

SEARCH WARRANT AFFIDAVIT

POLICY & PROCEDURE NO. 3.08	ISSUE DATE: July 27, 2015
	EFFECTIVE DATE: 8/3/2015
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED:	REVISION DATE: _____

I. GENERAL CONSIDERATIONS AND GUIDELINES

An affidavit is a formal declaration or statement of facts, in writing, made voluntarily and confirmed by oath or affirmation before a person having the legal authority to administer such oath or affirmation. It is a written statement of facts sworn to as the truth. Although affidavits have a number of legal purposes, their preparation to establish probable cause for the issuance of a search warrant imposes a most important responsibility on the police. For this purpose an affidavit must contain the facts, information and underlying circumstances which have led a police officer reasonably to believe that a particular crime has been, is being, or is about to be committed, and that seizable property connected with that crime is likely to be found in the place or upon the person to be searched.

The basic requirements for affidavits and search warrants are found in the Fourth Amendment to the U.S. Constitution which provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Similar wording is also found in Article XIV of the Massachusetts Declaration of Rights, contained in the state Constitution.

A police officer seeking a search warrant must appear personally before a judge or other court official authorized to issue search warrants in criminal cases and present an affidavit containing the facts, information and circumstances upon which the officer relies to establish sufficient grounds for the issuance of the warrant.¹ The judge or court official issuing the warrant must retain the affidavit and deliver it to the court to which the warrant is returnable. Upon the return of the warrant, the affidavit must be attached to the warrant and filed therewith. The affidavit is not a public document until the warrant is returned. These requirements were enacted into law "to ensure that the Commonwealth can demonstrate by a writing that any given search and seizure was reasonable and was based on probable cause."² However, the fact that search warrant affidavits are "public records" does not mean that the court lacks impoundment authority. A judge must determine whether good cause for impounding exists and must tailor the scope of the impoundment order so that it does not exceed the need for impoundment.³

Justices of the Supreme Judicial Court, the Superior Court Department and the various District Court Departments, and Clerk/Magistrates, Assistant Clerk/Magistrates, Temporary Clerk/Magistrates, and Temporary Assistant Clerk/Magistrates of the District Court Departments are authorized to determine the justification for and the issuance of search warrants upon the application and suitable affidavit of a police officer.⁴ A judge or clerk may issue a search warrant for execution anywhere in the Commonwealth. However, with respect to body cavity searches, such a warrant may only be issued by a judge on a strong showing of particularized need supported by a high degree of probable cause.⁵

II. POLICY

A. It is the policy of this department that:

1. All officers have a sound knowledge of the legal requirements associated with obtaining a search warrant in order to prevent suppression of evidence, support the Constitutional

rights of citizens and to maintain public confidence in the department; and

2. Officers shall apply for a search warrant whenever practical.

III. PROCEDURES

A. Affidavit Requirements

1. The standard affidavit form provided by the various courts to be prepared to support an application for a search warrant must be substantially in accordance with the provisions of M.G.L. c. 276, s. 2B as set forth in the attached form.
2. Whenever possible and practicable to do so, a police officer preparing an affidavit to justify the issuance of a search warrant should secure the advice and guidance of the department legal advisor or a representative of the District Attorney's Office.
3. The officer submitting the affidavit shall clearly identify himself/herself and briefly explain in the affidavit any expertise or special training [s]he has which pertains to his/her belief that a given crime has been committed and that given items are connected to that crime.
4. The officer should disclose all relevant information in the affidavit and do so in a complete (yet concise) and logical (perhaps chronological) fashion.
 - a. The affidavit must disclose facts and information which furnish probable cause to believe that a specific crime has been, is being, or will be committed.
 - i. Many cases have been lost because an officer had sufficient basis for probable cause but did not furnish enough information in his/her affidavit. Any fact that is not set out in the affidavit cannot be inserted or used later for the purpose of establishing probable cause. The Supreme Judicial Court declared that the "contents of an affidavit supporting a search warrant cannot be buttressed by oral testimony

as to what was stated to the magistrate at the time the search warrant was issued."⁶

