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SFA

BILL ANALYSIS

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Senate Bill 1358 (as enrolled)
Sponsor: Senator Bill Bullard, Jr.
Senate Committee: Judiciary
House Committee: Criminal Justice

PUBLIC ACT 506 of 2002

Date Completed: 5-7-03

RATIONALE

Public Act 189 of 1966 specifies the procedures for obtaining and executing a search warrant. The Act provides that, when an affidavit is made on oath to a magistrate authorized to issue a warrant in a criminal case, and the affidavit establishes grounds for issuing a warrant, the magistrate must issue the search warrant if he or she is satisfied that there is probable cause for the search. When a police officer finds or seizes any property or other things while conducting the search, he or she must make a tabulation of the property and things that were seized. Public Act 128 of 2002 (House Bill 5270) amended Public Act 189 to specify that a search warrant, affidavit, or tabulation in any court file or record retention system was nonpublic information. Public Act 112 of 2002 (Senate Bill 730) also amended Public Act 189 to allow the suppression of a search warrant affidavit. Those measures took effect on April 22, 2002.

According to proponents of the amendments, limiting the availability of a search warrant affidavit was necessary to protect complaining witnesses and victims whose sworn statements establish probable cause for a search warrant. Upon the passage of Public Act 128, however, many people expressed opposition to classifying a warrant, affidavit, and tabulation as nonpublic information. They claimed that the revisions shielded police and prosecutors from public oversight and could violate the U.S. Constitution's Fourth Amendment prohibition against unreasonable search and seizure. In response to those concerns, some people suggested that a statutory balance between protecting victims and providing for public oversight of police activities should be pursued. (For more information on Public Acts 112 and 128 of 2002, please see **BACKGROUND.**)

CONTENT

The bill amended Public Act 189 of 1966 to specify that an affidavit for a search warrant is nonpublic information, but becomes public information after 55 days unless a suppression order is issued. The bill took effect on July 19, 2002.

Previously, under amendments enacted by Public Act 128 of 2002, a search warrant, affidavit, or tabulation contained in any court file or record retention system was nonpublic information. Under the bill, this applies only to an affidavit for a search warrant, and is subject to the exception described below.

On the 56th day following the issuance of a search warrant (or on August 1, 2002, whichever was later), the search warrant affidavit contained in any court file or court record retention system becomes public information unless, before that day, a peace officer or prosecuting attorney obtains a suppression order from a magistrate upon a showing under oath that suppression is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. A suppression order may be obtained ex parte (that is, without notice to or appearance of an opposing party) in the same manner that the search warrant was issued. An initial suppression order expires on the 56th day after it is issued. A second or subsequent suppression order may be obtained in the same manner as the initial suppression order and expires on the date specified in the order.

According to the bill, the provision that an affidavit for a search warrant is nonpublic information and the exception to that provision, do not affect a person's right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law

enforcement agency under the Freedom of Information Act (FOIA).

MCL 780.651

BACKGROUND

Public Act 189 of 1966 requires that a search warrant state the grounds or the probable or reasonable cause for its issuance, or have attached to it a copy of an affidavit that established grounds for issuing the search warrant. When an officer executing a search warrant finds property or seizes any of the other things for which the warrant is allowed, the officer must make a complete and accurate tabulation of the property and things seized. The officer must give a copy of the warrant and the tabulation to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and the tabulation at the place from which the property or thing was taken. The officer also must file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by court order until the final disposition of the case, unless otherwise ordered.

Under revisions enacted by Public Act 112 of 2002, 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 or thing was taken.

Public Act 128 of 2002 added the provision making a search warrant, affidavit, or tabulation contained in any court file or record retention system, nonpublic information.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Public Acts 112 and 128 of 2002 were designed to protect a witness or victim who is identified in an affidavit establishing probable cause to search premises in a criminal investigation. In response to concerns that those measures went too far in denying public access to information about search warrants, Senate Bill 1358 strikes a balance between protecting victims and witnesses and allowing public disclosure. By providing that only a search warrant affidavit in a court file or record system, rather than a warrant, affidavit, and tabulation, is nonpublic information, the bill narrowed the limitation on public oversight of search warrant information and procedures. Also, while an affidavit, warrant, and tabulation in a court file or record system were permanently classified as nonpublic information under Public Act 128, Senate Bill 1358 provides that, after 55 days, an affidavit in a court file or record system becomes public information unless a police officer or prosecutor obtains a suppression order from a magistrate. In addition, the bill explicitly states that provisions designating a search warrant affidavit as nonpublic information, and allowing for the suppression of the affidavit after it becomes public information, do not affect a person's right to obtain a copy of a search warrant affidavit from a law enforcement agency or prosecutor's office under FOIA.

Opposing Argument

Open government is vital in a democracy. Government actions, especially police actions, must be subject to the public's oversight, in order to accommodate the needs of society while safeguarding the rights of individuals. Public Acts 112 and 128 violated the concept of open government by essentially authorizing, and perhaps encouraging, secret searches. While the bill may make incremental improvements on those laws, it is a weak attempt to address the restrictions those Acts placed on public oversight of the search warrant process. Even with the revisions in Senate Bill 1358, a person's home can be searched without that person's ever being told why the search warrant was executed. Although the bill lifts the nonpublic information status of a search warrant affidavit after 55 days, it also allows that affidavit to be suppressed indefinitely, even by an ex parte motion. Also, specifying that the information remains subject to FOIA does not

solve the problem, because obtaining information under FOIA can be a difficult task. Police or prosecutors may deny a FOIA request based on their belief that fulfilling the request could infringe upon an ongoing investigation. The person then may have to prove to a judge that the affidavit should be released. In addition, the bill does not address concerns raised about Public Act 112, which allows an affidavit to be suppressed from the beginning of the process by the magistrate authorizing a search warrant. In that case, the affidavit will not be available under a FOIA request in any event.

Senate Bill 1358 retains a culture of secrecy implemented by Public Acts 112 and 128. Under all three measures, a person's home may be searched and, if there is never a criminal charge or forfeiture proceeding based on the search, the person might never know the reason for the search. This process undermines the public's right to oversight of its government's actions and infringes on Fourth Amendment rights regarding search and seizure.

Response: The Fourth Amendment to the U.S. Constitution governs the procedure for seeking a search warrant. Neither the earlier legislation nor Senate Bill 1358 alters that process, and, under the revisions in Senate Bill 1358, access to an actual warrant is not limited. These measures merely provide a degree of protection for victims and witnesses by delaying the availability of information provided in a search warrant affidavit. This is consistent with Article I, Section 24 of the Michigan Constitution, which provides for the rights of crime victims, including being "reasonably protected from the accused throughout the criminal justice process".

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.