N. Gordon;
2. I am the attorney for Matthew Duran, who is currently in custody at the SeaTac Federal Detention Center in Seattle, Washington after being found in civil contempt for refusing to answer questions before a Grand Jury in the above-referenced cause number;
3. Mr. Duran was found in contempt during a hearing held on September 13, 2012. That hearing was the second of two held on September 13, 2012.
4. The first hearing concerned a Motion to Quash, filed by Mr. Duran. That hearing occurred prior to Mr. Duran's Grand Jury appearance. Because it occurred prior to Mr. Duran's Grand Jury appearance, the transcript of his grand jury testimony was

DECLARATION OF MATTHEW DURAN - 1

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1 not introduced. The questions by the Grand Jury, and any answers allegedly given,  
2 were not discussed.

3 5. The Government and Mr. Duran each filed multiple pleadings regarding Mr. Duran's  
4 Motion to Quash. Because these pleadings were all filed prior to Mr. Duran's Grand  
5 Jury appearance, they did not include or summarize Grand Jury testimony.

6 6. This first hearing, concerning Mr. Duran's Motion to Quash, was closed to the public.  
7 I know this because as Mr. Duran and I attempted to enter the courtroom, we were  
8 accompanied by an interested member of the public, who was denied entry.

9 7. Specifically, as I entered the courthouse, I was accompanied by my client, my  
10 paralegal, and another interested member of the public. Inside the lobby of the  
11 courthouse, we all had to produce identification and sign a log, prior to proceeding  
12 through the metal detector.

13 8. Thereafter, the four of us took an elevator to the floor on which the hearing would be  
14 held. The courtroom was separated from this floor's lobby by two sets of doors.  
15 Before we entered the first door, we were stopped by several law enforcement  
16 officers. We were again required to identify ourselves. After we did, they only  
17 allowed me, my client, and my paralegal to enter the courtroom. The interested  
18 member of the public was made to wait outside the courtroom during the entire  
19 hearing.

20 9. After Mr. Duran's Grand Jury appearance, we were again directed to appear in court,  
21 for a hearing on the Government's contempt motion. Again, my client and I were  
22 accompanied by an interested member of the public. As we stepped out of the  
23 elevator, we were all met by a large group of armed officers. We were physically  
24 stopped and informed that we were not allowed to be on the floor. After I explained  
25 our reason for going to the courtroom, we were allowed to pass. However, the  
26 member of the public was again stopped and prohibited from entering the courtroom.

DECLARATION OF MATTHEW DURAN - 2

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1 10. Although I did not realize it at the time, it later became clear that the inside set of the  
2 double doors were locked behind us, by the armed officers, after we entered the  
3 courtroom. In other words, after a show of force by armed officers, we were locked  
4 in the courtroom, and the public was locked outside.

5 11. The contempt hearing began, and a portion of the hearing involved recitation of the  
6 transcript from Mr. Duran's Grand Jury appearance. The Court indicated that this  
7 portion of the hearing was closed to the public. But then the Court announced that  
8 the remainder of the hearing would be open to the public. It appeared to me, at that  
9 time, that one of the armed officers unlocked the inner doors and exited the  
10 courtroom. But no member of the public entered the courtroom and the hearing was  
11 soon concluded. Thereafter, I learned that the officers had not informed the public  
12 that the hearing had been opened. I learned that the member of the public that had  
13 originally accompanied us to the courtroom, along with other members of the public,  
14 had been denied access.

15 12. Pleadings were also filed in relation to the contempt hearing. But these pleadings  
16 were also prepared and filed prior to Mr. Duran's grand jury appearance. As a result,  
17 they neither referenced specific grand jury testimony, nor included a transcript of that  
18 testimony.

19 Dated this 16<sup>th</sup> of November, 2012 at Seattle, WA.

20  
21   
22 Kimberly N. Gordon, WSBA #25401  
Attorney for Matthew Duran

Exhibit 2

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

---

PER CURIAM.

Before us is the third party motion of journalist Sheila Regan to unseal the court docket and filings in this case. Neither the petitioner nor the government objects to her motion. The government has requested, however, that information infringing upon the secrecy and integrity of the grand jury proceeding be withheld.

The government's motion for *in camera* review should remain sealed, as well as sections of any briefs, motions, and other court materials which contain grand jury testimony, identify grand jury witnesses, or describe matters the grand jury is investigating.

We therefore grant Regan's motion and direct the government to submit proposed redactions to the district court within twenty one days. We also remand this

matter to the district court for it to oversee the redaction process and rule on the government's proposals as well as any objections by Regan and petitioner.

BYE, Circuit Judge, concurring in part and dissenting in part.

I concur in the court's decision to grant the third party motion of journalist Sheila Regan to unseal the court docket and filings in this case. The motion clearly has merit, see In re Grand Jury Subpoena, 97 F.3d 1090, 1095 (8th Cir. 1996) (indicating matters involving grand jury proceedings should remain open to the public in large part and closed "only when substantive grand jury matters are being disclosed"), as reflected by the government's concession the motion should be granted.

I dissent, however, from the portions of the court's decision which unduly limit the scope of the information to be disclosed and the timing of the disclosure.

First, I disagree with the court's order to keep sealed the government's motion for *in camera* review of certain documents -- some of which purport to establish that the statute of limitations has not yet run on the crime which is the subject of the grand jury proceedings. While I agree certain *portions* of the documents attached to the motion should remain sealed, there is no basis for keeping the motion *itself* sealed. The motion is a plain vanilla statement by the government which does not reveal any activities of the grand jury or its investigation. By way of illustration, there appears to be nothing in the following which reveals secret grand jury information:

The United States of America, Appellee, by the United States for the Southern District of Iowa, and Clifford R. Cronk III, Assistant United States Attorney, moves this Court for *in camera* inspection of sealed documents, and in support of this motion states:

1. The attached documents, Request for Protective Order and *Ex Parte* Request for an Order to Show Cause why Grand Jury Witness Should

Not be Held in Civil Contempt, were filed as an ex parte request under seal. The District Court granted the government's request to keep these matters private.

2. Release of the materials to the public and to counsel in this case would be detrimental to the government.

WHEREFORE, the United States respectfully requests that this Court allow in camera inspection of the attached sealed documents.

Secondly, I disagree with the court's directions allowing the government another twenty-one days to submit proposed redactions of the briefs, motions, and other court materials in this appeal which may contain secret grand jury information. Despite having ample time to respond to the motion to unseal, the government has failed to identify any such material. At the most, another seven days would be sufficient in which to allow the government to submit proposed redactions. As the third party movant asserts, the public's rightful access to the majority of the records in this appeal has already been delayed by two months.

