



December 17, 2021

Chief John Rohrbacher
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Lori Frugoli
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Hon. Mark A. Talamantes
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Via email to jrohrbacher@sausalito.gov; jhoffman@sausalito.gov; lfrugoli@marincounty.org; administration@marincourt.org; hand delivered to Marin County Superior Court

Dear Chief Rohrbacher, District Attorney Frugoli, Mayor Hoffman and Judge Talamantes:

I write on behalf of the First Amendment Coalition.

We were shocked and dismayed to learn today that a search warrant issued, and has apparently been executed, on materials police seized from journalist Jeremy Portje.

As clearly set forth in our letter of December 7, 2021, enclosed with this letter, ***the California Penal Code expressly and absolutely bars the use of search warrants to obtain a journalist's unpublished materials.*** Cal Penal Code section 1524(g) [***“No warrant shall issue*** for any item or items described in Section 1070 of the Evidence Code”].)

The warrant for Mr. Portje's materials is dated December 9 – two days after you received our letter. Accordingly, Sausalito police along with Sausalito's mayor and the Marin County District Attorney were on notice both of Mr. Portje's status as a journalist and of the absolute bar on the use of search warrants to obtain a journalist's unpublished materials.

It is imperative under California's journalist Shield Law, the federal Privacy Protection Act and the First Amendment that police ***immediately cease reviewing any material seized from Mr. Portje*** and that they ***immediately return his seized materials.***

We urge Judge Talamantes to, at a minimum, ***take immediate steps to take control of Mr. Portje's seized materials and maintain their confidentiality,*** and to invalidate the search warrant and to order the return of Mr. Portje's materials to him.

To be clear, FAC does not represent Mr. Portje in any legal matter, and we do not purport to speak on his behalf. But our mission includes defending the rights of journalists to report the news and to shield their confidential sources and unpublished materials.

These rights have been clearly violated by the issuance of the search warrant on December 9. While these violations cannot now be undone, it is imperative that the police and the Marin County Superior Court take immediate steps to minimize the resulting damage.

Sincerely,

David Snyder
Executive Director
First Amendment Coalition
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Enclosure



**SOCIETY OF
PROFESSIONAL
JOURNALISTS**

December 7, 2021

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***Via U.S. Mail, fax to 415-289-4175, and email to jrohrbacher@sausalito.gov;
jhofman@sausalito.gov; lfrugoli@marincounty.org***

Dear Chief Rohrbacher, District Attorney Frugoli, and Mayor Hoffman:

We write on behalf of the First Amendment Coalition and the Society of Professional Journalists, Northern California Chapter (“SPJ NorCal”).

Based on the information that is publicly available as of today's date, the arrest of journalist Jeremy Portje by Sausalito police officers on November 29 and the seizure of Mr. Portje's camera and other equipment appear to violate not just California law and the California Constitution, but the First Amendment to the United States Constitution and the federal Privacy Protection Act.

While we understand there may be facts we do not yet know about the November 29 arrest, we write to highlight the very grave concerns raised by the behavior of police as described in news reports and as seen in a widely circulated video of Mr. Portje's arrest.

In particular, we urge the Sausalito Police Department to immediately return any equipment seized from Mr. Portje, including but not limited to any memory cards, cameras, and any electronic storage devices, including any iPhones, iPads or the like. The seizure of these materials was almost certainly a violation of California and federal law. The Sausalito Police Department should be on notice that **it cannot, under state and federal law, view any data contained on any devices it seized from Mr. Portje**. As set forth in some detail below, these materials are protected under California's journalist Shield Law, the First Amendment and the federal Privacy Protection Act and thus should not have been seized in the first place, much less reviewed now that they are improperly in the possession of the Sausalito Police Department.

To be clear, neither FAC nor SPJ Nor Cal represent Mr. Portje in any legal matter, and we do not purport to speak on his behalf. But our organizations' missions include defending First Amendment principles and supporting and defending the rights of journalists to report the news and to shield their confidential sources and unpublished materials. We fear these rights are in jeopardy.