- b. The affidavit must disclose facts and information which furnish probable cause to believe particular items are connected to that crime and that:
 - i. Those items are (or will be) at a particular place; or
 - ii. Those items are (or will be) found on particular person or persons.
5. Probable cause to justify the existence of a search warrant must exist at the time the warrant is issued. If the information specified in the affidavit is "stale", it may prevent a finding of probable cause to conduct a search.⁷
 - a. A sixteen day lag between the commission of a murder and the issuance of a search warrant for a murder weapon was too long for a finding of probable cause that the gun was still at the defendant's premises.⁸
 - b. The Appeals Court held that where the affidavit furnished information of continuing illegal activity and a substantial basis for concluding that the property sought was probably still on the premises to be searched, the time factor or "staleness" was not found to be of serious importance and the warrant issued in this case was declared valid.⁹
6. The affidavit should disclose how and when the facts and information came to the officer's attention.
 - a. If information from a confidential informant is relied on, the officer should follow the procedures set forth in Section III.B below and the departmental policy on ***Use of Confidential Informants***.
 - b. The affidavit must disclose why the persons who provided those facts and information are reliable.
7. If there are additional pages attached to the affidavit, the affidavit should refer to them as "see attached pages" in appropriate places.¹⁰ There is no requirement that all attached pages be signed.¹¹

8. The affidavit must describe with particularity:
 - a. The place or person(s) to be searched and
 - b. The item or items to be searched for. The degree of specificity required when describing goods to be seized may necessarily vary according to the circumstances and types of items required.¹²
9. Misstatements in an affidavit that amount to a knowing and intentional falsehood or reckless disregard for the truth will render a search warrant invalid.¹³ However, inaccuracies which do not affect the integrity of an affidavit do not destroy probable cause for a search.¹⁴ Negligent misrepresentations in affidavits do not require suppression.¹⁵
10. The affidavit should receive the approval of the Officer-in-Charge before submission to the court.
11. The officer submitting the affidavit shall sign the affidavit and personally appear before a judge or magistrate.

B. Information From Informant

1. In assessing and establishing the credibility of an informant and the reliability of the informant's information, an officer should consider, and disclose in the affidavit, the following factors:
 - a. The basis of the informant's knowledge.
 - i. Did the informant make personal, direct observations, or is the informant relating hearsay information?
 - ii. How recently did the informant acquire his/her information (is it still valid or has it become stale)?
 - iii. How detailed is the informant's information?
 - b. Factors that support the informant's reliability.

- i. Whether the informant provided accurate, useful information in the past. If so, did that information in the past contribute to successful arrests, searches or convictions?
 - ii. Whether the informant is admitting his/her own involvement in crime (this is known as a statement against penal interest). However, if the identify of the informant is unknown, any statements against his/her penal interest cannot buttress his/her credibility.¹⁶
 - iii. Whether the informant is an inherently reliable person, such as the victim, an eyewitness or a reputable citizen, or merely a person making guesses, spreading rumors or engaging in wild speculation.
- c. The existence of any corroboration that supports the informant, such as:
- i. Similar information received from other informants.
 - ii. Direct observations or investigations by the police.

C. Property Which May Be Seized

1. Under the provisions of G.L. c. 276, s. 1, the following different types of property or articles may be seized under a search warrant:¹⁷
 - a. Property or articles stolen, embezzled, obtained by false pretenses, or otherwise obtained in the commission of a crime.
 - b. Property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried, or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime.