Finally, I echo the third party movant's suggestion that this court review its general procedures for handling grand jury related appeals. Such appeals should be treated as presumptively open to the public unless and until one of the parties specifically brings a meritorious motion to seal portions which reveal secret grand jury information.

For the reasons expressed above, I respectfully concur in part and dissent in part.

February 25, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**SUPPLEMENTAL ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

---

This order supplements our unsealing order from earlier today in this matter. In that order we directed the government to submit proposed redactions to the district court within twenty one days. This court's clerk having advised that it would be more workable for the proposed redactions to the appellate record to be submitted to our clerk's office, we now direct the government to do so within twenty one days. We will rule on the government's proposals as well as any objections by Regan or petitioner. The district court will oversee the unsealing process for its own record.

**It is so ordered.**

February 25, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

---

On February 25, 2010 we entered an order granting a third party motion to unseal but directing the government to submit proposed redactions to the appellate record in this grand jury matter. On March 17 the government identified for redaction those portions of the record which contained testimony before the grand jury. Appellant responded on March 24 by objecting to any redactions. After due consideration we conclude that the government's proposed redactions are reasonable and appropriate and that appellant's objections are too broad. We therefore order the appellate record in this matter to be unsealed with the redaction of those portions to which the government objects.

BYE, Circuit Judge, dissenting.

The government's proposed redactions do not pertain to any actual grand jury testimony, but merely to a witness's refusal to testify before a grand jury. Therefore, I can find no reason why such reference is in any need of being sealed, particularly where the subject grand jury witness has stated her contextual preference. I therefore respectfully dissent from the court's order adopting the government's proposed redactions.

March 31, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

IN THE MATTER OF THE	)	Misc. No. 3:09mc0004
APPEARANCE AND TESTIMONY	)	
OF A GRAND JURY WITNESS	)	<b>ORDER</b>

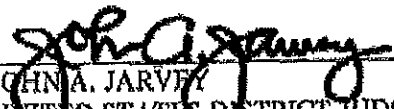
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This matter comes before the court pursuant to the February 25, 2010, order of the Eighth Circuit Court of Appeals remanding this matter to unseal portions of the record and to oversee any proposed government redactions. On March 16, 2010, the government provided the court with a document indicating that the following documents can be unsealed without revealing matters made secret pursuant to the protections afforded to a grand jury. The court directs the clerk to unseal docket numbers 3, 4, 6, 7, 7-1, 8 through 19, 22, 23, 23-1, 23-2, 24, 24-1, 26, 27, 28, 29, 31, 33 through 42. Docket numbers 1, 2, 5, 21 and 30 shall remain under seal. Docket numbers 20 and 25 shall be unsealed but redacted as requested by the government. The court will defer to the Court of Appeals with respect to the sealing of document number 32.

Upon the foregoing,

**IT IS ORDERED** that the documents in this matter are unsealed or shall remain sealed or shall be unsealed as redacted as reflected in the order above.

**DATED** this 19th day of March, 2010.

  
JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA

### Exhibit 3

HONORABLE RICHARD A. JONES

FILED ENTERED  
LODGED RECEIVED

JAN 30 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 SEARCH WARRANT ISSUED ON  
OCTOBER 3, 2012.

CASE NO. 12-MJ-534  
ORDER

This matter comes before the court on a Report and Recommendation ("R&R") from the Honorable Mary Alice Theiler, United States Magistrate Judge. Dkt. # 8. The R&R recommends that the court grant the motion of Index Newspapers, LLC (doing business as "The Stranger"), to unseal the file in this case. The R&R permits the Government to redact the names of suspects named in the search warrant application materials that are the subject of the case, as well as other specific information that might compromise the underlying investigation.

The Stranger has not objected to the R&R.

The Government has responded to the R&R by submitting versions of the search warrant application (including the affidavit supporting that allegation) as well as the search warrant return in which it has redacted the names of suspects as well as certain other identifying information. Dkt. # 9. The other information consists of several addresses, a few license plate numbers, and serial numbers and other specific identifying information for certain devices that were the subject of the application.

The court finds that the Government's redactions are consistent with the R&R.

ORDER - 1

1 The court orders as follows:

2 1) The court ADOPTS the R&R (Dkt. # 9) and grants The Stranger's motion to  
3 unseal the file in this case (Dkt. # 5), subject to the conditions stated in the  
4 R&R.

5 2) The clerk shall UNSEAL the file in this case, but shall SEAL the following  
6 specific documents:

7 a) the unredacted search warrant application (Dkt. # 1);

8 b) the unredacted search warrant return (Dkt. # 2).

9 3) The clerk shall ensure that a copy of this order is delivered by electronic mail  
10 to Neil Fox, attorney for The Stranger.

11 4) The clerk shall ensure that Judge Theiler receives notice of this order.

12 The court notes that the Stranger has also filed motions to unseal the case files in  
13 two grand jury proceedings (In re Duran, No. 12-GJ-149; In re Olejnik, No. 12-GJ-145).

14 The court will rule on those motions by the end of this week.

15 Dated this 30<sup>th</sup> day of January, 2013.

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18 The Honorable Richard A. Jones  
19 United States District Court Judge  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

)  
) CASE NO. 12-MJ-534-RAJ  
)  
)

IN RE SEARCH WARRANT ISSUED ON  
OCTOBER 3, 2012

) REPORT AND RECOMMENDATION  
)  
)  
)  
)

INTRODUCTION

This matter comes before the undersigned on a motion filed by Index Newspapers LLC  
dba *The Stranger* to unseal the search warrant affidavit and related materials filed in this case.  
(Dkt. 5.) The Government opposes the motion to unseal. (Dkt. 6.) Now, having considered  
the motion and all papers filed in support and opposition, along with the remainder of the  
record, the Court finds oral argument unnecessary and recommends the motion to unseal be  
GRANTED and the search warrant materials unsealed in a redacted form.

///

01 BACKGROUND

02 The Government obtained a search warrant in connection with the investigation into  
03 vandalism at the William Kenzo Nakamura United States Courthouse on May 1, 2012. The  
04 search warrant identified six individuals as anarchists suspected of participating and/or  
05 conspiring in the vandalism, and authorized the search of various electronic devices seized  
06 during searches conducted in Portland, Oregon. The Government filed the search warrant  
07 return on October 17, 2012 and, owing to the absence of a motion to seal due to an oversight on  
08 the part of the Government, the docket was unsealed. Beginning on the following day, the  
09 *Seattle Post-Intelligencer* and the *Seattle Times* published reports describing the content of the  
10 search warrant affidavit, but not naming the identified suspects. (Dkt. 5, Ex. 1.) (*See also id.*,  
11 Ex. 2 (articles from other new sources referencing the *Seattle Times* reporting).) On October  
12 19, 2012, the Government filed and the Court granted a motion to seal the file.

