

FILED
San Francisco County Superior Court

AUG 22 2019

CLERK OF THE COURT

By: 
Deputy Clerk

SUPERIOR COURT STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

IN RE THE MATTER OF SEARCH WARRANT) Case No. MISC-2516764
)
) **ORDER GRANTING MOTION TO**
) **QUASH, GRANTING MOTION TO**
) **UNSEAL THE SEARCH WARRANT**
) **MATERIALS, GRANTING AND DENYING**
) **REQUESTS TO REDACT INFORMATION**
) **FROM UNSEALED AFFIDAVIT AND**
) **MAKING OF RELATED ORDERS**
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Before the court are (1) Brian Carmody's motion to quash search warrant number 2516764 and to order return of property obtained during execution of that warrant; (2) the Media Coalition's motion to unseal materials, including the supporting affidavit, related to the same warrant;¹ and (3) Mr. Carmody's, the Media Coalition's, the San Francisco Police Department's and interested third parties' requests that specific information be redacted from the unsealed affidavit. Thomas R. Burke of Davis Wright Tremaine LLP

¹ The Moving Parties on the motion to unseal include The First Amendment Coalition, Reporters Committee for Freedom of the Press, and The Northern California Chapter of the Society of Professional Journalists. Collectively, they will be referred to as "the Media Coalition."

1 affidavit contains “official information” privileged and protected from disclosure under
2 Evidence Code section 1040, subdivision (a) (“Section 1040(a)”); Evidence Code section
3 1040, subdivision (b)(2) (“Section 1040(b)(2)”); and, Evidence Code section 1041,
4 subdivision (a)(2) (“Section 1041(a)(2)”).

5 The motions were noticed for hearing in another judicial department but were
6 referred here for adjudication. The court set the motions for hearing in July but an error
7 in service of the order meant that the hearing had to be re-set.

8 On August 19, 2019, the court heard the motions. At the hearing, the Media
9 Coalition offered the materials ordered unsealed in connection with four other warrants
10 involving Mr. Carmody. The exhibits were admitted without objection.

11 The Police Department seems now to recognize that Mr. Carmody is a
12 newsperson protected by California’s shield law. (See Cal. Const., art. I, § 2, subd. (b);
13 Evid. Code, § 1070; Pen. Code, § 1524, subd. (g).) The Department also recognizes the
14 course that motions on related warrants have taken. The Department, though, still
15 opposes the motion to quash and the motion to unseal as to warrant number 2516764.
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17 The court conducted an *in camera* hearing on the same day that it heard the
18 motions. The court had previously ordered the Police Department “to make available for
19 the *in camera* hearing all witnesses with information material to the disposition of its
20 claim that disclosure of the affidavit would violate the official information privilege.”
21 The Police Department was also ordered “to make available for inspection all documents
22 and exhibits material to the disposition of its claim that disclosure of the affidavit would
23 violate the official information privilege.” The court invited the Media Coalition to
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1 submit questions to be asked of the Police Department witnesses during the *in camera*
2 hearing.

3 Ms. Wagner testified for the Police Department at that hearing. The Media
4 Coalition submitted questions for the court to ask during the *in camera* hearing; those
5 questions relevant to the Department's confidentiality claims were asked in substance.
6 The Department produced no documents or exhibits. The *in camera* hearing was
7 reported and the court ordered the official transcript sealed until further court order.

8 No party requested an evidentiary hearing other than the *in camera* hearing that
9 the court conducted.

10 After the *in camera* hearing, new issues emerged. The Media Coalition asked to
11 re-define the scope of its motion so that it did not cover the identity of Mr. Carmody's
12 source or sources. By the end of the discussion, it appeared that the Media Coalition had
13 withdrawn this request. Mr. Carmody, however, urged a substantially identical limitation
14 on unsealing, as did the San Francisco Police Department. It was at this point that Mr.
15 Hinckley made his appearance announcing that he represented interested third parties and
16 arguing in favor of limited unsealing. The court granted Mr. Hinckley leave to brief the
17 issues. Mr. Hinckley filed a brief arguing for redactions.

18 As the court understands it, Mr. Carmody argues that any reference to any of his
19 news sources is protected by the shield law and must be redacted from the warrant
20 materials. To the extent his source may be identified in the warrant affidavit, the affiant
21 learned of the identity of the source during searches conducted pursuant to an earlier
22 related warrant, which has already been quashed. But for the earlier, now-invalidated
23 warrant, the affiant of this warrant would not have had the identifying information and he
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1 would not have been able to disclose it in his affidavit. The information should,
2 therefore, remain confidential under the shield law. The Department did not argue
3 anything to the contrary. The court accepts Mr. Carmody's unopposed oral objection to
4 disclosure. The court will factor the objection in its ruling on the motion to unseal and
5 the requests for redactions.

