House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

SEARCH WARRANT AFFIDAVITS

Senate Bill 1358 with committee amendment
First Analysis (6-5-02)

Sponsor: Sen. Bill Bullard, Jr.
House Committee: Criminal Justice
Senate Committee: Judiciary

THE APPARENT PROBLEM:

An affidavit is required when seeking a search warrant. The affidavit establishes probable grounds for issuing a warrant, and often contains the names and addresses of victims or other persons supplying information regarding a crime. According to information supplied by the Domestic Violence and Homicide Prevention Task Force, a recent court of appeals decision required law enforcement officers to present a copy of the affidavit along with the search warrant to the person whose premises are being searched or to leave a copy of both at the searched premises if the person named in the search warrant is not there.

This was considered problematic for several reasons. According to testimony offered by a representative of the Prosecuting Attorneys Association of Michigan, little if any protection is available to a victim of a crime until after charges are brought against a perpetrator. Therefore, providing a person with a copy of the affidavit, which may contain the name and address of a victim, can put a victim at risk for another assault. This is a particularly dangerous situation for victims of sexual assaults or domestic violence. In order to provide greater protection to victims while law enforcement officials investigated and built a case, Public Acts 112 and 128 of 2002 were enacted.

Public Acts 112 and 128 of 2002, which took effect on April 22, amended Public Act 189 of 1966. Under revisions enacted by Public Act 112, upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, a magistrate who issues a search warrant may order that an affidavit be suppressed and not be given to the person whose property is seized or whose premises are searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving the seized evidence. Also, the officer is not required to give a copy of the affidavit to a person whose property is seized or whose premises are searched or to leave a copy of the affidavit at the place from which the property was taken. Essentially, Public Act 112 codified practices in existence prior to the court of appeals decision.

The controversy that ensued following passage of these two bills centered on Public Act 128, which added the provision that a search warrant, affidavit, or tabulation contained in any court file or record retention system is nonpublic information. Some people, primarily those in law enforcement, interpreted the language to apply only to those documents held by a court. Courts are not included in the definition of "public body" contained in the Freedom of Information Act (FOIA) and therefore are not subject to requests made under the FOIA. However, court files have historically been open to public review. By making these documents "nonpublic", courts could no longer allow access to them by the public.

Now, copies of a search warrant, affidavit, and tabulation are also kept by the local law enforcement agency involved and by the county prosecutor. These records are subject to rules of discovery (after a charge has been brought or a civil action filed) and also are subject to public access under the FOIA. Section 13 of the FOIA, however, has a laundry list of types of information that a public body is allowed to exempt from disclosure. Information that can be exempted from disclosure in response to a FOIA request includes public records of a law enforcement agency that could identify or provide a means of identifying an informer or confidential source, or that would interfere with law enforcement proceedings; information of a personal nature if such disclosure would constitute an invasion of privacy; disclosure of a person's Social Security number; and so forth. Further, under the list of exemptions, any of the documents in question can be denied to the public if an investigation is still being conducted. Once the investigation is concluded and a charge is brought, or

the case closed, before releasing a requested document, a prosecutor or law enforcement agency can redact (block out) any portions containing information that meets the FOIA exemption criteria. Therefore, prior to the enactment of Public Act 128, it was much easier to just go to a court and ask to see a document than to obtain the same information under the FOIA.

The controversy did not end there, though. Still others interpreted the phrase "or record retention system" contained in Public Act 128 as including the file cabinets and data bases of county prosecutors and law enforcement agencies, and, when coupled with the term "nonpublic information" believed that the new act – in effect - cut off all public access to these documents by the public forever. Such an interpretation meant that if a person's home was searched, even though the law still required the search warrant to be given to the person, the person could not access a copy of the affidavit (which would tell why his or her home was searched) unless criminal charges were brought or he or she were named in a civil forfeiture proceeding. This has been viewed by the press, civil rights advocates, and concerned citizens as infringing on Fourth Amendment rights, which protect against unreasonable searches and seizures. It is believed that oversight by the public via accessibility to these search warrants and affidavits keeps government corruption at bay and protects citizens' rights against privacy invasions.

In light of the conflicting interpretations of Public Act 128, legislation has been introduced to clarify the issue.

THE CONTENT OF THE BILL:

The bill would amend Public Act 189 of 1966, which prescribes search warrant procedures, to specify that an affidavit for a search warrant would be nonpublic information, but would become public information after 55 days unless a suppression order was issued.

Currently, a search warrant, affidavit, or tabulation contained in any court file or record retention system is nonpublic information. Under the bill, this would apply only to an affidavit for a search warrant contained in any court file or court record retention system, and would be subject to the exception described below.

On the 56th day following the issuance of a search warrant, the search warrant affidavit contained in any court file or court record retention system would become public information unless, before that day, a peace officer or prosecuting attorney obtained a suppression order from a magistrate upon a showing under oath that suppression was necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. A suppression order could be obtained ex parte in the same manner that the search warrant was issued (that is, without notice to or appearance of an opposing party).

The bill states that the provision that an affidavit would be nonpublic information, and the exception to that provision, would not affect a person's right to obtain a copy of an affidavit from the prosecuting attorney or law enforcement agency under the Freedom of Information Act.

MCL 780.651

HOUSE COMMITTEE ACTION:

The committee adopted a series of amendments to change references to a "judge or district court magistrate" to a "magistrate".