13 Brendan Kiley, a reporter with *The Stranger*, has written several stories about the grand  
14 jury investigation into the vandalism and related contempt proceedings. (*Id.*, Ex. 3.) Through  
15 filing the motion under consideration, Kiley and *The Stranger* seek to make available to the  
16 public the search warrant materials previously filed publicly in this matter.

17 DISCUSSION

18 There is a presumption of public access to judicial records and documents. *Nixon v.*  
19 *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this  
20 country recognize a general right to inspect and copy public records and documents, including  
21 judicial records and documents."). *See also* Local Civil Rule (LCR) 5(g) ("There is a strong  
22 presumption of public access to the court's files."). The right of public access includes "a

01 common law right 'to inspect and copy public records and documents, including judicial  
02 records and documents,' and 'a First Amendment right of access to criminal proceedings' and  
03 documents therein[.]” *United States v. Bus. of the Custer Battlefield Museum*, 658 F.3d 1188,  
04 1192 (9th Cir. 2011) (quoting *Nixon*, 435 U.S. at 597, and *Press-Enter. Co. v. Superior Court*,  
05 478 U.S. 1, 8 (1986)). The right of public access “‘is a general right held by all persons[.]’”  
06 and “has been invoked, for example, by those with ‘a proprietary interest’ in a document, by  
07 those who need a document ‘as evidence in a lawsuit,’ by citizens who ‘desire to keep a  
08 watchful eye on the workings of public agencies’ and by news organizations seeking ‘to publish  
09 information concerning the operation of government.’” *Id.* at 1192 n.4 (discussing within the  
10 context of the common law right of access) (quoting *In re EyeCare Physicians of Am.*, 100 F.3d  
11 514, 517 (7th Cir. 1996), and *Nixon*, 435 U.S. at 597-98)).<sup>1</sup>

12 The public’s right of access is qualified, not absolute. *Id.* at 1192; accord *Nixon*, 435  
13 U.S. at 597. See also *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940,  
14 946 (9th Cir. 1998) (“Of course, there is no right of access which attaches to all judicial  
15 proceedings, even all criminal proceedings.”). Access may be denied where outweighed by a  
16 compelling governmental interest, and narrowly tailored to serve that interest. *Times Mirror*  
17 *Co. v. United States*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989) (cited sources omitted). The  
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19 <sup>1</sup> The Government does not dispute and the Court finds no basis for questioning either the  
20 standing of Kiley and *The Stranger* in seeking access to the sealed files, or the procedural mechanism  
21 utilized in that pursuit. See, e.g., *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778,  
22 780-84 (9th Cir. 1982) (recognizing public’s standing to assert limited right of access to grand jury  
records and the propriety of filing direct requests for disclosure to the court supervising a grand jury’s  
activities); *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009) (“Domestic press  
outlets unquestionably have standing to challenge access to court documents.”) (cited source omitted).  
See also LCR 5(g)(8) (“A non-party seeking access to a sealed document may intervene in a case for the  
purpose of filing a motion to unseal the document.”).

01 party seeking to file or maintain a document under seal bears the burden of showing compelling  
02 reasons overcoming the presumption of public access. *Kamakana v. City of Honolulu*, 447  
03 F.3d 1172, 1178 (9th Cir. 2006).

04       The decision as to access rests within the discretion of the district court, exercised with  
05 consideration of the facts and circumstances at issue. *Nixon*, 435 U.S. at 599. The Court  
06 weighs the interests of the public and government, looking to “considerations of experience  
07 and logic[.]” *Times Mirror Co.*, 873 F.2d at 1213, 1218-19 (in a First Amendment analysis,  
08 the Court looks for a historic tradition of public access, and whether public access would play a  
09 “significant positive role” in the process, while a common law analysis looks to a history of  
10 access and the existence of an important public need, or whether disclosure would “serve the  
11 ends of justice.”) (quoting *Press-Enter. Co.*, 478 U.S. at 8-9, and *United States v. Schlette*, 842  
12 F.2d 1574, 1581 (9th Cir. 1988)). In sealing or retaining a seal, the court must “base its  
13 decision on a compelling reason and articulate the factual basis for its ruling, without relying on  
14 hypothesis or conjecture.” *Kamakana*, 447 F.3d at 1179 (quoting *Hagestad v. Tragesser*, 49  
15 F.3d 1430, 1434 (9th Cir. 1995)).

16       “A narrow range of documents is not subject to the right of public access at all because  
17 the records have ‘traditionally been kept secret for important policy reasons.’” *Id.* at 1178. In  
18 *Times Mirror Co.*, the Ninth Circuit held that “members of the public have no right of access to  
19 search warrant materials while a pre-indictment investigation is under way.” 873 F.2d at 1211.  
20 See also *Press-Enterprise*, 478 U.S. at 10 (“[G]rand jury proceedings have traditionally been  
21 closed to the public and the accused.”); *Kamakana*, 447 F.3d at 1178 (no right of public access  
22 to grand jury transcripts). The Court found no historic tradition of public access to warrant

01 proceedings, that “public access would hinder, rather than facilitate, the warrant process and the  
02 government’s ability to conduct criminal investigations[,]” and that “the ends of justice would  
03 be frustrated, not served, if the public were allowed access to warrant materials in the midst of a  
04 pre-indictment investigation into suspected criminal activity.” *Id.* at 1214-19. The Court  
05 observed that suspects identified “might destroy evidence, coordinate their stories before  
06 testifying, or even flee the jurisdiction[,]” as well as potential injury to the privacy interests of  
07 identified individuals. *Id.*

08 Kiley and *The Stranger* (hereinafter collectively *The Stranger*) seek the public  
09 disclosure of search warrant materials pertaining to a pre-indictment investigation. Without  
10 more, this request would be foreclosed by Ninth Circuit law. *See id.* However, as argued by  
11 *The Stranger* and for the reasons described below, the circumstances at issue in this case  
12 warrant public access.

13 The search warrant materials were filed publicly and obtained by, at a minimum, two  
14 news sources, the *Seattle Times* and the *Seattle Post-Intelligencer*. Those sources wrote  
15 detailed articles describing the content of the search warrant materials (Dkt. 5, Ex. 1), and  
16 articles from a variety of other news sources followed (*id.*, Ex. 2 (reports from Q13 Fox News,  
17 HeraldNet, King5.com, KGW.com, SFGate, and RT)).