6 7 **II. Legal Analysis and Findings**

8 **A. The Warrant Is Ordered Quashed.**

9
10 The motion to quash the search warrant is GRANTED. The affidavit in support
11 of the warrant was based in substantial part on information obtained upon execution of an
12 earlier related warrant. That earlier warrant has now been quashed and the information
13 obtained upon execution of that warrant has been ordered unavailable to the government,
14 including the Police Department. If the affidavit in support of warrant number
15 2516764—the warrant under review here—is stripped of the information now ordered
16 unavailable, then the affidavit does not establish probable cause for the warrant and the
17 warrant must be quashed. These findings resolving Mr. Carmody's motion, the court
18 need not address the other arguments in favor of quashing the warrant.

19 20 **B. The Warrant Materials Are Ordered Unsealed.**

21 The motion to unseal the warrant materials is GRANTED. At this time, the
22 public interest in disclosure outweighs any interest in non-disclosure.

23 Several factors weigh in favor of disclosure. Notable among them is San
24 Francisco Police Chief Bill Scott's May 24, 2019 official statement, essentially inviting
25 public review of the warrant materials. Also significant are the orders from other judges

1 made in connection with related motions to unseal. Those orders make public identical
2 or materially identical information.

3 The Police Department did not establish that factors favoring non-disclosure
4 outweigh the important and clear factors favoring disclosure. At the hearing, the Police
5 Department confirmed that it was not proceeding under Evidence Code section 1041,
6 subdivision (b)(1). The Department did not carry its burden under Section 1040. Nor did
7 the Department carry its burden of production or persuasion on the balancing test
8 articulated, among other places, in Section 1041(b)(2). While factors favoring non-
9 disclosure exist, at this time the factors favoring disclosure predominate as to most of the
10 information in the affidavit. As to the information covered by recognized privacy
11 interests or a well-established privilege, the relevant confidentiality concerns are best
12 addressed not by keeping the warrant materials sealed, but by specific and narrow
13 redactions to the unsealed documents.
14

15 **C. The Court Orders Specific Information Redacted from the**
16 **Unsealed Warrant.**

17 All parties request that specific information be redacted from the unsealed
18 affidavit in support of the warrant. There is agreement on some redactions and
19 disagreement on others. After an independent review, the court finds that specific
20 information must be kept private and orders that this information be redacted from the
21 unsealed affidavit.
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23 The court finds the Department's concern for the privacy of certain information,
24 such as telephone numbers, well-founded. This information must be redacted. Also
25 well-founded is the Department's concern for identifying information regarding a

1 Department source of confidential information. On this record and at this time, the
2 confidentiality concerns about this information outweigh the interest in disclosure. This
3 information will be redacted, as well.

4 The remaining redactions are made at the request of Mr. Carmody. Mr. Carmody
5 asks that the court redact information identifying his news sources under the shield law.
6 Allowing publication of the identity of his news sources, Carmody argues, would amount
7 to state-compelled disclosure of those sources which would run afoul of the shield law.
8 The shield law is not boundless, of course. For example, it does not mean that a reporter
9 or her sources may not be investigated, or may not have to answer, for a violation of a
10 valid and applicable criminal law. (See *Brandzburg v. Hayes* (1972) 408 U.S. 665, 691-
11 692; see also *Rosato v. Superior Court* (1975) 51 Cal. App.3d 190, 218-219.) But no
12 party here, including the Police Department, argues that the identity of Mr. Carmody's
13 news sources should now be disclosed notwithstanding the shield law. The Media
14 Coalition pointed to the fact that the information may otherwise be publicly available.
15 But disclosure by court order would not be consistent with the shield law, even if the
16 information is otherwise available. On this record, the court finds that non-disclosure of
17 this information is appropriate, if not compelled, under the shield law.
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19 The court need not address the parties' separate claims in favor of redacting the
20 same information.

21 22 **III. Orders**

- 23 1. Pursuant to the motion to quash, warrant number 2516764 is quashed.
24 The San Francisco Police Department may not use any information obtained by
25 warrant 2516764.

1 2. The Police Department must return any and all property seized or acquired
2 during execution of warrant 2516764. An affidavit under penalty of perjury
3 attesting to the return or destruction of the property must be filed with the Court
4 and served on the parties by close of business on August 27, 2019.

5 3. Pursuant to the motion to unseal the warrant materials, the warrant
6 materials are ordered unsealed

7 4. Pursuant to the parties' requests for redactions, the court orders that before
8 releasing the unsealed affidavit in support of warrant 2516764, the Department
9 must make the following redactions:

- 10 a. For all references to telephone numbers, the last seven digits;
- 11 b. On page 8, last line, starting after "source" and stopping just before
12 ".";
- 13 c. On page 9, fourth full paragraph, third line, starting after
14 "Officers" and stopping just before "from";²
- 15 d. On page 9, fifth full paragraph, first line, starting after "Carmody
16 and" and stopping on second line "were";
- 17 e. On page 9, fifth full paragraph, second line, starting after "." and
18 stopping just before "is";
- 19 f. On page 9, fifth full paragraph, third line, starting after "to" and
20 stopping on the next line just before "was";
- 21 g. On page 9, fifth full paragraph, fourth line, starting after "assigned
22 to the" and stopping at the end of the fifth full paragraph;
- 23 h. On page 9, sixth full paragraph, first line, starting after "with" and
24 stopping on the next line just before "via";
- 25 i. On page 9, sixth full paragraph, second line, starting after "1520
 hours." and stopping on the next line just before "is a San
 Francisco";

² If a page starts with a less-than-complete paragraph, that paragraph does not count as a "full paragraph."