(1) The First Amendment Protects Mr. Portje's Right to Film or Take Pictures in Public Spaces

Mr. Portje is reported to have been filming in a city-sanctioned homeless encampment on November 29, and [video](#) of his arrest shows him being detained in or near a parking lot. Sausalito Police Arrest Photojournalist Covering Homelessness, PACIFIC SUN (December 3, 2021) <https://pacificsun.com/sausalito-police-arrest-journalist>. These are public spaces, where journalists or any member of the public have a First Amendment right to film or take pictures. Accordingly, Mr. Portje appears to have been exercising this First Amendment right to gather news. *See Contra Costa Newspapers, Inc. v. Superior Court*, 61 Cal. App. 4th 862, 866 (1998) (“[N]ews gathering is an activity protected by the First Amendment”) (*citing Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Videotaping and photographing police activity are protected by the First Amendment. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)

(acknowledging a First Amendment right to “film matters of public interest” in the context of a journalist videotaping a protest); *Adkins v. Limtiaco*, 537 F. App’x. 721, 722 (9th Cir. 2013) (holding plaintiff adequately pled First and Fourth Amendment violations where police officers seized his cell phone, which he used to photograph police activity).

No facts have come to public light that would justify the arrest of a journalist in Mr. Portje’s situation and nothing on the widely circulated video documenting Mr. Portje’s arrest provides any such justification. Nevertheless, reports indicate that Mr. Portje has been charged with (a) battery on a police officer, (b) battery on a police officer requiring medical attention and (c) resisting a law enforcement officer with violence. We strongly urge District Attorney Frugoli to take the serious constitutional issues into consideration when deciding whether prosecution of Mr. Portje is justified. **Based on the information made public to date, we believe Ms. Frugoli should decline to pursue these charges.**

(2) Seizure of Mr. Portje’s Equipment Was Unlawful

There appears to be no basis in law for the seizure of Mr. Portje’s equipment. The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV; see CAL. CONST. art. 1, § 13 (containing virtually identical language).

As a member of the press, the search and seizure of Mr. Portje’s items warrant even greater scrutiny under the Fourth Amendment. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (“Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’”) (*quoting Stanford v. Texas*, 379 U.S. 476, 485 (1965)). The Supreme Court in *Riley v. California*, 573 U.S. 373, 403 (2014), applied the Fourth Amendment to the search of a cell phone incident to an arrest, holding: “Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”

California law, however, *forbids* the use of search warrants for journalists’ unpublished materials. California Penal Code section 1524(g) plainly states “[n]o warrant shall issue for any item or items described in Section 1070 of the Evidence Code.” Cal. Pen. Code § 1524(g) (emphasis added). California’s journalist Shield Law, codified in California Evidence Code section 1070 and later enshrined in article 1, section 2(b) of the California Constitution, protects journalists from being held in contempt of court if they refuse to reveal “unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.” Cal. Evid. Code § 1070; CAL. CONST. art. 1, § 2(b).

Mr. Portje is a documentary filmmaker and freelance news photographer whose unpublished materials are protected by California Penal Code section 1524(g) and the California journalist Shield Law. The state's Shield Law protects a "reporter or other person connected with or employed upon a newspaper, magazine or other periodical publication." Cal. Evid. Code § 1070(a). Mr. Portje falls within the definition of a journalist because he is a freelance journalist whose credits have appeared in the Marin Independent Journal, the Mercury News, the Associated Press and other outlets. Courts have held that the broad language of Evidence Code section 1070 protects a wide variety of journalists, including freelancers, bloggers, and student journalists. *See, e.g., People v. Von Villas*, 10 Cal. App. 4th 201, 231-32 (1992) (holding that freelancers for Hustler Magazine were protected by California's Shield Law); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1461-66 (2006) (same for website bloggers who wrote exclusively about Apple products).

The definition of "unpublished information" under section 1070 is broad and "includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." Evid. § 1070(c) (emphasis added). The equipment seized from Mr. Portje includes information gathered pursuant to his role as a journalist, and any such information contained in any seized equipment is "unpublished information" under section 1070. Penal Code section 1524(g) thus prohibits the Sausalito Police Department from obtaining a search warrant for the content of Mr. Portje's devices.

Mr. Portje's unpublished materials are also protected under the First Amendment. The Supreme Court long ago recognized the broad application of press protections: "the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). "[T]he critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public." *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).. Based on publicly available knowledge, Mr. Portje was engaged in gathering and disseminating "newsworthy" facts on matters of public importance, specifically the issue of homelessness. *See id.* at 1290-96 (applying the privilege to author of non-fiction book about family feud over control of U-Haul, including murder of one family member).

