

ENDORSED
FILED
Superior Court of California
County of San Francisco

7/13 - 2 019

CLERK OF THE COURT
BY: LINA MANUEL
Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff,)
)
 vs.)
)
)
)
 IN THE MATTER OF BRIAN CARMODY,)
)
 Defendant.)
 _____)

Case No. 2516765

ORDER OF THE COURT

I. INTRODUCTION

On February 22, 2019, at approximately 5:51 p.m., San Francisco Public Defender Jeff Adachi was found unresponsive in an apartment located in the City and County of San Francisco. On this same date, at approximately 6:54 p.m., Adachi was pronounced dead. Due to the high profile circumstances of the death, there was general public interest surrounding the circumstances of the death. In connection with the death, Brian Carmody obtained a copy of the police report related to Adachi's death. When this became apparent to the San Francisco Police Department, they commenced an investigation into the circumstances of the release of the report. During the course of the investigation, San Francisco Police officers sought and obtained several search warrants in connection with the investigation.

II. SEARCH WARRANTS

1
2 On March 1, 2019, the Honorable Rochelle East signed a search warrant for Carmody's
3 telephone records for the date range of February 22, 2019 to February 23, 2019. At the time the
4 warrant was presented to Judge East, Carmody's status as a member of the press was not made
5 clear by the search warrant affidavit and failed to include the fact that Carmody had been issued
6 a press pass by the San Francisco Police Department valid through December 31, 2019.

7
8 On March 13, 2019, the Honorable Joseph Quinn signed a search warrant for
9 Carmody's telephone records from Verizon for the period of February 22, 2019 to February 23,
10 2019. Again, Carmody's status as a member of the press was not clear and did not include the
11 fact that Carmody had a press pass issued by the San Francisco Police Department valid
12 through December 31, 2019.

13
14 On April 11, 2019, Sgt. Joseph Obidi and Lt. Tim Watts, members of the San Francisco
15 Police Department, sought to interview Carmody at his residence in relationship to the release
16 of the police report. During the course of this interview, the officers attempted to obtain the
17 names of any individuals who assisted in providing Carmody with the police report regarding
18 the death of Adachi.

19
20 On April 16, 2019, this Court signed a search warrant for telephone records related to
21 two members¹ of the San Francisco Police Department and Carmody. The search warrant
22 affidavit alleged that Carmody did not simply receive a copy of the police report, but rather
23 actively solicited and conspired with these members of the San Francisco Police Department to
24 obtain the police report prior to its official release by the Department in violation of Penal Code
25 sections 484(a) (petty theft) and 148 (delaying or obstructing an officer in the discharge of his
26

27
28 ¹. Due to the Court's redactions, the Court has chosen to use the word "member" to reflect
either an officer and/or civilian employee of the San Francisco Police Department.

1 or her duties). The warrant sought communications between the members and Carmody during
2 the period between April 12, 2019 through April 15, 2019 (which appeared to be designed to
3 determine whether Carmody had contacted the two members of the Department who provided
4 him with the report after he had been questioned by Sgt. Obidi and Lt. Watts on April 11,
5 2019).

6 On May 10, 2019, the Honorable Victor Hwang signed a search warrant for the search
7 of Carmody's residence. In connection with the search, officers seized numerous items
8 including Carmody's computer equipment and other media related materials.

9 On this same date, the Honorable Gail Dekreon signed a search warrant for Carmody's
10 office. In connection with the search, officers seized additional computer equipment and other
11 media related items.

12 On May 16, 2019, Carmody filed an "*Ex Parte* Application of Non-Party Journalist
13 Bryan Carmody for Order Quashing Search Warrants and For Return of Improperly Seized
14 Newsgathering Materials; or in the alternative, To Shorten Time; Supporting Memorandum of
15 Points and Authorities; Declaration of Bryan Carmody and Thomas R. Burke with Exhibits A
16 & B" [hereinafter referred to collectively as the "Application of Carmody"]. The Application of
17 Carmody referred to the two search warrants issued in relationship to Carmody's residence and
18 office.

19 On June 5, 2019, Carmody filed a "Notice of Amendment of Application of Non-Party
20 Journalist Bryan Carmody for Order Quashing Search Warrants and For Return of Improperly
21 Seized Newsgathering Materials" [hereinafter referred to as "Amended Application of
22 Carmody"]. The Amended Application of Carmody applies to three warrants issued in
23 relationship to searches of Carmody's telephonic communications (Judges East, Quinn and Hite
24 search warrants).

