

- SUBJECT:** Temporary sealing of affidavits on which search warrants are based
- COMMITTEE:** Criminal Jurisprudence — favorable, without amendments
- VOTE:** 5 ayes — Peña, Vaught, Riddle, Escobar, Talton
0 nays
1 present not voting — Hodge
3 absent — Mallory Caraway, Moreno, Pierson
- SENATE VOTE:** On final passage, March 29 — 29-1 (Zaffirini)
- WITNESSES:** *(On House companion bill, HB 1011:)*
For — John Jocher, Harris County District Attorney’s Office; Breck McDaniel, Houston Police Department; *(Registered, but did not testify:* Tom Gaylor, Texas Municipal Police Association; James Jones, Southwest Texas Law Enforcement Association; Hans Marticiuc, Houston Police Officers Union; James McLaughlin, Texas Police Chiefs Association; Gary Tittle, Dallas Police Department)

Against — Joseph Larsen, Freedom of Information Foundation of Texas; *(Registered, but did not testify:* Ruth Epstein and Benny Hernandez, ACLU of Texas; Ken Whalen, Texas Daily Newspaper Association and Texas Press Association)

On — Stephen Slater, Department of Public Safety
- BACKGROUND:** Code of Criminal Procedure, art. 18.01 prohibits a magistrate from issuing a search warrant unless sufficient facts are presented first to satisfy the magistrate that probable cause exists for its issuance. For every search warrant, a sworn affidavit with the facts establishing probable cause must first be filed. If the warrant is executed, it and its contents, including the underlying affidavit, become public information.
- DIGEST:** SB 244 would add the Code of Criminal Procedure, art. 18.011 to allow a prosecutor in a felony case to request that a district or appellate judge seal an affidavit filed in support of a warrant under art. 18.01(b). The judge

could order the affidavit sealed if the prosecutor established a compelling state interest in keeping the information sealed by showing that public disclosure of the affidavit would:

- jeopardize the safety of a victim, witness, or confidential informant;
- cause the destruction of evidence; or
- reveal information obtained from an ongoing court-ordered wiretap.

An order sealing an affidavit under this section would expire 31 days after the date on which the search warrant was executed. A prosecutor could request before the 31st day that a judge grant a 30-day extension to the sealing order. The judge could grant the extension if the judge made a new finding of compelling state interest. Once the order to seal the affidavit, and any extension, had expired, the affidavit would be unsealed.

An order to seal an affidavit would not 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 pursuant to a search warrant. SB 244 would not affect the right of a defendant to discover the contents of an affidavit.

The bill would take effect September 1, 2007, and would apply only to affidavits presented to a judge as part of an application for a search warrant on or after that date.

**SUPPORTERS
SAY:**

SB 244 would allow the temporary sealing of a search warrant only in circumstances that demonstrated a compelling state interest to protect victims, witnesses, evidence, or ongoing wiretap investigations. Law enforcement officials currently are forced to reveal facts of their investigation in the affidavit for a search warrant. Once the warrant is granted, those facts enter the public domain. This can result in a threat to the safety of a witness, the flight of a suspect, the destruction of evidence, or other interference that could derail an ongoing investigation.

The 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. Law enforcement would have to convince a prosecutor of the need to protect an affidavit. The prosecutor then would have to convince a judge to seal the affidavit. Specific criteria would have to be met for the affidavit to be sealed. These tough standards would ensure that the vast majority of

affidavits were treated just as they are now. SB 244 would be used only in extraordinary cases in which confidentiality was essential.

SB 244 would not deny information from the public. Temporary sealing orders would last only 30 days, while extended sealing orders could last only an additional 30 days. This would ensure that the information entered the public domain. If a particular prosecutor's office or judge were abusing the sealing power and applying it to every warrant, the media quickly would expose the trend.

Law enforcement cannot always use confidential informants. In order for the state to classify a person as a confidential informant, the police or prosecutor must have used the informant on a prior occasion and then must demonstrate to the judge that the informant is someone who can be believed. Thus, a sealed affidavit is a more versatile tool.

SB 244 would not affect a defendant's right to discover information in a search warrant affidavit, so there would be no curtailment of a defendant's civil rights.

**OPPONENTS
SAY:**

Allowing search warrants to be sealed — even temporarily — would delay public access to information that rightfully is in the public domain. Law enforcement groups and prosecutors would seek to have the affidavits sealed on most, if not all, search warrants. Information delayed can be information denied.

Examining search warrant affidavits allows the media and the 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 were 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 to law enforcement 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. In addition, prosecutors may keep informants confidential or use the police to protect vulnerable witnesses and evidence.

NOTES:

HB 1011 by Riddle, the identical House companion, was left pending in the House Criminal Jurisprudence Committee, where testimony was taken on March 27.