FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

NEW MEXICO PUBLIC
REGULATION COMMISSION,

Petitioner,

v. No. D-101-CV-201501823

THE NEW MEXICAN, INC.

Respondent.

NEW MEXICAN'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO TEMPORARY RESTRAINING ORDER

PART A PLAINTIFFS ARE ASKING THE COURT TO IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON THE PRESS

1. The PRC and the other plaintiffs are asking the court to impose a blatantly unconstitutional prior restraint on the press, in violation of the free speech and petition clauses of the First Amendment, and the related provisions of the New Mexico Constitution. Any person seeking to obtain a court order preventing the press from publishing has a virtually insurmountable burden under the constitutions of the United States and of New Mexico. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551-62 (1976). *See also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) – also known as the Pentagon Papers case. Both of those cases presented much stronger reasons for prior restraint – the right to a fair trial in Nebraska, the Vietnam War and national security in the Pentagon Papers case – but the court nevertheless refused to gag the press.

In the Pentagon Papers case, Daniel Ellsberg leaked secret classified government studies to the New York Times and other news media, arguably in violation of the Espionage Act. The secret studies had concluded the Vietnam War could not be won, so the

government sought to keep this a secret. Meanwhile, sixty thousand American soldiers died in an unwinnable war. The Pentagon Papers case led to the Watergate break-in, which led to President Nixon's attempted cover-up, which led to the Saturday Night Massacre [the dismissal of Special Prosecutor Archibald Cox and the resignations of Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus], which led to President Nixon's resignation. All this because of secrecy.

2. This lawsuit is part of a conspiracy by the PRC and PNM and Westmoreland and BHP to violate and chill the First Amendment rights of The New Mexican. It is also a conspiracy against the rights of citizens to petition the government for a redress of grievances, which they can only do if they have the pertinent information.

3. The PRC claims that it has "quasi-judicial" authority. Maybe so, in some other contexts, but not here. "Quasi- judicial" authority is not the same as real judicial authority, which can only be exercised by real judges, such as district court judges, who have been selected and qualified under Article VI of the New Mexico Constitution to serve in that independent and co-equal branch of government. Rather than "quasi-judicial", a more accurate description would be "pseudo-judicial", at least for purposes of the present case.

4. An independent judiciary is a crucial safeguard for the constitutional rights of the press.

PART B ORDERS OF THE PRC, OR A PRC HEARING EXAMINER, ARE NOT BINDING ON THE NEW MEXICAN.

5. The PRC does not have jurisdiction over The New Mexican. The legislature has not authorized the PRC to regulate the press. The legislature has more respect for the constitution than to try to do that.

6. The PRC hearing examiner has no legal authority over The New Mexican. First, The New Mexican is not a party to Case No. 13-00390-UT. Second, the hearing examiner has no legal authority to issue "confidentiality" orders that would be binding on The New Mexican. Third, the hearing examiner is not an Article VI judge, so he does not have the powers of the judicial branch.

7. The plaintiffs claim that The New Mexican is prohibited from publishing by the order which the hearing examiner issued on February 21, 2014. In substance, the plaintiffs contend that the hearing officer issued an *ex parte* gag order against The New Mexican on February 24, 2014.

8. The New Mexican has not signed any confidentiality agreements. As a matter of contract law, it is not bound by agreements that other people might have signed.

PART C THE PRC AND THE PRC HEARING EXAMINER HAVE NEVER RULED THAT THESE DOCUMENTS ARE "CONFIDENTIAL"

9. The hearing examiner has never ruled that these documents are actually "confidential" or "trade secrets".

> This Order establishes a procedure for the expeditious handling of information that a party claims is Confidential Material. This Order shall not be construed as a ruling on the confidentiality of any document or other information.

Hearing Examiner Order at 3, Exhibit A to PRC Petition.

PART D ON JUNE 24, 2015, THE PRC RULED THAT THESE DOCUMENTS ARE PUBLIC

10. On June 24, the PRC entered the following order:

> D. Hearings pertaining to the acquisition of replacement resources for San Juan Units 2 & 3 shall be conducted in public. (See NMSA 1978, §62-1 0-5). The Commission also expects that all evidence pertaining to the acquisition of replacement

resources and agreements will be presented in the public record. (See NMSA 1978, §62-6-1 7(C)).

