

RECOMMENDED LOCAL RULE ON SEALING WARRANTS

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Background and reason for the recommended rule:

General Statutes § 132-1.4(k), which is part of North Carolina's Public Records Law, addresses the sealing of search warrants and related documents. The statute provides: "The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders." Although sealing court documents raises significant constitutional issues, the statute provides no guidance as to when it is appropriate to seal those documents or the procedures that courts should follow in resolving sealing motions.

The Court of Appeals in *In re investigation into Death of Cooper*, 200 N.C. App. 180 (2009), spoke to the standard to be applied in deciding whether to seal warrants. Although the Court of Appeals got there by a different route, it generally followed the standard articulated by the federal Fourth Circuit Court of Appeals in *Baltimore Sun Company v. Goetz*, 886 F.2d 60 (4th Cir. 1989). Both courts say that access to court documents may be restricted only when doing so is "essential to preserve higher values and is narrowly tailored to serve that interest." In *Cooper* the court recognized protection of the defendant's right to a fair trial, maintenance of the integrity of an ongoing investigation, and protection of the state's right to prosecute a defendant as among the "higher values" that could justify sealing warrants or otherwise restricting access.

The *Cooper* decision did not discuss in any significant way the procedure to be followed in deciding whether to seal warrants, though it described the procedure followed in the case pursuant to an administrative order entered by the Wake County senior resident superior court judge and chief district judge. Few judicial districts have such administrative orders or local rules, however. The recommend local rule below is intended to fill that gap.

The recommended local rule comes via a small group of court officials (judges, a clerk of court, a district attorney) and news media representatives who met at the UNC School of Government in 2009. They built on a proposed local rule distributed by the Conference of District Attorneys several years ago and the Wake County administrative order. The original recommendation has been modified slightly to reflect later concerns raised by clerks about filing procedures.

No organization such as the Superior Court Judges Conference or the Conference of District Attorneys has formally considered or endorsed the recommended rule, but those among whom it has been circulated seem satisfied that it states the present law correctly and offers a procedure that properly balances the public's right to access with the interests of law enforcement and fair trials.

Any questions or comments should go to Michael Crowell at the UNC School of Government. The e-mail address is crowellm@sog.unc.edu and the telephone number is 919 966-4438.

Recommended rule:

Pursuant to G.S. 132-1.4(k) arrest and search warrants and related documents become public records when they have been executed and returned to the clerk's office, unless ordered sealed by the court. The following procedures shall apply to a request to seal or redact an arrest or search warrant, a search warrant application, a search warrant affidavit, an inventory of items seized pursuant to a search warrant, or other similar court document:

- (1) The request shall be made by written motion filed by or on behalf of the Attorney General or a district attorney.
- (2) The motion shall set out the general grounds for the sealing but need not disclose any sensitive information.
- (3) The motion shall be accompanied by an affidavit signed by the movant, or by another person involved in the investigation, setting forth detailed grounds for the requested sealing. This supporting affidavit shall be sealed.
- (4) The sealing motion shall be heard and decided by a superior or district court judge.
- (5) If the motion is made in the course of an ongoing criminal investigation in which charges have not yet been filed, the motion and sealed affidavit supporting the motion shall be filed in the office of the Clerk of Superior Court as provided in the clerks' Rules of Record Keeping (i.e., the motion should be filed in a new CVS file, without a filing fee, and the affidavit should be kept in a separate, secure file).
- (6) If the motion is made in the course of an investigation in which charges have been filed, the motion and sealed affidavit supporting the motion shall be filed in the appropriate CVS file in the office of the Clerk of Superior Court.
- (7) Normally a motion to seal the inventory of items seized should not be filed until after the search warrant has been executed. Such a motion will be considered in advance of the execution of the warrant only when the identity of the items to be seized, and the need for withholding disclosure, is known for certain.
- (8) In addition to the docket entries prescribed by paragraphs (5) and (6) the Clerk of Superior Court shall maintain as a public record information related to all sealing orders. For each such sealing order the Clerk shall make available at least the following information: (a) the identity of the law enforcement agency or official at whose request the search warrant was issued; (b) the identity of the attorney who signed the sealing motion; (c) the identity of the judge who signed the sealing order; (d) the date the order was signed; and (e) the date and time the order expires.
- (9) The court will seal an arrest or search warrant, a search warrant application, a search warrant affidavit, an inventory of items seized pursuant to a search warrant, or other similar court document, only when doing so is "essential to preserve higher values and is narrowly tailored to serve that interest." See *In re investigation into Death of Cooper*, 200 N.C. App. 180 (2009), and *Baltimore Sun Company v. Goetz*, 886 F.2d 60 (4th Cir. 1989). Interests that may justify sealing, when supported by sufficient evidence that public disclosure of the document would jeopardize such interests, include but are not

limited to the right of the State or defendant to a fair trial, the need for law enforcement to maintain the integrity of an ongoing investigation, the privacy rights of innocent third parties, and the protection of witnesses and other third parties. In ruling on a motion to seal a document, the court shall first consider whether the need for confidentiality can be served by redacting portions of the document or its supporting documentation by any other less restrictive alternative.

- (10) Any order directing that a warrant or warrant affidavit or other document be sealed or redacted:
 - a. May explicitly adopt, without recitation, the facts set out by the State to justify sealing or redacting the document, if those facts appear credible and sufficient;
 - b. Must conclude that the reasons set forth in the State's motion and supporting affidavit show that the sealing or redaction is essential to preserve higher values identified in the order and that the order has been narrowly tailored to serve those interests.
 - c. Shall expire in 30 days unless a different expiration date is specified in the order; and
 - d. Shall be docketed as provided in paragraph (5) or (6) above.
- (11) If the motion is made and the order is issued during non-business hours, the motion and order shall be filed during the next business day.
- (12) The State may move for extension of an order sealing or redacting a court document, and the existing order shall remain in effect until the motion for extension is decided.
- (13) If a dispute arises between the news media or other interested party and the State as to whether any matter sealed under this rule should remain sealed, the parties should make a good faith attempt to resolve the dispute before bringing the matter to the court.
- (14) Motions to vacate or modify sealing orders shall be treated as motions to compel the disclosure of public records and shall be scheduled as soon as reasonably practicable and shall be given priority.