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal impact on state or local units of government. (6-3-02)

ARGUMENTS:

For:

The bill represents a compromise between those who feel that the public right to information should be protected and those who seek to afford protection to victims, witnesses, and confidential sources. Reportedly, the intent of Public Act 128 was to prohibit court personnel from allowing access to search warrants, affidavits, and tabulations that could inadvertently put victims or witnesses in harm's way by disclosing names, addresses, and so forth. Though many in law enforcement read the act as pertaining only to court documents, others felt the prohibition to public access extended to copies of those documents retained by police agencies and county prosecutors. Further, many interpreted the phrase "nonpublic information" as meaning that these documents were not requestable under the Freedom of Information Act. If this were so, conceivably, a person whose house was searched would never have access to the affidavit, which would explain why the search was conducted, unless criminal charges or a civil forfeiture suit were filed. Since it is not uncommon

for a search to yield no evidence on which to support a criminal charge, it is therefore conceivable that the new law would allow – in essence – secret searches. Such a scenario, therefore, increases the opportunities for civil rights to be violated. Allowing access to search warrant affidavits by individuals whose homes were searched or by the press or civil rights groups ensures that searches are not used as scare tactics or harassment. Even though a search warrant requires judicial review and approval, public accessibility to affidavits provides another level of protection from potential judicial or law enforcement abuses.

The bill would seek to rectify the controversy by clarifying that affidavits retained by courts only would be nonpublic information, but only for 55 days. Then, unless a prosecutor or peace officer obtained an order to suppress the affidavit, the affidavit would be accessible, through the court, to any person. A motion to suppress the affidavit would have to show, under oath, that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. During the 55-day period when a court could not provide public access to the document, a person could file a FOIA request with a law enforcement agency or prosecutor's office. However, such a request would still be subject to the allowable exemptions under the FOIA. This means that during or after the 55-day period, the law enforcement agency or prosecutor could deny the request for disclosure if the investigation was still being conducted, or personal information or information endangering a victim or witness could be blackened out.

The 55-day period in which courts could not provide access to the affidavit is important because unlike a law enforcement agency or prosecutor, a court would have no idea of the status of a case, nor of the potential harm that could be done to a case, victim, or witness by disclosure of certain information contained in the affidavit. Therefore, for the 55-day period, it is better to steer a person towards seeking the information from the prosecutor or law enforcement agency. In this way, the rights of the person subjected to a search, the rights of the public to be informed, and the well being and safety of victims and witnesses can all be protected.

Response:

The bill is a far cry better than Public Act 128, but the 55-day period, which is almost eight weeks, should be shortened. It should be noted that anytime during this eight-week period, a motion could be filed to suppress the affidavit after the 55-day period expired. In a way, this creates a presumption that affidavits are not public information. Instead, the presumption should be that an affidavit is a public document unless the prosecution can prove that grounds exist for suppression. Requiring a prosecutor to ask for suppression up front when the search warrant is being sought could solve this. And, even before Public Act 128 took effect, judges always had the discretion to block information and records they felt were sensitive. Further, if a prosecutor's motion to suppress access to an affidavit via the court file were successful, it would appear that this means forever. Instead, the suppression order should be reviewed at some point in time to see if grounds still exist to deny access to the court-retained affidavit.

Rebuttal:

Often, search warrants are sought in the middle of the night or come up quickly so as to find evidence before it can be destroyed. Sometimes a search of someone's premises yields other information pertaining to a different crime that had been, or in the case of conspiracy, is about to be, committed. In such situations, it may not be apparent up front that information contained in the search warrant affidavit could place another person in peril. And, it is not always the police and prosecutor who may be in hurry. Judges get woken in the night, or called away from social engagements, and though capable of deciding if an affidavit supports issuance of a search warrant, may also not be in the best place to decide then and there if the affidavit should be suppressed. Only as investigators gather evidence and see where it leads can such a determination be made. Therefore, prosecutors must retain the ability to file a motion to suppress the affidavit beyond the 55-day period if necessary. The affidavit in such a situation would be exempt from a FOIA request, and so it should continue to be unavailable to the public through a court. If the FOIA provisions recognize that there are legitimate reasons to deny disclosure of certain public documents or information, then those documents and information should not be able to be obtained just by going to a court and asking for them.

For:

The House committee amendments changed the reference to a "judge or district court magistrate" to "magistrate". Currently, the term "magistrate" already refers to a judge, whereas a district court magistrate is a quasi-judicial post with restricted duties under the Revised Judicature Act (MCL 600.8511). Under the RJA, a district court magistrate can only issue a search warrant if he or she has been authorized to do so by a district court judge. Therefore, without the committee amendments, the

bill would have expanded the authority of district court magistrates.

POSITIONS:

A representative of the Michigan Press Association testified in support of the bill. (6-4-02)

A representative of the Oakland Press testified in support of the bill. (6-4-02)

A representative of the Ingham County Prosecutor's Office testified in support of the bill. (6-4-02)

A representative of the Livonia Police Department indicated support for the bill. (6-4-02)

A representative of the American Civil Liberties Union testified in support of the bill. (6-4-02)

A representative of the Lansing State Journal testified in opposition to the bill. (6-4-02)

Analyst: S. Stutzky

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.