18 This case is distinguishable from *Times Mirror Co.* and requests for pre-indictment  
19 warrant materials never before revealed to the public. The search warrant materials at issue  
20 here were made available to the public and only later sealed. In such circumstances, the  
21 justification for continued secrecy is necessarily called into question. *See, e.g., Virginia Dep’t*  
22 *of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (interest in protecting

01 integrity of ongoing law enforcement investigation insufficient to override right of public  
02 access where the bulk of information under seal was already a matter of public knowledge); *In*  
03 *re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (holding that, where judge mistakenly  
04 named a target of a grand jury investigation in open court and attempted to enjoin reporters  
05 from disclosing the name of the target: "On the present record, . . . 'the cat is out of the bag.'  
06 The district court did not close the hearing and the disclosure was made in the courtroom, a  
07 particularly public forum. Once announced to the world, the information lost its secret  
08 characteristic, an aspect that could not be restored by the issuance of an injunction to two  
09 reporters."); *In re North*, 16 F.3d 1234, 1240-41 (D.C. Cir. 1994) (finding grand jury material  
10 widely reported on "lost its protected character[]" and stating: "Information widely known is  
11 not secret."); *United States v. Loughner*, 769 F. Supp. 2d 1188, 1191-92 (D. Ariz. 2011) (noting  
12 Ninth Circuit recognition that "logic alone may be enough to establish a qualified right of  
13 access to court documents[,] and finding changed circumstances rendered inapposite the bar  
14 on search warrant disclosure set forth in *Times Mirror, Co.*, which "was predicated on the need  
15 for secrecy during an investigation and before a final indictment [was] returned") (citing *In re*  
16 *Copley Press*, 518 F.3d 1022, 1026 (9th Cir. 2008)).<sup>2</sup>

17 *The Stranger* persuasively argues that, because the search warrant materials have  
18 already been released and made the subject of extensive reporting, the "cat is out of the bag"  
19 and the public's First Amendment and/or common law rights of access "come[] into play." *In*  
20 *re Charlotte Observer*, 921 F.2d at 50. This is not to say that the Government does not raise

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22 <sup>2</sup> As noted by the Government, the request to unseal at issue in *Loughner* occurred post-indictment, not pre-indictment. 769 F. Supp. 2d at 1191-92.

01 valid concerns regarding disclosure of the search warrant materials. However, the  
02 Government fails to support the conclusion that the interest in maintaining the secrecy of the  
03 materials outweighs the public's right of access.

04       The Government argues the need to prevent disclosure of the search warrant materials  
05 in order to avoid interference with the ongoing investigation. It avers disclosure of the  
06 affidavit to "a few members of the press is only damaging to the extent that the press chooses to  
07 report the details of the affidavit." (Dkt. 6 at 3.) The Government maintains the press  
08 coverage has been very limited, omitting numerous details, including the names of the suspects  
09 and other details allowing for both suspect identification and a roadmap of the evidence  
10 compiled in the investigation to date. It rejects *The Stranger's* suggestion that the suspects are  
11 likely aware they are under investigation as mere speculation, and further denies that redaction  
12 of the suspects' names will remedy potential harms, noting their identities could be discerned  
13 through other information, and contending the affidavit includes far more sensitive material  
14 than the suspects' names. The Government avers that disclosure of the affidavit could  
15 interfere with the investigation by causing suspects to flee or destroy evidence, or result in the  
16 contamination or otherwise affect the testimony of potential witnesses. It distinguishes case  
17 law relied upon by *The Stranger* as not involving, as here, information remaining secret to the  
18 general public and (to its knowledge) to the suspects and witnesses involved in the  
19 investigation. Finally, the Government stresses that it is not the Court's job to ensure fairness  
20 or a level playing field among newspapers, noting *The Stranger* had as much access to the  
21 search warrant materials as any other newspaper or media organization during the period of  
22 public release.

01 It should first be noted that the right of the media to access information is co-extensive  
02 and does not exceed the right of the public. *Virginia Dep't of State Police*, 386 F.3d at 575 n.5.  
03 *Accord Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011). While the Court need not ensure a  
04 level playing field between media outlets, it cannot ignore the First Amendment and common  
05 law rights of access afforded to the public as a whole.

06 The Government here unsuccessfully seeks to minimize the relevance of the fact that  
07 the search warrant materials were filed in the public record. If the Court were to deny the  
08 pending motion, the search warrant materials would remain sealed in only an artificial and  
09 selective sense. That is, they would remain sealed only to those who did not access the  
10 materials when filed publicly in this case. As other courts have found, "[o]nce announced to  
11 the world, the information lost its secret characteristic, an aspect that [can] not be restored" by  
12 simply re-sealing the information. *In re Charlotte, Observer*, 921 F.2d at 48-50. *See also In*  
13 *re North*, 16 F.3d at 1244-45 ("As one member of this panel observed in a far different context,  
14 it 'is impossible' to 'remove[] leaked material from the news media and cram [] it back into  
15 grand jury secrecy.' Just so here.") (quoting *Barry*, 865 F.2d at 1328 (Sentelle, J., dissenting)).

16 The fact that only portions of the search warrant materials have been introduced to the  
17 public as a whole does not render inapposite the case law relied upon by *The Stranger* and the  
18 Court herein. For instance, in *In re Charlotte, Observer*, the Court found no basis for an  
19 injunction prohibiting disclosure of a suspect's name where the two reporters made privy to that  
20 information had not as yet reported the name publicly. 921 F.2d at 48-50. What mattered to  
21 the Court was that the reporters had, as members of the press and the public, obtained  
22 knowledge of that information. *Id.* at 50. Also, contrary to the suggestion of the

01 Government, the Court in *Virginia State Dep't of Police* considered relevant the fact that the  
02 "bulk of the information" under seal had already been publicly revealed, it did not limit the  
03 unsealing of information to only that previously publicly revealed. 386 F.3d at 579-80  
04 (emphasis added). *See also id.* at 580-81 (finding no basis to keep a portion of a hearing  
05 transcript under seal where the government failed to offer any reason specific to that document,  
06 but remanding for consideration of four documents where neither the district court, nor the  
07 parties offered sufficient explanation for their positions).

08       It further remains entirely unclear how many entities or individuals obtained copies of  
09 the search warrant materials prior to their sealing. While the contention of wider disclosure is  
10 perhaps speculative, the Government is likewise incapable of providing assurance as to the  
11 extent of disclosure.

