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THE SUPERIOR COURT  
 COUNTY OF STANISLAUS  
 BY *[Signature]*  
 DEPUTY

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11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF STANISLAUS

15 In re Sealed Search Warrants, Warrant Affidavits,  
 16 and Returns, and Arrest Warrant Possible Cause  
 17 Showing - Laci Peterson Investigation

CASE NO. 1045188

**CONTRA COSTA NEWSPAPERS,  
 INC.'S AND SAN JOSE MERCURY  
 NEWS' REPLY BRIEF IN SUPPORT  
 OF MOTION TO UNSEAL SEARCH  
 WARRANT AND ARREST  
 WARRANT RECORDS**

Date: May 5, 2003  
 Time: 8:30 a.m.  
 Place: Dept. 5, 800 11<sup>th</sup> Street  
 [Hon. Roger M. Beauchesne]

23 **I. INTRODUCTION**

**BY FAX**

24 The People's Opposition to this motion overlooks the fact that, now that defendant Scott  
 25 Peterson has been taken into custody, there is no longer any reason to keep the search warrants  
 26 and related documents sealed. The People simply attach a copy of their brief in Case No.  
 27 1045098, a Petition brought by the Modesto Bee, but that brief was filed before Mr. Peterson was

28 Case No. 1045188 - CONTRA COSTA NEWSPAPERS, INC.'S AND SAN JOSE MERCURY  
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 ARREST WARRANT RECORDS

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1 taken into custody. The gist of the People's argument in that case was that disclosure of the  
2 documents sought before a Complaint was filed would jeopardize an ongoing investigation.  
3 Now that a Complaint has been filed against Mr. Peterson and he is in custody, the People's  
4 argument no longer applies.

5 This Court recognized in Case No. 1045098 that once Mr. Peterson was arrested, the  
6 documents sought here should be made public. The Court of Appeal's Order staying proceedings  
7 in Case No. 1045098 was issued before Mr. Peterson was taken into custody and was issued in a  
8 different case, and therefore furnishes no reason not to unseal the records sought. This motion  
9 should be granted.

10 **II. THE PEOPLE'S ARGUMENTS IN CASE NO. 1045098 DO NOT APPLY NOW**  
11 **THAT A COMPLAINT HAS BEEN FILED AND AN ARREST MADE.**

12 **A. Penal Code Section 1534 and Rule 243.1 Do Not Violate Separation of**  
13 **Powers Doctrine. Indeed, They Are Required by the First Amendment.**

14 The People's brief in Case No. 1045098 – which is attached to its cursory three-paragraph  
15 opposition in this case – is almost entirely premised upon the argument that release of the search  
16 warrants would jeopardize what was then (but is no longer) an ongoing pre-complaint  
17 investigation. See Opposition in Case No. 1045098 at 1:16-19 ["No prosecuting agency has filed  
18 a complaint...Police investigation continues"]; at 3:15-16 ["no criminal case has been filed, nor  
19 any indictment returned"] at 14:6-8 [referring to "long history of secrecy with regards to the  
20 search warrant process in a pre-complaint investigative stage"].

21 The People's primary argument was that Penal Code section 1534 and California Rule of  
22 Court 243.1 violate the separation of powers doctrine. (Opposition in Case No. 1045098 at 4-  
23 14.) That argument was rejected in PSC Geothermal Services v. Superior Court (1994) 25  
24 Cal.App.4th 1697, 1715, where the Court held: "[T]he court is not dictating the course of the  
25 investigation. The court is employing its inherent power to control the proceedings associated  
26 with its issuance of a search warrant...The People know that if certain procedures are employed  
27 the resulting evidence may be subject to disclosure or suppression." Likewise, there is no  
28 exception in section 1534 for instances where a search was used to further an ongoing

1 investigation. Id. at 1714.