1 This Order relates to the search warrant issued by this Court on April 16, 2019
2 [hereinafter referred to as the "April 16, 2019 Warrant"].
3

4 III. LEGAL DISCUSSION

5 A. Motion to Return Property

6 As an initial matter, the Amended Application of Carmody requests that this Court
7 return the property seized in connection with the April 16, 2019 Warrant. Carmody makes this
8 application under Penal Code sections 1536, 1538.5, 1539 and 1540, as well as this Court's
9 inherent power to control and prevent abuse of its process. (*People v. Superior Court (Loar*
10 *(1972) 28 Cal. App.3d 600, 607.*) However, a motion to return property is inappropriate in this
11 instance since the April 16, 2019 Warrant pertains to property owned by the telephone
12 companies not Carmody; and Carmody is not a criminal defendant to any criminal action for
13 purposes of 1538.5. As such, the motion to return property is denied on these grounds.
14
15

16 B. Issuance of the April 16, 2019 Warrant

17 On April 16, 2019, this Court signed a search warrant for telephone records related to
18 two members² of the San Francisco Police Department and Carmody. The search warrant
19 affidavit alleged that Carmody actively solicited and conspired with two members of the San
20 Francisco Police Department to obtain the police report related to Jeff Adachi's death prior to
21 its official release by the Department in violation of Penal Code sections 484(a) (petty theft)
22 and 148 (delaying or obstructing an officer in the discharge of his or her duties). The warrant
23 sought communications between the members and Carmody during the time period between
24 April 12, 2019 through April 15, 2019 (which was designed to determine whether Carmody had
25

26
27 ². Due to the Court's redactions mentioned below, the Court has chosen to use the word
28 "member" to reflect either an officer or civilian employee of the San Francisco Police
Department.

1 contacted the members of the Department who had provided him with the police report after he
2 had been questioned by Sgt. Obidi and Lt. Watts on April 11, 2019).

3 The California Shield Law is embedded in the California Constitution, article I, section
4 2(b), which states in relevant part that a journalist “shall not be adjudged in contempt by a
5 judicial . . . body . . . for refusing to disclose the source of any information procured while so
6 connected or employed for publication in a newspaper, magazine or other periodical
7 publication, or for refusing to disclose any unpublished information obtained or prepared in
8 gathering, receiving or processing of information for communication to the public.” The
9 constitutional provision was codified in the California Penal and Evidence Codes.
10

11 Penal Code section 1524(g) states: “No warrant shall issue for any item or items
12 described in Section 1070 of the Evidence Code.” Evidence Code section 1070(a) states:
13

14 A publisher, editor, reporter, or other person connected with or employed upon a
15 newspaper, magazine, or other periodical publication, or by a press association or wire
16 service, or any person who has been so connected or employed, cannot be adjudged in
17 contempt by a judicial, legislative, administrative body, or any other body having the
18 power to issue subpoenas, for refusing to disclose, in any proceeding as defined in
19 Section 901, the source of any information procured while so connected or employed
20 for publication in a newspaper, magazine or other periodical publication, or for refusing
21 to disclose any unpublished information obtained or prepared in gathering, receiving or
22 processing of information for communication to the public.

23 Due to the fundamental role newsgathering entities play in our constitutional
24 democracy, courts have given a broad interpretation of the shield law and its application when
25 it has been properly invoked. (*Rosato v. Superior Court* (1975) 51 Cal. App.3d 190, 217-218.)
26 To qualify for protection under the shield law, the newsperson must show: (1) that they are an
27 individual protected by the law; (2) that the information was “obtained or prepared in
28 gathering, receiving or processing of information for communication to the public”; and (3) the
information obtained has not been publicly disseminated by the source. (*Vasco, supra*, 131 Cal.

1 App.4th at p. 151.) The shield law provides absolute rather than qualified protection in
2 immunizing a newsperson from contempt for not revealing unpublished information. (*Ibid.* at
3 151, citing *Miller v. Superior Court* (1999) 21 Cal.4th 883, 890.)

4 Nevertheless, courts have determined that the shield law does not go so far as to allow a
5 reporter or his or her news sources to violate valid criminal laws. In *Brandzburg v. Hayes*
6 (1972) 408 U.S. 665, 691-692, the United States Supreme Court stated:

7
8 It would be frivolous to assert—and no one does in these cases—that the First
9 Amendment, in the interest of securing news or otherwise, confers a license on either
10 the reporter or his news sources to violate valid criminal laws. Although stealing
11 documents or private wiretapping could provide newsworthy information, neither
12 reporter nor source is immune from conviction for such conduct, whatever the impact
13 on the flow of news. Although stealing documents or private wiretapping could provide
14 newsworthy information, neither reporter nor source is immune from conviction for
15 such conduct, whatever the impact on the flow of news. Neither is immune, on First
16 Amendment grounds, from testifying against the other, before the grand jury or at a
17 criminal trial. The Amendment does not reach so far as to override the interest of the
18 public in ensuring that neither reporter nor source is invading the rights of other
19 citizens through reprehensible conduct forbidden to all other persons.