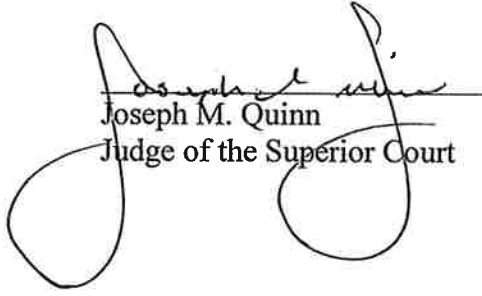
- 1 j. On page 9, sixth full paragraph, third line, starting after “assigned
to” and stopping at the end of the sixth full paragraph;
- 2 k. On page 9, seventh full paragraph, second line, starting after
3 “identified” and stopping just before “entering”;
- 4 l. On page 9, seventh full paragraph, fourth line, starting at the
5 beginning of the line and stopping on the next line just before
“was”;
- 6 m. On page 9, seventh full paragraph, fifth line, starting after “from”
7 and stopping on the next line just before “to”;
- 8 n. On page 9, seventh full paragraph, sixth line, starting after “after”
9 and stopping just before “left”;
- 10 o. On page 9, seventh full paragraph, seventh line, starting after
11 “checked” and stopping just before “call”;
- 12 p. On page 9, seventh full paragraph, eighth line, starting after “that”
13 and stopping on the next line just before “visit”;
- 14 q. On page 10, first full paragraph (top paragraph), first line, starting
15 after “that” and stopping on the next line just before “and”;
- 16 r. On page 10, first full paragraph (top paragraph), second line,
17 starting after “and” and stopping just before “know”;
- 18 s. On page 10, first full paragraph (top paragraph), third line, starting
19 after “with” and stopping just before “in”;
- 20 t. On page 10, first full paragraph (top paragraph), fourth line,
21 starting after “learned that” and stopping on the next line just
before “,”;
- 22 u. On page 10, first full paragraph (top paragraph), fifth line, starting
23 after “Carmody and” and stopping just before “tasked”;
- 24 v. On page 10, first full paragraph (top paragraph), fifth line, starting
25 after “tasked” and stopping on the next line just before “with”;
- w. On page 10, second full paragraph (first paragraph following
“Conclusion:”)), first line, starting after “for” and stopping just
before “and”; and,
- x. On page 10, second full paragraph (first paragraph following
“Conclusion:”), second line, starting at the beginning of the line
and stopping just before “phone”.

1 5. The San Francisco Police Department shall release the unsealed
2 documents with redactions as ordered above by 10:00 a.m. on August 28, 2019.

3 6. The Department is ordered to file and serve copies of the unsealed
4 documents with redactions as authorized above by 10:00 a.m. on August 28,
5 2019. The documents shall be filed in case no. MISC-2516764.

6 It is so ORDERED.

7 DATED: August 22, 2019

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9 Joseph M. Quinn
10 Judge of the Superior Court
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Superior Court of California
County of San Francisco

IN RE THE MATTER OF SEARCH WARRANT

Case Number: 2516764

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Johnny Sengmany, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 22, 2019, I served the attached ORDER GRANTING MOTION TO QUASH, GRANTING MOTION TO UNSEAL THE SEARCH WARRANT MATERIALS, GRANTING AND DENYING REQUESTS TO REDACT INFORMATION FROM UNSEALED AFFIDAVIT AND MAKING OF RELATED ORDERS, placing a copy thereof in a sealed envelope, address as follows:

RONNIE WAGNER
San Francisco Police Dept.
850 Bryant Street, Rm. 511
San Francisco, CA 94103

AARON R. FIELD
Cannata O'Toole Fickes & Olson LLP
100 Pine Street, Suite 350
San Francisco, CA 94111

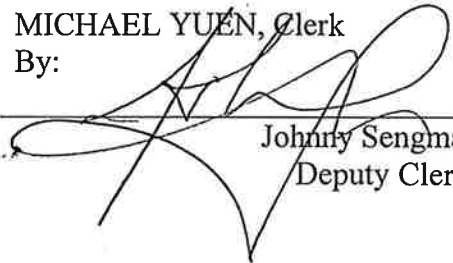
THOMAS R. BURKE
Davis Wright Tremaine LLP
600 Montgomery Street, Suite 800
San Francisco, CA 94111

MICHAEL HINCKLEY
Law Office of Michael Hinckley
803 Hearst Avenue
Berkeley, CA 94710

And, I then placed the sealed envelope(s) in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: 8/22/19

MICHAEL YUEN, Clerk
By:



Johnny Sengmany
Deputy Clerk