12       It is equally speculative to conclude that retaining the documents under seal will avoid  
13 any further disclosure and, therefore, promote the Government's objective of preventing  
14 interference with the ongoing investigation. The investigation associated with the search  
15 warrant, as well as related contempt matters, is unquestionably newsworthy and of broad public  
16 interest, and is likely to remain that way for the remainder of the investigation. There is no  
17 basis for concluding that reporting on subsequent events will not reveal additional details from  
18 the search warrant materials, or that such details will not otherwise find their way into the  
19 public domain.

20       The Government also unsuccessfully downplays the details included in published  
21 reports to date. The news articles identify numerous details concerning the suspects, including  
22 that five of the six suspects drove in a rental car from Oregon to Seattle, stopping in Olympia on

01 the way. (*See, e.g.*, Dkt. 5, Ex. 1.) The articles describe the investigation into the suspects'  
02 activities, including a May 3, 2012 search of "a known anarchist 'squat' – crash pad – where  
03 they recovered 'distinctive clothing' from some of the alleged conspirators that was observed  
04 being worn by members of the black bloc protesters in Seattle[.]" and a "trio of FBI searches  
05 July 25 in Portland – two homes and a storage shed – where they recovered clothing, phones  
06 and laptop computers[.]" (*Id.* at 6 (also noting the seizure of "five cellphones, six digital  
07 storage devices, two iPods and one camera"); *see also id.* at 3 (noting investigators seized "14  
08 pieces of electronics and 11 CDs[.]").) The articles quote language used in text messages  
09 recovered in the searches and provide partial descriptions of clothing worn by the suspects  
10 during the vandalism. (*See, e.g.*, Ex. 1 at 3, 6 ("I only cut the shirt in half becuse its [sic] not  
11 big enough,' one suspect wrote. 'If you can figure out two slightly small bandanas out of it,  
12 thatd [sic] be great.'"; "We are all OK,' a May 1 text about the protest from one activist reads.  
13 'It was awesome.'") and Ex. 1 at 6 (describing surveillance-camera footage as allowing  
14 identification of "suspects based on clues: the white strip around one suspect's waist, the  
15 'fringe' of a shirt, the shape of a backpack."))

16 The amount of detail revealed in the news articles calls into question one of the primary  
17 justifications offered by the Government for keeping the materials under seal – confirmation of  
18 the suspects' identities and any potential ramifications thereof, such as flight of the suspects or  
19 destruction of evidence. The information contained in the search warrant materials cannot be  
20 viewed in a vacuum. The articles followed multiple searches conducted by law enforcement  
21 personnel. The suspects' clothing, cell phones, and other equipment and personal belongings  
22 were seized. The Court finds highly unconvincing the suggestion that the individuals under

01 suspicion remain ignorant of that fact, or would only flee or destroy evidence once they  
02 received confirmation through the unsealing of the search warrant materials.

03       In maintaining the need for continued secrecy, the Government also alludes to the  
04 presence of far more sensitive material than the suspects' names, describes the search warrant  
05 affidavit as a roadmap of the investigation, and points to the potential for contamination or  
06 some other effect on the testimony of potential witnesses. Maintaining the integrity of an  
07 ongoing law enforcement investigation is, without question, a compelling governmental  
08 interest. *Times Mirror Co.*, 873 F.2d at 1213, 1215. Indeed, had the search warrant materials  
09 not been inadvertently publicly filed, they would not now be subject to public access given that  
10 important interest. *Id.* However, while the various other justifications proffered by the  
11 Government may be valid in a general sense, the Government fails to provide the necessary  
12 specificity in relation to this particular case. *See, e.g., Virginia Dep't of State Police*, 386 F.3d  
13 at 579 (party asserting the need to protect the integrity of an ongoing investigation must provide  
14 "specific underlying reasons for the district court to understand how the integrity of the  
15 investigation reasonably could be affected by the release of such information."); *United States*  
16 *v. James*, 663 F. Supp. 2d 1018, 1021 (W.D. Wash. 2009) (finding justification for sealing only  
17 a portion of documents in question; noting that a "significant portion" of the documents  
18 contained "boilerplate language" and information otherwise a matter of public record, and  
19 concluding "the government has not shown how most of the information in the documents will  
20 compromise its active investigation. Rather, the assertion to that effect is vague.")

21       Courts can accommodate concerns regarding, *inter alia*, the protection of an ongoing  
22 investigation, privacy interests, and the need for secrecy in grand jury proceedings "by

01 redacting sensitive information rather than refusing to unseal the matters entirely.” *Bus. of the*  
02 *Custer Battlefield Museum*, 658 F.3d at 1195 n.5. *See also Loughner*, 769 F.2d at 1196  
03 (finding compelling need to redact limited portions of documents “likely to be inflammatory  
04 and difficult to forget, or inadmissible at trial.”) In this case, redaction of the names of the  
05 suspects is not opposed by *The Stranger* and would serve the important purpose of protecting  
06 the privacy interests of those individuals.<sup>3</sup> Further redactions could be warranted upon a  
07 showing that divulging specific sensitive material would affect the integrity of the investigation  
08 by, for example, allowing for the contamination of witness testimony. As it stands, however,  
09 the Court is unable to make such a determination. Any further findings as to redactions would  
10 need to follow a specific showing on the part of the Government.

#### 11 CONCLUSION

12 In sum, the Court recommends the motion to unseal be GRANTED and the search  
13 warrant materials unsealed in a redacted form.<sup>4</sup> The names of the suspects should be redacted  
14 to protect the privacy interests of those individuals. *See also supra* n.3. The determination of  
15 whether further redaction is appropriate is contingent on a proper showing by the Government.

16  
17 3 The Court reaches this conclusion despite the fact that the Government did not identify  
18 protection of the privacy of the suspects as a compelling interest arguing against disclosure. *See Times*  
19 *Mirror Co.*, 873 F.2d at 1216 (finding absence of qualified right of public access to search warrant  
20 materials prior to indictment “reinforced by . . . the privacy interests of the individuals identified in the  
21 warrants and supporting affidavits[.]” explaining: “The Supreme Court has acknowledged that one of  
the reasons for maintaining the secrecy of grand jury proceedings is to ‘assure that persons who are  
accused but exonerated by the grand jury will not be held up to public ridicule.’ This concern applies  
with equal force here.”) (quoted and cited sources omitted). In addition, although also not addressed by  
the parties, photographs of the suspects and the names or nicknames of other individuals contained  
within the search warrant materials could also be subject to redaction for privacy purposes.