2 The separation of powers argument should be given short shrift here as it was in PSC  
3 Geothermal. The last sentence of Penal Code section 1534(a) states very clearly that search  
4 warrant documents "shall be open to the public as a judicial record" within 10 days after  
5 issuance. That provision was added to the statute in 1963 and there has never been any question  
6 of its constitutionality. Likewise, Rule 243.1, which strictly limits sealing of judicial records,  
7 was enacted to effectuate the First Amendment right of access and to avoid, not create,  
8 constitutional problems. See, e.g., NBC Subsidiary v. Superior Court (1999) 20 Cal.4th 1178,  
9 1181-82 [First Amendment "generally precludes closure of substantive courtroom proceedings"  
10 in criminal and civil cases]; Advisory Committee Comment to Cal. Rule of Court 243.1 [rule  
11 derived from NBC Subsidiary; rule "recognize[s] the First Amendment right of access to  
12 documents used at trial or as a basis of adjudication"]. Public access to the search warrant  
13 documents here does not violate the Constitution. It is required by the Constitution.

14 **B. Rule 243.1 Requires Unsealing of Search Warrant Documents.**

15 The People also argued in Case No. 1045098 that even if California Rule of Court 243.1  
16 applied, the search warrant documents should remain sealed. As this Court recognized, that  
17 argument does not hold water in a post-complaint setting. Indeed, the People's argument (at  
18 15:26-16:2) was essentially that the Rule did not apply "to a pre-complaint search warrant."

19 The People's assertion that the documents sought here are not being used "as a basis of  
20 adjudication" (at 16:1-2) fails. The search warrant affidavit, return and the warrant itself all  
21 involved judicial functions and the documents sought were all used as a basis for adjudication of  
22 whether a warrant should have been issued in the first place. Accordingly, Rules 243.1 and  
23 243.2(h) are very much applicable here.

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1           **C. Newspapers Have Standing Here**

2           The People argued in Case No. 1045098 (at 16-18) that "neither the First Amendment nor  
3 the common law afford a right of access to search warrant documents relating to a pre-  
4 prosecution, on-going criminal investigation." (Id. at 16:14-16.) To the extent the People's  
5 argument related only to a "pre-prosecution, on-going criminal investigation," it no longer  
6 applies, as set forth above, now that Mr. Peterson has been arrested and charged.

7           To the extent the People are arguing that the Newspapers here have no standing, they are  
8 wrong.

9           Oziel v. Superior Court (1990) 232 Cal.App.3d 1284, 1295, cited by the People (at 18), is  
10 distinguishable. There, the Court dealt with a videotape seized from the home and office of a  
11 third party, the psychotherapist for the Menendez Brothers. (Id. at 1288.) The Court observed:  
12 "Real parties have not cited any authority that property seized under color of a search warrant, as  
13 opposed to the affidavit, return or other documents and records of the court relating to the  
14 warrant, constitute a judicial record." (Id. at 1295, citing Penal Code section 1534(a).) Thus, the  
15 Court appeared to recognize that at least the affidavit, return or other documents and records of  
16 the court relating to a search warrant – as opposed to property seized – are public judicial  
17 records. In any event, Oziel is distinguishable since it involved a third party's property, not  
18 judicial documents relating to a search of the defendant.

19           The People's reliance upon the "official information privilege," Evidence Code section  
20 1040, likewise fails. The People have made "absolutely no foundational showing" that the  
21 information in question here "fall within the scope of privileged 'official information'" as  
22 defined by section 1040. See People v. Tockgo (1983) 145 Cal.App.3d 635, 641.

23           The People argue at length that the press does not have a right of access to "the search  
24 warrant application process." (Brief in Case No. 1045098 at 19:14-15, 21:16-18.) To the extent  
25 the People are concerned that petitioners here seek (or sought) access to the warrant application  
26 process itself, they are knocking down a straw man. Petitioners here seek only "documents and  
27 records of the court relating to the warrant" which, under the express terms of Penal Code section  
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1 1534(a), "shall be open to the public as a judicial record." The Court need not confront or  
 2 resolve the question of access to the search warrant application process itself, or whether the  
 3 press must be notified of such applications at the pre-complaint stage.