PART E THE PRC DID NOT PROPERLY AUTHORIZE THIS LAWSUIT

11. The PRC is a collective public body, so it can act only by a majority vote of a quorum of the commissioners, NMSA 1978, § 8-8-4(D), and in compliance with the Open Meetings Act, NMSA 1978, §§ 10-15-1 *et seq.* Upon information and belief, a majority of the PRC did not vote in a proper open meeting to file this lawsuit. At least The New Mexican has found no readily available evidence that the PRC did so.

PART F THE NEW MEXICAN GENERALLY DENIES THE ALLEGATIONS IN THE FOUR COMPLAINTS, EXCEPT FOR THE TRIVIAL ONES

12. The New Mexican has not had enough time to prepare and file proper answers to the four complaints filed by the PRC, Westmoreland, PNM, and BHP. The New Mexican will do so within the time allowed by Rule 1-012. In the meantime, The New Mexican makes a general denial of all the important allegations in the four complaints, per Rule 1-008(B).

PART G NONE OF THE EXHIBITS FILED BY THE PLAINTIFFS ARE ADMISSIBLE AS EVIDENCE AGAINST THE NEW MEXICAN

13. None of the exhibits filed by the four plaintiffs are admissible in this case as evidence against The New Mexican. *Inter alia*,

- The affidavits and contracts are inadmissible hearsay under Rule 11-801(C), because they are out of court statements by the PRC or other plaintiffs, offered to prove the truth of the matters asserted. PNM, PRC, Westmoreland, and BHP are engaged in quoting themselves, as if that were admissible evidence.

- The affidavits are speculative and not based on personal knowledge as required by Rule 11-602.

● The affidavits were submitted in a different proceeding, an administrative proceeding, not a judicial proceeding under Article VI of the New Mexico Constitution, so they are not admissible against The New Mexican. Without these protections, the PRC and PNM could try The New Mexican *in absentia*, in their own cozy forum.

PART H WHAT DOES "CONFIDENTIAL" MEAN, ANYWAY?

14. PNM, PRC, BHP and Westmoreland present a medley of amorphous adjectives: "Some of these documents contain confidential, proprietary or commercially sensitive information . . . ."; "business-sensitive"; etc. These terms have no clearly defined meaning in the law.

PART I THE PLAINTIFFS ENGAGE IN *IPSE DIXIT* REASONING

15. The four plaintiffs claim that the documents are confidential because they say so. In the law, this is called *ipse dixit* reasoning. *Ipse dixit* is Latin, meaning "he himself said it". In English, it's called bootstrap reasoning. The law recognizes that *ipse dixit* reasoning is fallacious, for any number of reasons. For one thing, *ipse dixit* is circular. Also, *ipse dixit* reasoning is a form of self-quotation, which violates the hearsay rule. And *ipse dixit* is often a cover for a lack of personal knowledge.

16. One form of *ipse dixit* commonly occurs in affidavits and briefs, when a party states a bald legal conclusion, without support. In this case, the four plaintiffs repeatedly assert that the documents are "trade secrets", without presenting any specific facts. "Affidavits consisting only of conclusions are insufficient to raise an issue of fact." *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, (Tex. App. 2002) (quoting *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)). See also *Iowa Film Prod. Serv. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 222

(Iowa 2012) ("While affidavits and testimony by . . . provide opinions concerning the deleterious effects disclosure will have on . . ., such evidence is self-serving and does not contain hard facts.")

PART J THE DOCUMENTS ARE NOT TRADE SECRETS

17. The information in the documents does not meet the statutory definition of trade secret in NMSA 1978, § 57-3A-2(D). For example, salaries are not trade secrets. *Campbell v. Marion Cnty. Hosp.*, 580 S.E.2d 163, 169 (S.C. Ct. App. 2003); *Iowa Film Prod. Serv. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207 (Iowa 2012); *Swoboda v. Clear Channel Commc'ns*, No. L–02–1149, 2003 WL 22739622, ¶ 17 (Ohio Ct. App. Nov. 14, 2003).