- c. Property or articles, the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under Chapter 138 (alcoholic beverages), sections 42 through 56, inclusive (see c. 138, s. 56 for warrantless arrest and seizure of alcohol until warrant obtained. Note: c. 138, s. 46 makes it a fineable offense to search for or seize illegal alcoholic beverages in a dwelling without a warrant).
 - d. The dead body of a human being.
 - e. The body of a living person for whom a current arrest warrant is outstanding.
2. The word "property" includes books, papers, documents, records and any other tangible objects. As the above list indicates, a Chapter 276 search warrant may authorize searches or seizures of:
- a. The proceeds or "fruits" of a crime,
 - b. Instrumentalities by which the crime was committed,
 - c. Contraband,
 - d. A dead human body, and
 - e. A person for whom there is an outstanding arrest warrant.
3. In addition, the police may seek a search warrant authorizing the seizure of "mere evidence." The phrase "mere evidence" refers to any item or object that would tend to prove the commission of a crime or the identity of the criminal. For example, while executing a search of a murder suspect's home pursuant to a warrant, officers found and seized bloody clothing. Although that clothing did not fit into any of Items (a) through (e) above, it was seizable as "evidence" of the commission of a crime and, having been located in the defendant's home, the clothing also tended to establish the identity of the criminal.¹⁸

Attachment: Sample Form for Search Warrant Affidavit

THE COMMONWEALTH OF MASSACHUSETTS

(COUNTY) SS.

(NAME) COURT.

I, *(name of applicant)* being duly sworn, depose and say:

1. I am *(describe position, assignment, office, etc.)*.
2. I have information, based upon *(describe source, facts indicating reliability of source and nature of the information; if based on personal knowledge and belief, so state)*.
3. Based upon the foregoing reliable information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described *(has been stolen, or is being concealed, etc.)* and may be found *(in the possession of A.B. or any other person)* at premises *(identify)*.
4. The property for which I seek the issuance of a search warrant is the following: *(here describe the property as particularly as possible)*.

Wherefore, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of *(identify premises and the persons to be searched)* and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

Signature:

Name

Then personally appeared the above named _____ and made oath that the foregoing affidavit by him subscribed is true.

Before me this ____ day of _____, 200 .

Justice or Special Justice, Clerk/Magistrate or
Assistant Clerk/Magistrate of the _____
Court.

Police Department

¹M.G.L. c. 276, s. 2B

²*Com. v. Monosson*, 351 Mass. 327, 221 N.E.2d 220 (1966)

³*Newspapers of New England v. Clerk-Magistrate*, 403 Mass. 628, 531 N.E.2d 1261 (1988) *cert. den'd* 490 U.S. 1066, 109 S.Ct. 2064 (1989)

⁴ M.G.L. c. 218, s. 33

⁵*Rodriguez v. Furtado*, 410 Mass. 878, 575 N.E.2d 1124 (1991)

⁶*Com. v. Penta*, 352 Mass. 271, 225 N.E.2d 58 (1967)

⁷*Com. v. Higgenbotham*, 11 Mass. App. Ct. 912, 415 N.E.2d 229 (1981); *Com. v. Morton*, 26 Mass. App. Ct. 949, 526 N.E.2d 1074 (1988)

⁸*U.S. v. Charest*, 602 F.2d 1016 (1st Cir. 1979)

⁹*Com. v. Blye*, 5 Mass. App. Ct. 817, 362 N.E.2d 240 (1977); *Com. v. Malone*, 24 Mass. App. Ct. 70, 506 N.E.2d 163 (1987)

¹⁰*Com. v. Dane Entertainment Services*, 23 Mass. App. Ct. 1017, 505 N.E.2d 892 (1987) *rev. den'd* 400 Mass. 1101, 508 N.E.2d 620 (1987)

¹¹ *Com. v. Truax*, 397 Mass. 174, 490 N.E.2d 425 (1986)

¹² *Com. v. Rutkowski*, 406 Mass. 673, 675, 550 N.E.2d 362, 364 (1990)

¹³ *Franks v. Delaware*, 438 U.S. 154 (1978)

¹⁴ *Com. v. Rugaber*, 369 Mass. 765, 343 N.E.2d 865 (1976); *Com. v. Hanneus*, 390 Mass. 136, 453 N.E.2d 1053 (1983)

¹⁵ *Com. v. Valdez*, 402 Mass. 65, 521 N.E.2d 381 (1988)

¹⁶ *Com. v. Allen*, 406 Mass. 575, 579, 549 N.E.2d 430, 433 (1990)

¹⁷M.G.L. c. 276, s. 1

¹⁸*Com. v. Murray*, 359 Mass. 541, 269 N.E.2d 641 (1971)