20 (See also *Rosato, supra*, 51 Cal. App.3d at 218-219.)

21 The sworn affidavit presented to this Court asserted that Carmody did not simply obtain
22 or receive the improperly obtained police report but that he actively solicited and conspired
23 with two members of the San Francisco Police Department to steal the police report without the
24 permission of the Department and prior to its official release. A magistrate in evaluating
25 probable cause for a warrant is “simply to make a practical, common-sense decision whether,
26 given all the circumstances set forth in the affidavit before him [or her], including the ‘veracity’
27 and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability
28 that contraband or evidence of a crime will be found in a particular place.” (*Illinois v. Gates*
(2009) 462 U.S. 213, 235.) The showing required in order to establish probable cause is less
than a preponderance of the evidence or even a prima facie case. (*Id.* at 238.) This

1 determination does not reflect upon the ultimate determination of guilt or innocence, which is
2 evaluated under a beyond a reasonable doubt standard.

3 Based on the legal standard of probable cause for issuance of a search warrant and the
4 information contained in the sworn affidavit, the Court issued the April 16, 2019 Warrant.

5 **C. Motion to Quash and/or Traverse**

6 Carmody moves in his Amended Application of Carmody to quash and/or traverse the
7 April 16, 2019 Warrant. The Court finds authority to review the motion to quash and/or
8 traverse the warrant under California Electronic Communications Privacy Act (CalECPA),
9 pursuant to Penal Code section 1546.4(c).³ The Court finds further authority to review the
10 motion under Penal Code section 1536 and its inherent power to control and prevent the abuse
11 of its process. (See *Ensoniq Corp. v. Superior Court (Dattoro)* (1998) 65 Cal. App.4th 1537,
12 1547; and *People v. Superior Court (Loar)* (1972) 28 Cal. App.3d 600, 607.) As such,
13 Carmody as a target of the warrant has standing to move to quash and/or traverse the April 16,
14 2019 Warrant regarding his telephonic communications.
15

16 **D. The Effect of Judge Rochelle East's July 18, 2019 Order**

17 On July 18, 2019, the Honorable Judge Rochelle East granted Carmody's motion to
18 quash the March 1, 2019 warrant. Judge East found that the March 1, 2019 warrant affidavit
19 did not describe Carmody as a journalist and failed to mention that Carmody had been issued a
20 press pass from the San Francisco Police Department. Judge East ordered the San Francisco
21 Police Department to destroy any information obtained from the warrant, to file an affidavit
22 attesting to the destruction of the materials, and prohibited any further use of the information.
23
24

25
26 ³. Penal Code section 1546.4(c) states, "An individual whose information is targeted by a warrant, order, or
27 other legal process that is inconsistent with this chapter, or the California Constitution or the United States
28 Constitution . . . may petition the issuing court to void or modify the warrant, order, or process, or to order the
destruction of any information obtained in violation of this chapter, or the California Constitution, or the United
States Constitution."

1 The phone records obtained from Judge East's March 1, 2019 warrant affidavit formed
2 the basis of the probable cause for the issuance of the April 16, 2019 Warrant. This Court relied
3 upon the information obtained from Judge East's warrant in issuing the April 16, 2019 Warrant.
4 That information has now been quashed and prohibited from further use. The absence of this
5 information leaves the April 16, 2019 Warrant without probable cause to issue. The San
6 Francisco Police Department has failed to present the Court, either during oral argument or
7 during the in camera proceedings, with any independent justification for the issuance of the
8 April 16, 2019 Warrant in light of Judge East's ruling. As such, the motion to quash the April
9 16, 2019 Warrant is granted.
10

11 **E. Motion to Unseal**

12 On May 16, 2019, the Media Coalition⁴ filed a Notice of Motion and Motion by Media
13 Coalition to Unseal Arrest and Search Warrant Records; Memorandum of Points and
14 Authorities in Support; Declaration of David Snyder; Declaration of Duffy Carolan, Exhibit A
15 Thereto [hereinafter referred collectively to as "Motion to Unseal"].
16

17 On May 19, 2019, the San Francisco Police Department (SFPD) filed an Opposition to
18 Motion to Unseal Search Warrant Affidavits (*People v. Hobbs* (1994) 7 Cal.4th 948; Cal. Evid.
19 Code §§ 1040, 915(b) [hereinafter referred to as "Opposition to Unseal"].
20