22 4 The Court also agrees with *The Stranger* as to an absence of justification for filing any of the  
briefing associated with this motion under seal.

01 A proposed order accompanies this Report and Recommendation.

02 DATED this 8th day of January, 2013.

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Mary Alice Theiler  
United States Magistrate Judge

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THE HON. RICHARD JONES

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re KATHERINE OLEJNIK

Grand Jury Witness,

In re MATTHEW DURAN,

Grand Jury Witness.

CASE NOS. 12-GJ-00145  
12-GJ-00149

CERTIFICATE OF SERVICE

I, Alexandra Fast, certify and declare that on February 15, 2013, I served the attached MOTION FOR RECONSIDERATION AND MOTION TO ALTER OR AMEND A JUDGMENT on:

Counsel for the United States, Jenny Durkan and Michael Dion, by leaving a copy at the United States Attorney's Office, 700 Stewart St, Suite 5220, Seattle WA, 98101;

Counsel for Matthew Duran, by depositing a copy in the United States Mail with proper first-class postage attached in an envelope addressed to:

Kimberly Gordon  
Gordon & Saunders  
1111 Third Ave. Suite 2220  
Seattle WA 98101

Counsel for Katherine Olejnik by leaving a copy at the office of Jennifer Kaplan at 2003 Western Ave. Suite 330, Seattle WA 98121.

I certify or declare under penalty of perjury that the foregoing is true and correct.

2/15/2013-Seattle, WA  
DATE AND PLACE

Alexandra Fast  
Alexandra Fast

CERTIFICATE OF SERVICE - Page 1

In re Katherine Olejnik/In re Matthew Duran, No. 12-GJ-00145/149

Law Office of Neil Fox, PLLC  
Market Place One, Suite 330  
2003 Western Avenue  
Seattle, Washington 98121  
206-728-5440

## APPENDIX I

JUDGE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

In Re Grand Jury Subpoena,  
Katherine Olejnik,  
Subpoenaed Party.

Cause No. 12-GJ-145

DECLARATION OF KATHERINE  
OLEJNIK

Katherine Olejnik declares and certifies as follows:

1. My name is Katherine Olejnik. I am competent to be a witness and I have personal knowledge of the facts set forth below.
2. I am currently in custody at the SeaTac Federal Detention Center in Seattle, Washington after being found in civil contempt for refusing to answer questions before a Grand Jury in the above-referenced cause number.
3. My attorney has explained to me that motions have been filed to unseal my case and to unseal the search warrant affidavit associated with cause number MJ12-534, and what the effects of unsealing these records would be.
4. I have no objection to the unsealing of cause number GJ12-145 or MJ12-534.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 11 of November, 2012 at Seattle, WA.

  
Katherine Olejnik

DECLARATION OF KATHERINE  
OLEJNIK - 1

**Gilbert H. Levy**  
Attorney at Law  
2003 Western Avenue, Ste 330  
Seattle, Washington 98121  
(206) 443-0670 Fax: (206) 448-2252

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In Re Grand Jury Subpoena of  
Matthew Duran,  
Subpoenaed Party.

Cause No. GJ12-149

DECLARATION OF MATTHEW DURAN  
RE: MOTIONS TO UNSEAL FILE

I, Matthew Duran hereby declare under penalty of perjury of the laws of the State of Washington that the following is true and correct to the best of my knowledge:

1. My name is Matthew Duran;
2. I am currently in custody at the SeaTac Federal Detention Center in Seattle, Washington after being found in civil contempt for refusing to answer questions before a Grand Jury in the above-referenced cause number;
3. I have reviewed attorney Neil Fox's Motion to Unseal File filed under case number GJ12-149 and his Motion to Unseal File filed under case number MJ12-534;
4. I have no objection to the unsealing of case number GJ12-149 or MJ12-534.

Dated this 9<sup>th</sup> of November, 2012 at Seattle, WA.

  
MATTHEW DURAN

## APPENDIX J

FILED \_\_\_\_\_ ENTERED \_\_\_\_\_  
 LODGED \_\_\_\_\_ RECEIVED \_\_\_\_\_

NOV 16 2012

The Honorable Richard A. Jones

BY <sup>1</sup> AT SEATTLE  
<sup>2</sup> CLERK U.S. DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 DEPUTY

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

In Re Grand Jury Subpoena of

Cause No. GJ12-149

Matthew Duran,

DECLARATION OF KIMBERLY GORDON  
 RE: MOTION TO UNSEAL FILE

Subpoenaed Party.

I, Kimberly N. Gordon hereby declare under penalty of perjury of the laws of the  
 State of Washington that the following is true and correct to the best of my knowledge:

1. My name is Kimberly N. Gordon;
2. I am the attorney for Matthew Duran, who is currently in custody at the SeaTac Federal Detention Center in Seattle, Washington after being found in civil contempt for refusing to answer questions before a Grand Jury in the above-referenced cause number;
3. Mr. Duran was found in contempt during a hearing held on September 13, 2012. That hearing was the second of two held on September 13, 2012.
4. The first hearing concerned a Motion to Quash, filed by Mr. Duran. That hearing occurred prior to Mr. Duran's Grand Jury appearance. Because it occurred prior to Mr. Duran's Grand Jury appearance, the transcript of his grand jury testimony was

DECLARATION OF MATTHEW DURAN - 1

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1 not introduced. The questions by the Grand Jury, and any answers allegedly given,  
2 were not discussed.

3 5. The Government and Mr. Duran each filed multiple pleadings regarding Mr. Duran's  
4 Motion to Quash. Because these pleadings were all filed prior to Mr. Duran's Grand  
5 Jury appearance, they did not include or summarize Grand Jury testimony.

6 6. This first hearing, concerning Mr. Duran's Motion to Quash, was closed to the public.  
7 I know this because as Mr. Duran and I attempted to enter the courtroom, we were  
8 accompanied by an interested member of the public, who was denied entry.

9 7. Specifically, as I entered the courthouse, I was accompanied by my client, my  
10 paralegal, and another interested member of the public. Inside the lobby of the  
11 courthouse, we all had to produce identification and sign a log, prior to proceeding  
12 through the metal detector.

13 8. Thereafter, the four of us took an elevator to the floor on which the hearing would be  
14 held. The courtroom was separated from this floor's lobby by two sets of doors.  
15 Before we entered the first door, we were stopped by several law enforcement  
16 officers. We were again required to identify ourselves. After we did, they only  
17 allowed me, my client, and my paralegal to enter the courtroom. The interested  
18 member of the public was made to wait outside the courtroom during the entire  
19 hearing.