4 The People relied heavily in Case No. 1045098 on Craemer v. Superior Court (1968) 265  
 5 Cal.App.2d 216, which dealt with unsealing of Grand Jury transcripts. Craemer doesn't help the  
 6 People for four reasons. First, we deal here with search warrants and Penal Code section  
 7 1534(a), not Grand Jury transcripts, the release of which is governed by Penal Code section  
 8 938.1(b). Second, both Craemer and section 938.1(b) deal with rights of the defendant to a fair  
 9 trial and the rare circumstances under which Grand Jury transcripts may remain sealed to avoid a  
 10 "reasonable likelihood" of prejudice to the defendant's fair trial rights; the People have no  
 11 standing to raise the defendant's fair trial rights. Third, it is far from clear that the "reasonable  
 12 likelihood" standard applies; rather, recent case law indicates that a defendant must show a  
 13 "substantial probability" of prejudice to his fair trial rights to justify sealing of documents or  
 14 denial of access. Press-Enterprise v. Superior Court (1994) 22 Cal.App.4th 498, 503. More  
 15 importantly, given the many alternatives available to safeguard fair trial rights, the continued  
 16 sealing of the documents sought here by the People cannot be justified under either standard. Id.  
 17 at 502, 505 [sealing of Grand Jury transcript containing potentially damaging and prejudicial  
 18 portions that were "unusual and surrealistic" could not be justified under either "reasonable  
 19 likelihood" or "substantial probability of prejudice" standard].

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CONCLUSION

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None of the arguments made by the People in Case No. 1045098 justify continued sealing of the documents sought here now that Mr. Peterson has been charged and is in custody. Likewise, the Court of Appeal's stay order in that case does not apply to this new proceeding and to the current, post-complaint situation. This motion should be granted.

Dated: May 1, 2003

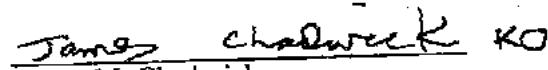
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By:   
Karl Olson

Attorneys for CONTRA COSTA  
NEWSPAPERS, INC.

Dated: May 1, 2003

GRAY CARY WARE & FREIDENRICH

By:  KO  
James M. Chadwick

Attorneys for SAN JOSE MERCURY  
NEWS

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CLERK OF THE SUPERIOR COURT  
COUNTY OF STANISLAUS

BY *[Signature]*  
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF STANISLAUS

In re Sealed Search Warrants, Warrant Affidavits,  
and Returns, and Arrest Warrant Possible Cause  
Showing - Laci Peterson Investigation

CASE NO. 1045188

DECLARATION OF SERVICE

Date: May 5, 2003  
Time: 8:30 a.m.  
Place: Dept. 5, 800 11<sup>th</sup> Street  
[Hon. Roger M. Beauchesne]

**BY FAX**

I, Ann Williams, state:

I am a citizen of the United States. My business address is 639 Front Street, Fourth Floor, San Francisco, CA 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as:

Filed By  
One Legal

**CONTRA COSTA NEWSPAPERS, INC.'S AND SAN JOSE MERCURY NEWS' REPLY BRIEF IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS**

on the following person(s) in this action addressed as follows:

Jim Brazelton, Esq. Stanislaus County District Attorney P.O. Box 442 800 11th Street, Rm. 200 Modesto, CA 95353 Tel.: 209/525-5550 Fax: 209/525-5545	Tim Bazar, Esq. Stanislaus County Public Defender 1021 I Street, Suite 201 P.O. Box 3428 Modesto, CA 95353-3428 Tel.: 209/525-4200 Fax: 209/525-4244
Charity Kenyon, Esq. Riegels Campos & Kenyon, LLP 2500 Venture Oaks Way, Suite 220 Sacramento, CA 95833-3287 Tel.: 916/779-7104 Fax: 916/779-7120	<b>Courtesy Copy:</b>  The Honorable Al Girolami Presiding Judge Stanislaus County Superior Court 800 11th Street, Rm. 100 Modesto, CA 95354

- BY FIRST CLASS MAIL** - I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.
- BY PERSONAL SERVICE**: - I caused such envelope(s) to be personally delivered by hand this date to the addressee(s).
- BY OVERNIGHT MAIL** - I caused such envelope to be delivered by a commercial carrier service for overnight delivery to the office(s) of the addressee(s).
- BY FACSIMILE** - I caused said document(s) to be transmitted by Facsimile machine to the number indicated after the address(es) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 1, 2003, at San Francisco, California.

  
Ann Williams