PART K THE INTERLOCKING COAL SUPPLY AND RESTRUCTURING CONTRACTS CANNOT BE SECRET, BECAUSE PNM CUSTOMERS WILL PAY THE COSTS OF THOSE CONTRACTS, OR RECEIVE THE BENEFITS OF THOSE CONTRACTS

PART L GOVERNMENT MISTAKES AND LEAKS DO NOT CREATE A RIGHT TO MUZZLE THE PRESS

18. The inadvertent disclosure of documents does not create a right to impose restrictions on the press, or to recover the documents. To the contrary, inadvertent disclosure waives the right to keep the documents confidential. See *Hartman v. El Paso Natural Gas Co.*, 1988-NMSC-080, 107 N.M. 679 (inadvertent disclosure waives attorney-client privilege). The PRC totally miscites *Hartman*.

19. As this court has already observed, IPRA does not contain a provision authorizing a government agency to call back documents which the agency has inadvertently released, even if the documents were actually exempt from IPRA. Nor does the IPRA authorize the PRC to file suit for a violation of IPRA. Under NMSA 1978, § 14-2-12, the only persons

who can file suit are the Attorney General or district attorney, or person whose written request has been denied.

20. If a government agency wants to keep documents secret, that job belongs to the government, not the press. See the Pentagon Papers case and the matter of Arturo Garcia, *In re Possible Violation of Order To Seal*, *infra*. If the government inadvertently discloses information that it wishes to keep secret, the press has no duty to fix the government's mistakes. Under the First Amendment, one of the core functions of the press is to report on government mistakes, not to fix them. If the news media were ever saddled with the responsibility for fixing government mistakes, the press would not have the time to do any news reporting.

21. An analogous case of inadvertent disclosure arose in 1989, when KOAT, Larry Barker, Conroy Chino, and Miguel Gandert broadcast the arrest of Doctor Arturo Garcia on a sealed federal warrant. *In re Possible Violation of Order To Seal*, Misc. No. 89-509JP (D.N.M. Feb.28, 1990), attached as an Exhibit.

In the Arturo Garcia case, Judge Deaton had entered an order that the criminal complaint and warrants were sealed until further order of the court. Nevertheless, Larry Barker and a cameraman from KOAT were present at Doctor Garcia's arrest, and filmed it. Judge Deaton appointed Professor Leo Romero (later the Dean at UNM law school) as a special prosecutor to investigate possible violations of his order to seal. Larry Barker and Miguel Gandert were asked how they had learned about the arrest before it happened, but they refused to answer any questions, so Judge Deaton cited them for contempt and sent the matter to Judge James Parker.

Judge Parker quashed the order to show cause. *Inter alia*, the record showed that Conroy Chino obtained the sealed warrant simply by asking the federal court clerk for it. Additionally, the sealing order itself revealed Arturo Garcia's name. Judge Parker's opinion also notes that a sealing order is in the nature of the directive to officers of the court rather than a gag order directed at the press.

Judge Parker ruled that these problems "can be avoided if the government implements a working policy of keeping confidential those matters it asks the courts to keep confidential. Unless the government provides compelling reasons for giving the news media information on impending requests, it should not expect judges to honor government request to seal documents. It cannot assure that the government has taken measures to protect the confidentiality of such information."

22. In the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. at 728-29, a very difficult case, Justice Stewart made the same point as Judge Parker:

> The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.

PART M THE DOCUMENTS ARE PUBLIC RECORDS UNDER IPRA

23. The documents are public records as defined in IPRA, NMSA 1978, § 14-2-6(G):

> "public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

24. The documents do not come within any explicitly recognized exception to IPRA. In *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't (Republican Party II)*, 2012-NMSC-26, ¶ 42, 283 P.3d 853, the Supreme Court held that courts should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by the Supreme Court. The Court ruled that there is no "rule of reason" exception to IPRA. In *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, 299 P.3d 424, the Court of Appeals held that: (1) there was no deliberative-process privilege under New Mexico law that could prevent DOH from disclosing requested email string; (2) DOH could not assert communications privilege with respect to requested email string; (3) designation of draft documents as "non-records" under regulations promulgated pursuant to Public Records Act (PRA) had no impact on status of draft documents as public records under the IPRA; and (4) new rule announced in *Republican Party II,* overruling cases that applied the "rule of reason" as justification for withholding records requested under IPRA and limiting exemptions under IPRA, applied retroactively to render DOH liable for withholding requested draft letter.

