

FINAL REPORT¹

New Pa.R.Crim.P. 513.1, Amendments to Pa.R.Crim.P. 513, and Revisions to the Comments to Pa.Rs.Crim.P. 540 and 547

PUBLIC ACCESS TO PRE-EXECUTION ARREST WARRANT INFORMATION: DELAY IN DISSEMINATION AND SEALING OF ARREST WARRANT INFORMATION FOR PUBLIC SAFETY PURPOSES

On December 23, 2013, effective March 1, 2014, upon the recommendation of the Criminal Procedural Rules Committee, the Court (1) adopted the amendment of Pa.R.Crim.P. 513 to provide for the temporary delay in the dissemination of arrest warrant information to the public prior to execution, (2) adopted new Rule 513.1 to provide for the sealing of arrest warrant information, and (3) approved correlative changes to the *Comments* to Rules 540 and 547.

I. BACKGROUND

For several years, the Committee had examined the question of an issuing authority's obligation to disseminate arrest warrant information to the public prior to the execution of the warrant.² The Committee recognized the strong tradition and policy in Pennsylvania of maintaining the openness of the courts and court records. At the same time, the Committee recognized that disclosure of arrest warrant information prior to execution has the potential for injury or loss of life to the executing officers in addition to the possibility of flight on the part of the defendant. This concern had been heightened by the increased level of automation of court records and increased accessibility of this information.

¹ The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

² "Arrest warrant information" is defined under the proposed amendments as the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.

Part of the impetus for the development of this proposal was an examination of *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (1987),³ in which the Court specifically reserved the question of access to pre-execution arrest warrant information. As a result, the Committee concluded that the current state of the law is unclear to what extent an issuing authority is obligated to make arrest warrant information available to the public at a point in a criminal case when such disclosure has the potential to affect public safety adversely. The Committee struggled to reach a balance between the interests of safety and public access. Ultimately, the Committee concluded that reasonable limitations on pre-execution disclosure should be put into place, regardless of whether that information is disseminated electronically or is physically available for inspection at the issuing authority's office.

II. DEVELOPMENT AND PUBLICATION OF PROPOSAL

The amendments are the product of extensive discussions by the Committee, the publication for comment of three separate *Explanatory Reports*, review of numerous comments received in response to these publications, and subsequent modifications based on the publication comments.

On August 4, 2007, the Committee published for comment a *Report* explaining the considerations in the development of a proposal to amend Rule 513 to provide for the temporary delay in the dissemination of arrest warrant information to the public prior to execution. This proposal was similar to the procedures in then-new Rule 212. See 37 *Pa.B.* 4178 (August 4, 2007). Based on comments received from this publication,

³ In *Fenstermaker*, a newspaper filed a motion for access to the probable cause affidavits for an executed arrest warrant. The Supreme Court of Pennsylvania noted that there were important policy considerations which underlay a general right to public access to court records, such as discouraging perjury, enhancing police and prosecutorial performance, and promoting a public perception of fairness in the arrest warrant process. However, the Court found that the public's right to inspect judicial documents is not absolute and the decision regarding public access to arrest warrant affidavits is best left to the discretion of the court. The remedy the Court supported was to require that affidavits be sealed under a court order, not simply upon the request of one of the parties.

the Committee realized that the limited procedure contemplated in the original proposal did not sufficiently address the safety needs that prompted the question nor did it ensure that the defendant's or the public's right to access were not unduly impinged.

The Committee concluded that the best method of addressing these questions was by the creation of a "two-tiered" system for access to arrest warrant information. As originally conceived, the first tier provided for a limitation on dissemination of the arrest warrant information, requested by the affiant or the attorney for the Commonwealth, for no more than 10 days or until the warrant is executed, whichever is sooner. The second tier, which was based on the sealing of search warrant procedures in Rule 211, could have been used to extend the time under which public access to arrest warrant information was limited or could have been used as a sealing order from the start.

In devising this approach, the Committee concluded that detailing procedures for sealing arrest warrants would have the added benefit of providing definition to a practice currently established only in case law, *see Commonwealth v. Fenstermaker, supra*. The Committee determined that, while the authority of a court to seal arrest warrants was generally recognized, gaps exist in the practice. This point is highlighted in *Fenstermaker* that explicitly left open the question of public access to pre-execution arrest warrant information. The Committee believed that judges, practitioners, and the public would benefit from the clarity and uniformity that a detailed rule would provide as to how access to arrest warrant information may be restricted and the standards for determining if such restrictions should be granted. This clarity and uniformity would provide law enforcement and prosecutors with the tools to ensure public safety while ensuring that defense and public interests are protected.

On December 8, 2007, the Committee published for comment a *Supplemental Report* that contained this revised approach. *See 37 Pa.B. 6392* (December 8, 2007). The Committee received several comments. One response argued that the only way in which any restriction may be placed on public access to arrest warrant information is by a formal sealing procedure. There were also questions raised as to the specific procedures to be followed for the execution of sealed arrest warrants, especially with regard to access to the warrant information at the preliminary arraignment as well as

Delay in Dissemination and Sealing of Arrest Warrants *Final Report: 12/23/2013* -3-

concerns about whether the rule would unduly restrict dissemination of the warrant information to law enforcement.

From the Committee's research and analysis, it was concluded there is a substantial difference between a temporary delay in dissemination limited to the pre-execution stage of a proceeding and a full sealing of the information. The first is a limited and temporary delay in dissemination to the public when there is an immediate public safety concern, while the latter is a bestowal of court-ordered confidentiality upon the information of potentially greater duration and restriction of access. The Committee went to considerable effort to differentiate the two concepts by creating two distinct procedures. For both procedures, the Committee has taken great pains to ensure that the public interest in access to the court records is protected by requiring specific grounds for delay or sealing and placing specific time limitations on the duration of the delay and seal.