While Mr. Portje's unpublished materials relating to freelance photography work he has done are plainly protected under California's journalist Shield Law, the First Amendment's protections sweep even more broadly to cover information gathered in pursuit of documentary films and the like. Criminal and civil courts have readily determined that non-fiction television programs are covered under state and federal constitutional protections, even in cases where the broadcast or

publication could be characterized as “entertainment,” so long as such programs or publications concern matters of public concern or public interest affecting the public welfare. *See People v. Hendrix*, 820 N.Y.S.2d 411 (N.Y. Sup. Ct. Kings County 2006) (regarding a “reality show about the New York City Police Department ultimately titled NYPD 24/7”); *Price v. Time, Inc.*, 2003 WL 23273874, 2003 U.S. Dist. LEXIS 24586 (N.D. Ala. Dec. 8, 2003) (applying First Amendment privilege to *Sports Illustrated*); *People v. Ford*, 2007 N.Y. Misc., LEXIS 55 at *2-6 (N.Y. Crim. Ct., Richmond City 2007) (quashing subpoena for footage from MTV show *True Life: I’m a Staten Island Girl*); *U.S. v. Grant*, 2004 U.S. Dist. LEXIS 28176 (S.D.N.Y. Nov. 18, 2004) (First Amendment privilege applied to different episode of MTV’s *True Life*); *Gonzales v. NBC*, 194 F.3d 29, 32 (2d Cir. 1999) (applying privilege to *Dateline* television program); *Krase v. Graco Children Prods., Inc.*, 79 F.3d 346, 353 (2d Cir. 1996) (same); *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (applying privilege to filmmakers); *Kinsella v. Welch*, 827 A.2d 325 (N.J. App. 2003) (applying newsgathering statute to television program *Trauma, Life in the E.R.*). Indeed, courts have found that similar documentary programs are entitled to state and federal constitutional newsgathering privileges and have quashed subpoenas under those protections. *See, e.g., State v. Fitzgerald*, No. 10-CRS-240570 (N.C. Sup. Ct. Meck. Cnty. Apr. 7, 2011); *U.S. v. Little*, 09-CR-20673, slip. Op. at 2 (S.D. Fla. Aug. 25, 2010) (quashing subpoena for footage under Fed. R. Crim. P. 17(c)).

The seizure of Mr. Portje’s devices also likely violates the federal Privacy Protection Act of 1980 (“PPA”), 42 U.S.C. § 2000aa. The PPA makes it illegal for a government officer or employee “to search for or seize any work product materials” or documentary materials, related to the prosecution or investigation of a criminal offense, “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, . . . broadcast, or other similar form of public communication.” 42 U.S.C. § 2000aa(a), (b).

The seizure of Mr. Portje’s equipment as he was reporting on a homeless encampment appears to be a clear violation of the statute. *See* 42 U.S.C. § 2000aa-7(a) (““Documentary materials” . . . includes but is not limited to written or printed materials, photographs, *motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs*”) (emphasis added).

None of the exceptions listed under the PPA are applicable to Mr. Portje. There is no reason to believe the seizure of his items was necessary to prevent death or serious bodily injury. Nor was there reason to believe that notice of a subpoena for his devices would result in their destruction. The Sausalito Police Department appears to have had no justification for seizing his devices at the time of his arrest and has no justification for retaining them now.

In a similar case in San Francisco, the San Francisco Police Department unlawfully

seized freelance journalist Bryan Carmody's electronic devices during the execution of several search warrants. Mr. Carmody won court orders nullifying the warrants, and then filed a claim against SFPD, resulting in the city paying a \$369,000 settlement to Carmody for his damages. San Francisco to Pay \$369,000 to Journalist for Police Raids, L.A. TIMES (Mar. 3, 2020), <https://www.latimes.com/world-nation/story/2020-03-03/san-francisco-to-pay-369k-to-journalist-for-police-raids>.

Thank you for your attention to this letter. We look forward to the prompt return of Mr. Portje's equipment and an assurance that criminal charges will not be pursued against Mr. Portje. We further request an investigation into the officers' conduct in this case.

We are glad to discuss any of this with any of you at any time.

Sincerely,

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