

SUBJECT: Temporary and extended sealing of affidavits for search warrants

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Hinojosa, Dunnam, Garcia, Green, Keel, Nixon, Smith, Wise
0 nays
1 absent — Talton

SENATE VOTE: On final passage, Local and Uncontested Calendar, April 22 — 30-0

WITNESSES: For — Michael A. McDougal, Montgomery County District Attorney's Office; John Bradley
Against — None

BACKGROUND: Code of Criminal Procedure, art. 18.01 prohibits search warrants from being issued unless sufficient facts are presented first to satisfy a magistrate that probable cause exists for its issuance. For every search warrant, a sworn affidavit with the facts establishing probable cause must be filed. The affidavits are public information if executed.

DIGEST: SB 919 would allow search warrant affidavits to be sealed under temporary or extended sealing orders and would establish procedures to be followed if a request were made to seal an affidavit.

Prosecutors could request that district judges seal search warrant affidavits. The affidavits could be sealed only on a showing that:

- ! the sealing was necessary for serious, specific, and substantial reasons to:
 - ! protect the safety of a confidential informant, witness, or peace officer;
 - ! prevent the destruction of evidence;
 - ! prevent the disclosure of information obtained from an active wiretap; or
 - ! prevent flight from arrest and prosecution; and

- ! no less restrictive means would protect the interest at issue adequately and effectively.

Temporary sealing orders. A temporary order sealing a search warrant could be issued on a written motion showing compelling need based on specific facts shown by an affidavit that:

- ! the sealing was necessary to prevent immediate and irreparable injury to a specific interest listed above; and
- ! no less restrictive means would protect the specified interest adequately and effectively.

A temporary sealing order would expire three days after the search warrant was executed unless the court granted an extension. A court could extend the temporary order once for up to 10 days, but only if the state posted notice as required. The court could modify or withdraw a temporary order on a motion by any party or an intervenor. A temporary order would not reduce the prosecutor's burden of proof for an extended sealing order.

By the third business day after execution of the search warrant, the state would have to post a copy of the temporary sealing order, the motion for temporary sealing, any affidavit supporting the motion for temporary sealing, and the search warrant.

Extended sealing orders. After a motion and hearing, the court could order an extended sealing of the affidavit for up to 60 days. A prosecutor could move to extend a sealing order only if, by the fourth day after a search warrant was executed, the state posted a public notice that a hearing on the prosecutor's motion for extended sealing would be held in open court and that any person could intervene and be heard on the motion. The notice would have to specify the time and place of the hearing and the style number of the case.

A copy of the posted notice would have to be filed immediately with the court clerk and the Court of Criminal Appeals. The public hearing on the motion for an extended sealing would have to be held as soon as practicable and at least within 10 days of the date the motion was filed and notice was posted.

The state would have to prove by a preponderance of evidence the existence of facts to warrant the sealing. Any party could participate in the hearing, and a nonparty could intervene.

A judge could inspect the search warrant affidavit in chambers, but not an affidavit supporting or opposing the sealing. A court could decide on a motion to seal or unseal an affidavit in accordance with the civil procedures for special appearances, except that intervenors could file and serve affidavits three days before the hearing on the motion for an extended sealing.

Judge's orders. Search warrants could be sealed by temporary or extended orders only on the prosecutor's written motion. The motion would be open to public inspection and could be decided only on a written order. The order would have to be open to public inspection and include the reasons for concluding whether the required criteria were met, the specific portions of the warrant that were to be sealed, and the period of the sealing. When a sealing order expired, the affidavit would have to be unsealed.

A sealing order could not:

- ! seal or prohibit the disclosure of information relating to the contents of a search warrant, the return of a search warrant, or the inventory of property taken to pursue a search warrant; or
- ! affect the right of a defendant to discover the contents of an affidavit.

Any person could intervene at any time before or after judgment to unseal a search warrant affidavit.

A court that issued a sealing order would retain continuing jurisdiction to enforce, alter, or vacate the order. An order sealing or unsealing an affidavit could not be reconsidered on the motion of any party or intervenor who had notice of the hearing that preceded the sealing order, unless there was a showing of changed circumstances materially affecting the order.

Any order or portion of an order or judgment relating to the temporary or extended sealing or unsealing of a search warrant affidavit would be considered severed from the case and a final judgment, and it could not be appealed by any party or intervenor who participated in a hearing preceding the issuance of the order. The appellate court could abate the appeal and order

the trial court to direct that further public notice be given, to hold additional hearings, or to make additional findings. Error in the sealing or unsealing of an affidavit would not constitute reversible error affecting the final judgment of a conviction.

The only remedy an appellate court could enter to correct an error in the sealing or unsealing of a search warrant would be to reverse, vacate, or modify the sealing or unsealing.

The bill would take effect September 1, 1999, and would apply only to a search warrant that had an affidavit filed on or after that date.

**SUPPORTERS
SAY:**

SB 919 would allow the temporary sealing of a search warrant affidavit only in limited, narrow circumstances that demonstrated a compelling need. Currently, law enforcement officials are forced to reveal all the facts of their investigation in the affidavit for a search warrant. Once the warrant is granted, all of those facts enter the public domain. This can result, for example, in a threat to a witness' safety, the flight of a suspect, the destruction of evidence, or other tampering that can derail an ongoing investigation.

This bill would protect ongoing investigations without compromising the principles of open government. Affidavits could be sealed only under narrow circumstances and after strict guidelines were met. Foremost, sealing could occur only if no less restrictive means would protect the interests of the investigation adequately. Also, specific reasons would have to be proved for the affidavit to be sealed. These tough standards would ensure that the vast majority of affidavits would be treated just as they are now. SB 919 would be used only in extraordinary cases in which confidentiality was essential.

SB 919 would not result in the public being denied information. Temporary sealing orders, even with extensions, would last only a few days, and extended sealing orders could last only 60 days. This would ensure that the information entered the public domain as soon as possible.

In addition, SB 919 would require public notice of sealing orders and would allow any person to intervene in the sealing or unsealing of a search warrant affidavit. This would ensure that the public was informed of judges' decisions and had the ability to become involved in the decision. SB 919 would not

affect a defendant's right to discover information in a search warrant affidavit.

OPPONENTS
SAY:

Allowing search warrant affidavits to be sealed — even temporarily — would delay public access to information that rightfully is in the public domain. Information delayed can be information denied.

Examining search warrant affidavits allows the media and public to know, for example, what type of evidence police are interested in and if someone is suspected of a crime. Without timely access to this information, the public might not know if a suspect was on the loose or if prosecutors were following up on their public comments about a case. Suspects often are apprehended because of information that the public gives law enforcement authorities after the media have highlighted a case, sometimes with information from a search warrant affidavit. In addition, examining search warrant affidavits allows timely oversight of law enforcement authorities and prosecutors. For example, if police instituted a crackdown on gangs, examining search warrant affidavits could reveal whether the police were handling all suspects fairly.

There is no compelling need to change current law. Search warrant affidavits have to show only probable cause for a warrant to be issued, not all the details of a prosecutor's case.