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**OPINION COMMITTEE**

**JAMES HICKS**  
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42<sup>nd</sup>, 104<sup>th</sup>, 326<sup>th</sup>, and 350<sup>th</sup>  
JUDICIAL DISTRICTS OF TEXAS

FILE # ML-48096-16  
I.D. # 48096

October 24, 2016

**RQ-0138-KP**

Honorable Ken Paxton  
Office of the Texas Attorney General  
Attn: Opinion Committee  
PO Box 12548  
Austin, Texas 78711-2548  
Via Email: [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)

RE: Whether a search warrant affidavit is "executed" and thus public information under Texas Code of Criminal Procedure art. 18.01(b) when the affidavit is signed and sworn to before the magistrate or when the search warrant is executed.

Attorney General Paxton:

Our office is in discussion with the district courts of our county over a construction of the Texas Code of Criminal Procedure and when it mandates that a search warrant affidavit must be made public. Texas Code of Criminal Procedure art. 18.01(b) states that:

No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. Except as provided by Article 18.011, the affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Our office takes the position that "the affidavit is public

information if executed” means that the affidavit becomes public if and when the warrant is executed, rather than when the affidavit is signed and sworn before the magistrate. Several of our district court judges are concerned that “execution” in this context refers to when the affidavit is signed and sworn to, which we believe to be in error. If the provision were to be read such that the affidavit became immediately public before the search warrant itself could be executed, it would allow criminals to receive forewarning that a search warrant had been issued and was imminent. This would result in the possible sequestration or destruction of evidence and compromise officer safety, which we believe was not the Legislature’s intent. It is my belief that public policy would dictate that a search warrant affidavit is not public until, if and when the search warrant itself is served on the target of the warrant.

We base our analysis on several factors. Typically, “execution” refers to putting a document into effect rather than its being sworn to; e.g., a will is attested to by the signature of the testator, but is not “executed” until admitted into probate by the executor. Specific to the Code of Criminal Procedure, “execution” as it used elsewhere in the code in reference to warrants clearly refers to the warrant being put into effect rather than signed and sworn to. Article 18.06(a), titled “Execution of Warrants,” reads as follows:

A peace officer to whom a search warrant is delivered shall execute the warrant without delay and forthwith return the warrant to the proper magistrate. A search warrant issued under Section 5A, Article 18.21, must be executed in the manner provided by that section not later than the 11th day after the date of issuance. In all other cases, a search warrant must be executed within three days from the time of its issuance. A warrant issued under this chapter shall be executed within a shorter period if so directed in the warrant by the magistrate.

Similarly, Article 15.16, titled “How Warrant is Executed” makes clear that the execution of an arrest warrant is accomplished by the “officer or person executing the warrant” taking the person into custody and bringing them before the magistrate. Article 15.26, titled “Authority to Arrest Must Be Made Known,” also provides that:

[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate’s clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk’s office during normal business hours.

Read in conjunction with Article 15.16, it is clear that an arrest warrant is executed when the arresting officer puts it into effect by taking the person into custody, and that the arrest warrant and affidavit are public information immediately after that execution is accomplished. Our position is that a reading of Article 18.01(b) that requires a different result for search warrant affidavits makes little sense and cannot have been the intent of the Legislature.

Case law on the matter is sparse, as public availability of search warrant affidavits is not a matter that would typically be the subject of litigation by a criminal defendant. Our research showed two cases dealing with the public availability requirement of Article 18.01(b): *Houston Chronicle Publ. Co. v. Woods*, 949 S.W.2d 492 (Tex. App. – Beaumont 1997, no writ) and *Houston Chronicle Publ. Co. v. Edwards*, 956 S.W.2d 813 (Tex. App. Beaumont 1997, no writ). Each of these cases contained a discussion and analysis of the text and legislative history of Article 18.01(b) and the public availability of search warrant affidavits; however, neither case deals directly with the issue of whether a search warrant affidavit must be made publically available before the search

warrant itself is executed. We believe our interpretation is the correct one, but given the lack of authority interpreting the statute, we request that your office provide a written opinion clarifying the matter.

Thank you for your attention to this matter. If you need to contact me directly please do not hesitate to do so.

Sincerely,



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