20 9. After Mr. Duran's Grand Jury appearance, we were again directed to appear in court,  
21 for a hearing on the Government's contempt motion. Again, my client and I were  
22 accompanied by an interested member of the public. As we stepped out of the

23 elevator, we were all met by a large group of armed officers. We were physically  
24 stopped and informed that we were not allowed to be on the floor. After I explained  
25 our reason for going to the courtroom, we were allowed to pass. However, the  
26 member of the public was again stopped and prohibited from entering the courtroom.

DECLARATION OF MATTHEW DURAN - 2

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1 10. Although I did not realize it at the time, it later became clear that the inside set of the  
2 double doors were locked behind us, by the armed officers, after we entered the  
3 courtroom. In other words, after a show of force by armed officers, we were locked  
4 in the courtroom, and the public was locked outside.

5 11. The contempt hearing began, and a portion of the hearing involved recitation of the  
6 transcript from Mr. Duran's Grand Jury appearance. The Court indicated that this  
7 portion of the hearing was closed to the public. But then the Court announced that  
8 the remainder of the hearing would be open to the public. It appeared to me, at that  
9 time, that one of the armed officers unlocked the inner doors and exited the  
10 courtroom. But no member of the public entered the courtroom and the hearing was  
11 soon concluded. Thereafter, I learned that the officers had not informed the public  
12 that the hearing had been opened. I learned that the member of the public that had  
13 originally accompanied us to the courtroom, along with other members of the public,  
14 had been denied access.

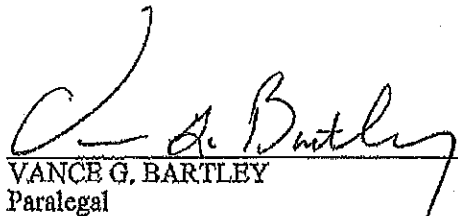
15 12. Pleadings were also filed in relation to the contempt hearing. But these pleadings  
16 were also prepared and filed prior to Mr. Duran's grand jury appearance. As a result,  
17 they neither referenced specific grand jury testimony, nor included a transcript of that  
18 testimony.

19 Dated this 17<sup>th</sup> of November, 2012 at Seattle, WA.

20  
21   
22 Kimberly N. Gordon, WSBA #25401  
Attorney for Matthew Duran

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November, 2012, I filed the foregoing under seal with the Clerk of the Court in person at the United States Courthouse, located at 700 Steward St., Seattle, WA 98101. I further certify that I served two copies of the above declaration on Assistant United States Attorneys Michael Dion and John McNeil in person at the United States Attorney's Office, located at 700 Stewart St. Ste. 5220, Seattle, WA 98101.

  
VANCE G. BARTLEY  
Paralegal  
GORDON & SAUNDERS  
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Fax: (206) 682-3756  
Email: ian@gordonsaunderslaw.com

## APPENDIX K

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

---

PER CURIAM.

Before us is the third party motion of journalist Sheila Regan to unseal the court docket and filings in this case. Neither the petitioner nor the government objects to her motion. The government has requested, however, that information infringing upon the secrecy and integrity of the grand jury proceeding be withheld.

The government's motion for *in camera* review should remain sealed, as well as sections of any briefs, motions, and other court materials which contain grand jury testimony, identify grand jury witnesses, or describe matters the grand jury is investigating.

We therefore grant Regan's motion and direct the government to submit proposed redactions to the district court within twenty one days. We also remand this

matter to the district court for it to oversee the redaction process and rule on the government's proposals as well as any objections by Regan and petitioner.

BYE, Circuit Judge, concurring in part and dissenting in part.

I concur in the court's decision to grant the third party motion of journalist Sheila Regan to unseal the court docket and filings in this case. The motion clearly has merit, see In re Grand Jury Subpoena, 97 F.3d 1090, 1095 (8th Cir. 1996) (indicating matters involving grand jury proceedings should remain open to the public in large part and closed "only when substantive grand jury matters are being disclosed"), as reflected by the government's concession the motion should be granted.

I dissent, however, from the portions of the court's decision which unduly limit the scope of the information to be disclosed and the timing of the disclosure.

First, I disagree with the court's order to keep sealed the government's motion for *in camera* review of certain documents – some of which purport to establish that the statute of limitations has not yet run on the crime which is the subject of the grand jury proceedings. While I agree certain *portions* of the documents attached to the motion should remain sealed, there is no basis for keeping the motion *itself* sealed. The motion is a plain vanilla statement by the government which does not reveal any activities of the grand jury or its investigation. By way of illustration, there appears to be nothing in the following which reveals secret grand jury information:

The United States of America, Appellee, by the United States for the Southern District of Iowa, and Clifford R. Cronk III, Assistant United States Attorney, moves this Court for in camera inspection of sealed documents, and in support of this motion states:

1. The attached documents, Request for Protective Order and *Ex Parte* Request for an Order to Show Cause why Grand Jury Witness Should

Not be Held in Civil Contempt, were filed as an ex parte request under seal. The District Court granted the government's request to keep these matters private.

2. Release of the materials to the public and to counsel in this case would be detrimental to the government.

WHEREFORE, the United States respectfully requests that this Court allow in camera inspection of the attached sealed documents.

Secondly, I disagree with the court's directions allowing the government another twenty-one days to submit proposed redactions of the briefs, motions, and other court materials in this appeal which may contain secret grand jury information. Despite having ample time to respond to the motion to unseal, the government has failed to identify any such material. At the most, another seven days would be sufficient in which to allow the government to submit proposed redactions. As the third party movant asserts, the public's rightful access to the majority of the records in this appeal has already been delayed by two months.

Finally, I echo the third party movant's suggestion that this court review its general procedures for handling grand jury related appeals. Such appeals should be treated as presumptively open to the public unless and until one of the parties specifically brings a meritorious motion to seal portions which reveal secret grand jury information.

For the reasons expressed above, I respectfully concur in part and dissent in part.

February 25, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**SUPPLEMENTAL ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

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This order supplements our unsealing order from earlier today in this matter. In that order we directed the government to submit proposed redactions to the district court within twenty one days. This court's clerk having advised that it would be more workable for the proposed redactions to the appellate record to be submitted to our clerk's office, we now direct the government to do so within twenty one days. We will rule on the government's proposals as well as any objections by Regan or petitioner. The district court will oversee the unsealing process for its own record.

