

 Lexington Police Department	Subject: Search Warrant Affidavits					Policy Number:	
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By Order of: Mark J. Corr, Chief of Police							

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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.

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 sizeable 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 Commonwealth's Constitution.

It is the policy of the Lexington Police Department that:

- Officers applying for search warrants 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
- Officers shall apply for a search warrant whenever practical.

PROCEDURES

A. Search Warrants Generally

1. Authority to Issue Warrants

- a. 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 issue search warrants.ⁱ
- b. A judge or clerk may issue a search warrant for execution anywhere in the Commonwealth.
- c. Warrants for body cavity searches may only be issued by a judge on a strong showing of particularized need supported by a high degree of probable cause.ⁱⁱ
- d. Warrants in criminal cases must identify the property to be searched for and name or describe the person or place to be searched.

2. Obtaining a Search Warrant

- a. The legal procedure for obtaining a search warrant is specified by M.G.L. c. 276, § 1, see Department policy **42F-Executing Search Warrants**.
- b. M.G.L. 276, § 2B states, the officer seeking the warrant must submit a warrant application and affidavit upon oath that [s]he believes that the property or articles named in the application for the warrant are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the Commonwealth and/or territorial waters.ⁱⁱⁱ
- c. The affiant must satisfy the justice or clerk before whom the warrant is sought that there is probable cause to believe that the property or person sought is located at the place to be searched.

3. Serving the Warrant: Officers conducting search based upon a search warrant are limited to searching the locations named in the body of the warrant and only in such places that the property sought may be

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concealed. (For example, searching a small drawer for a 50" TV is not reasonable where searching for drugs almost any place is reasonable).

B. Affidavit Requirements

1. Format: 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, § 2B (see sample Affidavit for Search Warrant at end of this policy).
2. Introduction
 - a. The officer submitting the affidavit shall clearly identify himself/herself and briefly describe the officer's education.
 - b. The officer must explain in the affidavit any expertise or special training which pertains to his/her belief that a given crime has been committed and that given items are connected to that crime.
3. Establishing Probable Cause
 - a. The officer should disclose all relevant information in the affidavit and do so in a complete, yet concise and logical (perhaps chronological) fashion.
 - b. The affidavit must disclose facts and information, which furnishes 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.
 - ii. **Any fact that is not set out in the affidavit cannot be inserted or used later for the purpose of establishing probable cause.**
 - iii. 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."^{iv}
 - c. The affidavit must disclose facts and information which furnish probable cause to believe that a particular person or that particular items are connected to that crime and that:
 - i. That person or those items are (or will be) at a particular place; or
 - ii. Those items are (or will be) found on particular person or persons.

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- d. Probable cause to justify the issuance 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.^v Two examples of cases where "staleness" was into question were:
- i. *U.S. v. Charest*, 602 F.2d 1016 (1st Cir. 1979) - 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.^{vi}
 - ii. *Com. v. Blye*, 5 Mass. App. Ct. 817, 362 N.E.2d 240 (1977); and *Com. v. Malone*, 24 Mass. App. Ct. 70, 506 N.E.2d 163 (1987) - 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.^{vii}
- e. The affidavit should disclose how and when the facts and information came to the officer's attention.
- i. If information from a confidential informant is relied on, the informant must be reliable and have a basis of knowledge. See also Department policy **42D - Confidential Information and Informants**.
 - ii. The affidavit must disclose why the persons who provided those facts and information are reliable.
- f. If there are additional pages attached to the affidavit, the affidavit should refer to them as "see attached pages" in appropriate places.^{viii} There is no requirement that all attached pages be signed.^{ix}
- g. The affidavit must describe with particularity:
- i. The place or person(s) to be searched.
 - (a) Describe the place to be searched in detail including address, location, type of building, color, construction, etc. Include a photo of the building if practical. Include the apartment number, floor, location, etc. if applicable.
 - (b) Describe the person to be searched. Include a photograph, if available. Traditional characteristics include such things as race, height, weight, hair color,