25. As part of its *ipse dixit* approach, the PRC contends that it is entitled to deference and a presumption that it has acted properly. Not so. Under IPRA, there is no such presumption. In *San Juan Agricultural Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶ 33, 150 N.M. 64, Justice Daniels made short work of this argument, writing for a unanimous court:

> Defendants [state agencies] argue that such hypothetical situations are speculative and improperly assume that public

entities will act in bad faith. While we hope that all public servants will act in good faith in complying with their statutory obligations under IPRA, "New Mexico's policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately." *City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 17, 146 N.M. 349, 210 P.3d 246. The very fact that IPRA provides a remedy for wrongful withholding of public documents reflects a legislative expectation that there will be occasions when public officials will fail to follow the law.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was efiled and served via Odyssey File and Serve to all counsel of record on August 12, 2015.

/s/ Victor R. Marshall
Victor R. Marshall

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE POSSIBLE VIOLATION
OF ORDER TO SEAL.

MISC. NO. 89-509JP

MEMORANDUM OPINION AND ORDER

The subject of this Opinion and Order is this Court's Order to Show Cause filed January 29, 1990, requiring KOAT-TV employees, Larry Barker, Miguel Gandert, and Barbara Schleiss, to show cause why they should not be held in contempt of court for refusing to obey an order of the United States Magistrate Deaton to answer certain questions at the November 11, 1989, proceeding in his courtroom. Having considered the arguments of counsel and having consulted the applicable authorities, I find that Barker, Gandert and Schleiss have shown cause why they should not be held in contempt of court.

This case arose out of a criminal complaint against Dr. Arturo Garcia and Donald Hudson, charging them with conspiring to illegally distribute Preludin, a controlled substance. On September 6, 1989, Judge Deaton entered an order in U.S. v. Arturo Garcia, et. al. "that the Criminal Complaint and Warrants be sealed until further Order of the Court." The United States government had requested that the complaint and warrants be sealed for fear that "making the Criminal Complaints and Warrants for Arrest public will alert co-conspirators, leading, in all likelihood, to their

flight and possibly the destruction of evidence." The criminal complaint contained no information on the time, place, or date of Dr. Garcia's arrest.

On September 11, 1989, at approximately 12:45 P.M., Arturo Garcia was arrested in front of his office. Larry Barker, a reporter with KOAT-TV, and Miguel Gandert, a cameraman with KOAT-TV, were present at the arrest. At approximately 4:00 P.M. that same day, Dr. Garcia and Mr. Hudson's initial presentments were held before United States Magistrate McCoy. Conroy Chino, an employee of KOAT-TV obtained a copy of the criminal complaint, still under seal, from the clerk's counter. At 6:00 P.M. and 10:00 P.M. on September 11, 1989, film footage of Dr. Garcia's arrest was shown on KOAT-TV. Information in the newscast was similar to information found in the criminal complaint. On September 22, 1989, Judge Deaton entered an order in U.S. v. Arturo Garcia, et. al. unsealing the criminal complaint and warrants.

After learning of the media's presence at the arrest of Dr. Garcia, Judge Deaton held a hearing on November 11, 1989, for the purpose of producing a record upon which findings could be made regarding the possible violation of his September 6th order to seal. Professor Leo Romero was the Special Prosecutor at this hearing. Barker, Gandert, and Schleiss were subpoenaed to testify. At the hearing they claimed they had a newsman's privilege to refuse to answer any questions which might have directly or indirectly revealed the identity of the person who informed them of the time and place of Dr. Garcia's arrest.

On January 29, 1990, this Court issued an order to show cause why Barker, Gandert, and Schleiss should not be held in contempt of court for refusing to obey Judge Deaton's order to answer certain questions at the November 11, 1989 proceeding in his courtroom. The following is a list of questions that the KOAT employees refused to answer:

BARKER (Reporter)

1. Were you present at the scene of Dr. Garcia's arrest on September 11, 1989?

2. When did you first learn about the investigation that led to the arrest of Dr. Garcia?

3. Did you learn about the potential or upcoming arrest of Dr. Garcia on September the 8th, 1989?

4. Were you present at the offices of the DEA [Drug Enforcement Administration] on September the 8th, 1989?

5. Were you present at a pre-arrest meeting of various law enforcement officials on the morning of September the 11th, 1989?