**It is so ordered.**

February 25, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

No: 09-3938

In re Grand Jury Proceedings, CF,

Petitioner

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:09-mc-00004-JAJ-1)

---

**ORDER**

---

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

---

On February 25, 2010 we entered an order granting a third party motion to unseal but directing the government to submit proposed redactions to the appellate record in this grand jury matter. On March 17 the government identified for redaction those portions of the record which contained testimony before the grand jury. Appellant responded on March 24 by objecting to any redactions. After due consideration we conclude that the government's proposed redactions are reasonable and appropriate and that appellant's objections are too broad. We therefore order the appellate record in this matter to be unsealed with the redaction of those portions to which the government objects.

BYE, Circuit Judge, dissenting.

The government's proposed redactions do not pertain to any actual grand jury testimony, but merely to a witness's refusal to testify before a grand jury. Therefore, I can find no reason why such reference is in any need of being sealed, particularly where the subject grand jury witness has stated her contextual preference. I therefore respectfully dissent from the court's order adopting the government's proposed redactions.

March 31, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

IN THE MATTER OF THE	)	Misc. No. 3:09mc0004
APPEARANCE AND TESTIMONY	)	
OF A GRAND JURY WITNESS	)	<b>ORDER</b>

---

This matter comes before the court pursuant to the February 25, 2010, order of the Eighth Circuit Court of Appeals remanding this matter to unseal portions of the record and to oversee any proposed government redactions. On March 16, 2010, the government provided the court with a document indicating that the following documents can be unsealed without revealing matters made secret pursuant to the protections afforded to a grand jury. The court directs the clerk to unseal docket numbers 3, 4, 6, 7, 7-1, 8 through 19, 22, 23, 23-1, 23-2, 24, 24-1, 26, 27, 28, 29, 31, 33 through 42. Docket numbers 1, 2, 5, 21 and 30 shall remain under seal. Docket numbers 20 and 25 shall be unsealed but redacted as requested by the government. The court will defer to the Court of Appeals with respect to the sealing of document number 32.

Upon the foregoing,

**IT IS ORDERED** that the documents in this matter are unsealed or shall remain sealed or shall be unsealed as redacted as reflected in the order above.

**DATED** this 19th day of March, 2010.

  
JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA

## APPENDIX L

## STATUTORY APPENDIX

28 U.S.C. § 1651 provides in part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Western District of Washington Local Civil Rule 5(g) provides in part:

There is a strong presumption of public access to the court's files. This rule applies in all instances where a party seeks to overcome the policy and the presumption by filing a document under seal.

(1) A party must explore all alternatives to filing a document under seal.

(A) If the party seeks to file the document under seal because another party has designated it as confidential during discovery, the filing party and the designating party must meet and confer to determine whether the designating party will withdraw the confidential designation or will agree to redact the document so that sealing is unnecessary.

(B) Parties must protect sensitive information by redacting sensitive information (including, but not limited to, the mandatory redactions of LCR 5.2) that the court does not need to consider. A party who cannot avoid filing a document under seal must comply with the remainder of this rule.

(2) A party may file a document under seal in only two circumstances:

(A) if a statute, rule, or prior court order expressly authorizes the party to file the document under seal; or

(B) if the party files a motion or stipulated motion to seal the document before or at the same time the party files the sealed document. Filing a motion or stipulated motion to seal permits the party to file the document under seal without prior court approval pending the court's ruling on the motion to seal. The document will be kept under seal until the court determines whether it should remain sealed.

A party filing a document under seal shall prominently mark its first page with the phrase "FILED UNDER SEAL."

(3) A motion to seal a document, even if it is a stipulated motion, must include the following:

(A) a certification that the party has met and conferred with all other parties in an attempt to reach agreement on the need to file the document under seal, to minimize the amount of material filed under seal, and to explore redaction and other alternatives to filing under seal; this certification must list the date, manner, and participants of the conference;

(B) a specific statement of the applicable legal standard and the reasons for keeping a document under seal, with evidentiary support from declarations where necessary. (4) A party must minimize the number of documents it files under seal and the length of each document it files under seal. Where the document to be sealed is an exhibit to a document filed electronically, an otherwise blank page reading "EXHIBIT \_\_ FILED UNDER SEAL" shall replace the exhibit in the document filed without sealing, and the exhibit to be filed under seal shall be filed as a separate sealed docket entry. Where the document to be sealed is a declaration, the declaration shall be filed as a separate sealed docket entry.

(5) Only in rare circumstances should a party file a motion, opposition, or reply under seal. A party who cannot avoid including confidential information in a motion, opposition, or reply must follow this procedure:

(A) the party shall redact the confidential information from the motion, opposition, or reply and publicly file the redacted motion, opposition, or reply; and

(B) the party shall file the unredacted motion, opposition, or reply under seal, accompanied by a motion or stipulated motion to seal the unredacted motion, opposition, or reply in compliance with part (3) above. . . .

Fed. R. App. P. 21 provides in part:

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled “In re [name of petitioner].”

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

Fed. R. Crim. P. 6 provides in part:

*(e) Recording and Disclosing the Proceedings.*

(1) *Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

*(2) Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter other than the grand jury's deliberations or any grand juror's vote may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel -- including those of a state, state subdivision, Indian tribe, or foreign government— that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national

security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence. . . .

...

(5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence. . . .

...

(5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

U.S. Const. amend. 1 provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

IN RE INDEX NEWSPAPERS LLC (*dba The Stranger*)

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

vs.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
Respondent.

(REAL PARTIES IN INTEREST: UNITED STATES ATTORNEY  
FOR THE WESTERN DISTRICT OF WASHINGTON, KATHERINE OLEJNIK  
AND MATTHEW DURAN)

---

**CERTIFICATE OF SERVICE**

---

I certify that I served this Petition for a Writ of Mandamus and the Four Volumes of Appendices (App. A-D, App. E, App. F-G, App. H-L) on the District Court, and on the Real Parties in Interest, the United States Attorney for the Western District of Washington, Katherine Olejnik and Matthew Duran by depositing copies into the United States mail on March 22, 2013, in envelopes, with proper postage attached, addressed to:

Judge Richard Jones  
United States District Court for the  
Western District of Washington  
700 Stewart St., Suite 13128  
Seattle, WA, 98101

Jenny Durkan  
United States Attorney for the Western District of Washington,  
Michael Dion, AUSA  
700 Stewart St, Suite 5220  
Seattle, WA, 98101

Kimberly Gordon (counsel for Matthew Duran)  
Gordon & Saunders  
1111 Third Ave. Suite 2220  
Seattle, WA, 98101

I further certify that I served counsel for Katherine Olejnik by leaving a copy at the office of Jennifer Kaplan at 2003 Western Ave. Suite 330, Seattle WA 98121.

I certify and declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
ALEX FAST