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- scars, tattoos, and other personally identifiable features.
 - ii. The item or items for which the search will be conducted.
 - (a) The degree of specificity required when describing goods to be seized may necessarily vary according to the circumstances and types of items required.^x
 - (b) Include a request to authorize a search for documents supporting ownership and control of the property if that information is pertinent.
4. Inaccurate Information
- a. Misstatements in an affidavit that amount to a knowing and intentional falsehood or reckless disregard for the truth will render a search warrant invalid.^{xi}
 - b. Inaccuracies, which do not affect the integrity of an affidavit, do not destroy probable cause for a search.^{xii}
 - i. Officers should use extreme care to read, reread and verify all the important facts stated on the warrant application.
 - ii. Simple misspellings or the reversal of numbers can be fatal errors to an affidavit.
 - c. Negligent misrepresentations in affidavits do not require suppression.^{xiii} However, they may have to be explained during a motion, hearing, or trial.
5. Affidavit Review
- a. The affidavit should receive the approval of the Detective Commander, or other designated supervisor, before submission to the court.
 - b. Whenever practical, secure the advice and guidance of the District Attorney's Office.
 - c. The Chief of Police will be notified that the Department is seeking a search warrant and the nature of the case before the search warrant is executed.
6. Submission of the Affidavit: The officer submitting the affidavit shall personally appear before a judge or magistrate and sign the affidavit.
- C. Application for Search Warrant Form
- 1. Trial Court Form
 - a. The Trial Court provides a form, TC-SW-1, which may be used for preparing a search warrant. (Copy attached to end of this Policy)

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- b. Instructions for preparing the warrant are included on the cover page.
 - c. An affidavit form is included which may be used, but is not required.
 - d. The “Application for Search Warrant” form and actual “Search Warrant” are a two-part carbon form, which transfers from the application to the actual warrant.
2. Completing the Application
- a. Include the applicant’s name and position, along with the “District” or “Superior” Court Department, depending upon where the application will be sought.
 - b. The “Division” indicates the actual District Court where the warrant will be returned.
 - c. Include the exact number of pages making up the affidavit(s) in line 1.
 - d. Enter all that apply regarding the type of property to be searched for in line 2.
 - e. Enter a detailed description of the property to be searched for in line 3.
 - f. Identify in detail the place(s), vehicles, and persons to be searched in line 4, including any and all persons present if appropriate.
 - g. Indicate by checking the appropriate box if the application has been previously submitted.
3. Issuing Justice or Clerk Magistrate
- a. The issuing official should check off whether or not:
 - i. The search may be conducted at night, between the hours of 10:00 p.m. and 6:00 am.
 - ii. Entry may be made without knocking and announcing.
 - iii. Any persons present may be searched.
 - b. The issuing official must sign the search warrant.
 - c. M.G.L. Chapter 276 §2B states, the person issuing the warrant shall retain the affidavit and shall deliver it within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit shall be attached to it and shall be filed therewith, and it shall not be a public document until the warrant is returned.

D. Informants

1. Generally: In order to establish the credibility of an informant whose information is being used to establish probable cause in a search

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warrant, the affiant must prove that the informant is reliable and has a basis of knowledge (known as the two-prong test).

2. RELIABILITY: Factors that support the informant's reliability:
 - a. 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?
 - b. Whether the informant is admitting his/her own involvement in crime (a statement against penal interest). However, if the identity of the informant is unknown, any statements against his/her penal interest cannot buttress his/her credibility.^{xiv}
 - c. Whether the informant is an inherently reliable person, such as the victim, an eyewitness, a reputable citizen or a person named in the affidavit.

Note: Be sure not to name a confidential informant, as this may jeopardize such person's safety and reduce their usefulness in the future.

3. BASIS OF KNOWLEDGE: Factors that establish an informant's basis of knowledge:
 - a. Did the informant make personal, direct observations, or is the informant relating hearsay information?
 - b. How recently did the informant acquire his/her information (is it still valid or has it become stale)?
 - c. How detailed is the informant's information?
4. CORROBORATION: The existence of any corroboration that supports the informant, such as:
 - a. Similar information received from other informants.
 - b. Direct observations or investigations by the police.