6. Your presence on the tape shown at the 10:00 news of KOAT-TV on September the 11th, 1989, was that taken at the scene of the arrest of Dr. Garcia?

7. Is it accurate that the broadcast at 10:00 P.M. said that this was a story that Channel 7 had been following all day?

8. When did you start following this story concerning the investigation of the sale of Preludin and other drugs that were involved in the arrest of Dr. Garcia on September the 11th, 1989?

9. When did you learn that the DEA alleged that there may be further arrests in this drug investigation?

10. Who informed you of the fact that there was going to be an arrest of Dr. Garcia on September the 11th, 1989?

11. Were you informed by anyone in the office of the Drug Enforcement Administration of the fact that Dr. Garcia was going to be arrested on September the 11th, 1989?

12. Were you informed by anyone in the office of the State Board of Pharmacy or by anyone employed by the Albuquerque Police Department about the arrest of Dr. Garcia on September the 11th, before it occurred?

13. The videotape of the broadcast by Channel 7 contains a statement that the grand jury will meet the day following the arrest of Dr. Garcia. How did you know this and who informed you about this?

14. Did you go to the office of the DEA after the arrest of Dr. Garcia on September the 11th, 1989?

GANDERT (Cameraman)

1. Were you present at the arrest of Dr. Garcia on September 11th, 1989?

2. When did you first learn that there was going to be an arrest of Dr. Garcia on September the 11th, 1989?

3. Did anyone from the office of the Drug Enforcement Administration, the New Mexico Pharmacy Board or the Albuquerque Police Department inform you about the upcoming arrest of Dr.

Garcia?

4. Who informed you that there was going to be an arrest of Dr. Garcia on September the 11th, 1989?

5. Were you present at the offices of the Drug Enforcement Administration on either September the 8th, 1989, or September the 11th, 1989?

6. Were you present at a pre-arrest meeting before the arrest of Dr. Garcia on September the 11th, 1989?

7. Were you informed by Mr. Barker as to why you were going to be at the scene of the arrest of Dr. Garcia on September the 11th, 1989?

SCHLEISS (Administrative Assistant in the News Department)

1. Do you have any personal knowledge as to why Mr. Barker and Mr. Gandert were present at the arrest of Dr. Garcia on September the 11th, 1989?

2. Do you have any personal knowledge who informed Mr. Barker and Mr. Gandert that there would be an arrest of Dr. Garcia on September the 11th, 1989?

3. Are there any records held by KOAT-TV that might include any sources for Mr. Barker and Mr. Miguel concerning the arrest of Dr. Garcia, on September the 11th, 1989?

The hearing before Judge Deaton was intended to determine whether someone disobeyed his order to seal the criminal complaint and warrants in U.S. v. Arturo Garcia, et. al.. Once the complaint

and warrants were placed under seal, giving copies of them to the media or otherwise disclosing the content of those documents to the media would certainly have been a violation of Judge Deaton's order, and it is possible that any person who violated the order could be held in criminal contempt.

KOAT-TV claims that it has a newsman's privilege, grounded in the First Amendment, that allows it to keep the identity of informants confidential. This same argument was made in the United States Supreme Court case Branzburg v. Hayes, 408 U.S. 665 (1972). In Branzburg, the petitioners, newsmen, were called to testify in front of the grand jury and reveal the source of certain information upon which they had reported which was relevant to a criminal investigation. Id. at 680. The petitioners argued, "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." Id. at 679-680. The newsmen asserted that they should not be forced to testify until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime, that the information is unavailable from other sources, and that the need for the information is sufficiently compelling to override the First

Amendment interests involved. Id.