21 On June 10, 2019, the Media Coalition filed a Reply of Media Coalition in Support of
22 Motion to Unseal Arrest and Search Warrant Records [hereinafter referred to as "Reply"].
23

24 On July 8, 2019, the Court issued an order granting an in camera proceedings and
25 finding that the Media Coalition had standing to bring the motion to unseal the warrant under
26 California Rules of Court, Rule 2.551(h)(2).
27

28 ⁴. The Media Coalition consists of The First Amendment Coalition, Reporters Committee for Freedom of the Press, and The Northern California Chapter of the Society of Professional Journalists.

1 On July 24, 2019, the Court conducted the in camera proceedings. Ronnie Wagner from
2 the San Francisco Police Department, Police Legal Division, appeared for the Department. The
3 proceedings were recorded and placed under seal in accordance with the Court's order on July
4 8, 2019. On August 2, 2019, the Court conducted a further in camera proceeding at the request
5 of Ms. Wagner. Ms. Wagner testified at both in camera proceedings. There were no other
6 witnesses called during either proceeding. The Court asked the questions presented by the
7 Media Coalition but found many of the questions to be improper in an in camera setting as
8 many of them called for legal conclusions and/or would elicit improper argument from Ms.
9 Wagner in the context of an ex parte hearing.
10

11 In connection with a motion to unseal, California courts have regularly employed a
12 constitutional analysis when dealing with "disputes over public access to court documents."
13 (*Overstock.com v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 485.) As such, the
14 Court reviews the continued sealing of the April 16, 2019 Warrant under the factors outlined in
15 *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1990) 20 Cal.4 1178, 1218 and California
16 Rules of Court, Rule 2.550, which are as follows:
17

- 18 (1) There exists an overriding interest supporting sealing;
- 19 (2) There is a substantial probability that the interest will be prejudiced absent
20 sealing;
- 21 (3) The proposed sealing is narrowly tailored to serve the overriding interest; and
- 22 (4) There is no less restrictive means of achieving the overriding interest

23 Based on the information obtained during the in camera proceedings, the Court grants
24 the motion to unseal in part and denies the motion in part.

25 The Court denies the motion to unseal certain names, addresses, telephone numbers and
26 any information which would reveal the names, addresses or telephone numbers of certain
27 individuals mentioned in the warrant. The Court finds this identifying information is protected
28 under Penal Code section 964, the California Shield Law, and the right to privacy found in

1 California Constitution, article I, section 1. As to Carmody, the Court will redact only his
2 telephone number and address as requested.

3 The Court further denies the motion to unseal any information related to identifying the
4 confidential informant. The Court finds that information related to identifying the confidential
5 informant is protected by the official information privilege under Evidence Code section 1040.

6 In applying *NBC Subsidiary*, the Court finds an overriding interest in the continued
7 sealing of these two areas of the warrant and affidavit. There have been no charges filed in this
8 matter and there does not appear to be an ongoing criminal investigation by any governmental
9 agency at this time. As such, these individuals have privacy rights that outweigh the public's
10 right to know this type of confidential identifying information. There is a substantial probability
11 that disclosure of the informant or information related to the informant would prejudice the use
12 of the informant in the future, deter others from coming forward with information, and will not
13 serve the public interest. The Court has also been presented with evidence that the informant
14 may be subject to retribution or reprisal if they were to be revealed. The Court makes this
15 finding despite the fact that the informant information was illegally leaked to the public. The
16 Court finds that the ordered sealing is narrowly tailored to confidential identifying information,
17 and there are no less restrictive means of achieving the overriding interest of protecting this
18 confidential identifying information.
19
20
21

22 As to the remainder of the April 16, 2019 Warrant, the motion to unseal the warrant and
23 affidavit is granted.
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. Orders of the Court

The Court hereby orders the San Francisco Police Department to immediately destroy any and all information derived from the April 16, 2019 Warrant, including but not limited to, cell phone records, including phone calls, texts, or cell phone tower information; and that the information derived from the warrant shall not be used for any other purpose. The San Francisco Police Department is ordered to file an affidavit under oath with the Court attesting to the destruction of the derived materials by August 9, 2019.

The Court orders that a copy of the redacted April 16, 2019 Warrant be attached to this order and be made public upon filing of the order.

IT IS HEREBY ORDERED.

Dated: August 2, 2019



The Honorable CHRISTOPHER C. HITE
JUDGE OF THE SUPERIOR COURT