E. Property Which May Be Seized

1. Generally
 - a. A copy of the search warrant must be present at the scene of the search before the search can begin. It must be presented upon demand of the occupant.^{xv}
 - b. The search warrant is the guide to what may be searched for where the search may take place.
2. Property that may be searched for
 - a. Under the provisions of G.L. c. 276, s. 1, the following types of property or articles may be seized under a search warrant:^{xvi}

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- i. Property or articles stolen, embezzled, obtained by false pretenses, or otherwise obtained in the commission of a crime.
- ii. 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.
- iii. Contraband, 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).
- iv. The dead body of a human being.
- v. The body of a living person for whom a current arrest warrant is outstanding.

- b. The word "property" includes books, papers, documents, records and any other tangible objects.

3. Mere Evidence

- a. In addition to items listed in c. 276, s. 1, the police may seek a search warrant authorizing the seizure of "mere evidence."
- b. 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 sizeable 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.^{xvii}

4. ITEMS NOT MENTIONED IN THE WARRANT: Illegal items not mentioned in the warrant may be seized if found in plain view while searching for items specified in the warrant.

F. Return of Warrant

1. Returning the Warrant

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- a. A return of the warrant must be made to the court of issue by the officer executing the warrant within seven days of the warrant's issuance.
- b. The back of the warrant must be completed and includes the following:
 - i. The date that the warrant was issued;
 - ii. A list of the property taken pursuant to the search warrant; and,
 - iii. A list of persons present when the inventory was made.
- c. The officer making the return must appear before the clerk magistrate to whom the return is made and swear that the inventory is a true and detailed account of all the property taken pursuant to the search warrant.

2. Impounding the Warrant

- a. The affidavit is not a public document until the warrant is returned. At that time it is open to public inspection "to ensure that the Commonwealth can demonstrate by a writing that any given search and seizure was reasonable and was based on probable cause."^{xviii}
- b. A search warrant affidavit may be impounded.
- c. 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.^{xix}

G. Department Reporting Requirements

In every case where a search is conducted with a warrant, the police officers involved shall make a written report of the circumstances to include all-important facts relative to the incident and an inventory of any evidence seized.

Attachment: Sample Search Warrant Affidavit

THE COMMONWEALTH OF MASSACHUSETTS
(COUNTY) SS. _____ (NAME) COURT
I, (<i>name of applicant</i>) being duly sworn, depose and say: I am (<i>describe position, assignment, office, etc.</i>). I have information, based upon (<i>describe source, facts indicating reliability of source and nature of the information; if based on personal knowledge and belief, so state</i>). Based upon the foregoing reliable information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described (<i>has been stolen, or is being concealed, etc.</i>) and may be found (<i>in the possession of A.B. or any other person</i>) at premises (<i>identify</i>). The property for which I seek the issuance of a search warrant is the following: (<i>here describe the property as particularly as possible</i>). <i>Wherefore</i> , I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (<i>identify premises and the persons to be searched</i>) 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 _____, 201__.
Justice or Special Justice, Clerk/Magistrate or Assistant Clerk/Magistrate of the _____ Court.

ⁱ M.G.L. c. 218, s. 33

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

ⁱⁱⁱ M.G.L. c. 276, s. 2B

^{iv} *Com. v. Penta*, 352 Mass. 271, 225 N.E.2d 58 (1967)

^v *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)

^{vi} *U.S. v. Charest*, 602 F.2d 1016 (1st Cir. 1979)

^{vii} *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)

^{viii} *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)

^{ix} *Com. v. Truax*, 397 Mass. 174, 490 N.E.2d 425 (1986)

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

^{xi} *Franks v. Delaware*, 438 U.S. 154 (1978)

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

^{xiii} *Com. v. Valdez*, 402 Mass. 65, 521 N.E.2d 381 (1988)

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

^{xv} *Com. v. Guaba*, 417 Mass. 746 (1994)

^{xvi} M.G.L. c. 276, s. 1

^{xvii} *Com. v. Murray*, 359 Mass. 541, 269 N.E.2d 641 (1971)

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

^{xix} *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)