In Branzburg, the Supreme Court refused to find that the First Amendment protected a newsman's agreement to conceal the criminal conduct of his source and stated, "[t]he preference for anonymity of those confidential informants involved in criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable is hardly deserving of constitutional protection." Id.; see also Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975); cert. denied 427 U.S. 912 (1976) (in which the court found that the state trial court's power and duty to enter enforceable orders to protect the due process right of the accused outweighed the newsman's interest in protecting his sources of information). Accordingly, KOAT-TV's newsman's privilege cannot be used to shield the identity of someone engaged in criminal conduct. Because a person who violates a court order may be held in criminal contempt, the KOAT-TV employees are compelled to answer any question which elicits information on how they received a copy of the complaint or the essential information contained therein while it was under seal.

In fact, KOAT-TV did reveal how its employees received a copy of the complaint. Conroy Chino supplied an affidavit stating that he received a copy of the complaint on September 11, 1989, from the Clerk's office. The order to seal was in effect from September 6th to September 22nd. In addition, during the hearing on the Order to Show cause, counsel for KOAT-TV stated that it would be the KOAT-TV employees' testimony that they did not

receive a copy of the complaint or warrants from anyone other than the court clerk. Thus, KOAT has answered the question of who violated Judge Deaton's Order to Seal by furnishing a copy of the criminal complaint

Barker, Gandert, and Schleiss still refuse to answer the questions put to them by the Special Prosecutor at the November 11, 1989, hearing. The questions which were asked by the Special Prosecutor were designed to elicit information primarily about how the KOAT-TV employees knew of the time and place of Dr. Garcia's arrest. Apparently, Judge Deaton felt that his order to seal encompassed a prohibition against the disclosure of any information regarding the time and place of arrest of Dr. Garcia. Yet, because the order is not explicit on this point, and because it is unclear who would be bound by the order, it would be impossible to hold someone in criminal contempt for violating the order by disseminating this information.[1] "It is well established that before one may be punished for contempt for violating a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed." United States v. Joyce, 498 F.2d 592, 596 (7th Cir.

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[1] The identity of Dr. Garcia as a defendant could not be considered information that was intended to be kept confidential by the order to seal for two reasons. First, Dr. Garcia's name was contained in the caption of the Motion and Order to Seal. Neither of these documents were under seal, thus, they were a matter of public record. Second, at the hearing on this Court's Order to Show Cause, Larry Barker revealed through counsel that he had learned that Dr. Garcia was under investigation before the Order to Seal was issued.

1974).

Although I have determined that, because of the narrow language of the order, disseminating the time and place of Dr. Garcia's arrest would not constitute a violation of the Order to Seal, I believe Judge Deaton had a legitimate concern. He was asked by the government to seal the criminal complaint and warrants on the ground that there was a need for confidentiality and, at the same time, it appears that government agencies may not have been maintaining confidentiality of matters relating to the complaint and warrants. In some manner, Larry Barker and Miguel Gandert were informed of the time and place of Dr. Garcia's arrest. This resulted in Dr. Garcia, who is presumed to be innocent of the charges against him, being shown in two television broadcasts in the custody of law enforcement officers leading him from his office in handcuffs. Although this may not have violated any specific legal rights of a defendant such as Dr. Garcia, at the very least it seems to be unnecessary and unfair. In my personal opinion this is tasteless television journalism that is unnecessary to report what may be newsworthy-- that Dr. Garcia was arrested.[2] This unbefitting practice, of television crews videotaping persons being arrested at their homes or offices, can be avoided if the government implements a working policy of keeping confidential

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[2] The press and public's First Amendment right of access attaches only to those governmental processes that as a general matter benefit from openness. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-510 (1st Cir. 1989). I can conceive of no general benefit in being able to see someone, still presumed to be innocent, taken into custody in handcuffs.

those matters it asks the courts to keep confidential. Unless the government provides compelling reasons for giving the news media information on impending arrests, it should not expect judges to honor government requests to seal documents if it cannot assure that the government has taken measures to protect the confidentiality of such information.[3]

IT IS THEREFORE ORDERED that the Order to Show Cause issued to Larry Barker, Miguel Gandert, and Barbara Schleiss is hereby dismissed.

United States District Judge

[3] It will be my personal practice not to grant requests for confidentiality where the government does not ensure confidentiality on its own behalf, and it is my recommendation to the other judicial officers in this District that they follow the same practice.