The Committee concluded that part of the problem with the proposal as published was that the second portion of the proposal mixed procedures for extending the delay in dissemination with procedures similar to the sealing of search warrants. The Committee determined that the distinction would be clearer if the two concepts, delay in dissemination and sealing, were placed in separate rules. The first rule would permit a limited delay in public access to arrest warrant information, while the second rule would provide procedures for sealing an arrest warrant in the traditional sense.

The Committee again revised the proposal as outlined above and a *Second Supplemental Report* was published on October 18, 2008. See 38 Pa.B. 5747 (October 18, 2008). Some of the responses to this publication opined that it would be better to have a "blanket" delay in the dissemination of arrest warrant information in all cases. This type of procedure had been considered by the Committee and rejected as unfeasible from a technological point.

III. DISCUSSION OF THE AMENDMENTS

The amendments create a "two-tiered" system for access to arrest warrant information. Rule 513 establishes the first tier with a limitation on the dissemination of

arrest warrant information. New Rule 513.1 establishes the second tier with the procedures for sealing arrest warrant information. Correlative changes have been made to the *Comments* to Rules 540 and 547.

Amendments to Rule 513

Rule 513 has been reorganized to incorporate the delay in dissemination procedures. New paragraph (A) sets forth the definition of “arrest warrant information.” The original text of the rule has become new paragraph (B), titled “Issuance of Arrest Warrant.” New Paragraph (C), titled “Dissemination of Arrest Warrant Information,” provides that an affiant or attorney for the Commonwealth may request that an issuing authority delay dissemination of arrest warrant information, in any form, to the public. Paragraph (C)(1) provides that, upon a finding of good cause, the issuing authority must delay the dissemination of the arrest warrant information for a period of 72 hours from issuance of the warrant or until notice of the execution of the warrant is received by the issuing authority. Paragraph (C)(2) also provides for a limited extension of the 72-hour limited when there is a delay in the administrative processing between the filing of the arrest warrant application and the issuance.

The amendments as originally proposed provided that the delay in dissemination of arrest warrant information would be for 10 days or until execution. This period was reduced to 72 hours in order for the rules to be compatible with the existing administrative practice, developed by AOPC Automation, of accommodating a 72-hour delay of the appearance of the electronic case information on the various court computer systems upon request by law enforcement or prosecutors.

Ordinarily, as soon as a case is created in one of the Court’s systems (MDJS, CPCMS, PACMS), the case information will be available immediately for public viewing on the UJS Web Portal. Additionally, when an arrest warrant has been issued, the Court’s systems, usually the MDJS, feed that information to the two law enforcement fugitive tracking systems, the Pennsylvania State Police’s CLEAN system and the FBI’s NCIC system, for dissemination to law enforcement. The administrative policy provides that the availability of this information may be delayed on a case-by-case basis if a written request is made by law enforcement personnel and approved by the issuing
Delay in Dissemination and Sealing of Arrest Warrants *Final Report: 12/23/2013 -5-*

authority in a written order. This process applies only to access to the electronic records. Pursuant to the Court's policy on public access to the paper records of the MDJs, the case and warrant information would be available for viewing at the MDJ office unless a seal order had been issued.

AOPC Automation became aware of problems with the 72-hour delay process that necessitated a change that would permit additional time for the delay in availability of the information. There had been cases in which there was a significant amount of time between when the case was set up in the system and when a warrant in that case was issued. On August 9, 2012, the administrative policy was modified to provide up to an additional 24 hours in the delay of dissemination of the warrant information if there is a delay in issuing the warrant. In other words, the 72-hour delay would begin to run from the time that the warrant is issued but if the issuance does not occur at the same time as the creation of the case record, an additional period of delay in dissemination, not to exceed 24 hours, would be available after the case had been created in the system but before issuance.

Since the amendments to Rule 513 were intended to be compatible with the administrative policy, they incorporate a provision in paragraph (C)(1) that, when there is a need for additional time for the administrative processing of the arrest warrant request, a period of 24 hours of additional delay in dissemination may be permitted. It should be noted that, unlike the administrative policy, the amendments to Rule 513 apply to both electronic and paper records. Any further restriction upon public access to the arrest warrant information beyond the period provided in Rule 513(C) must be sought through a sealing order as provided in Rule 513.1.

The temporary delay in dissemination is applicable only to the public. As explained in the Rule 513 *Comment*, nothing in the rule is intended to limit availability of the information that is subject to the delay to court personnel or law enforcement as needed in the performance of their duties was carried over from the original proposal. When the warrant is sealed, however, the availability of information to all parties would be much more limited. This limitation is discussed in more detail below in the discussion of new Rule 513.1.

Paragraph (C)(2) provides that the 72-hour period of delay begins upon the issuance of the arrest warrant.

Paragraph (C)(3) provides that, in those counties that require the approval of the attorney for the Commonwealth prior to the filing of complaints and arrest warrant request pursuant to Rule 507, only the attorney for the Commonwealth may request a delay in dissemination. As noted in the *Comment* to Rule 513, this requirement would apply when the attorney for the Commonwealth has elected to only require prior approval of certain offenses.

New Rule 513.1

New Rule 513.1, which is based on and incorporates many of the procedures for sealing search warrants contained in Rule 211, provides the procedures by which, upon a showing of good cause, a common pleas judge⁴ must order the arrest warrant information to be sealed. The request for sealing must be made by the attorney for the Commonwealth. The *Comment* provides direction on the application of the good cause standard to requests to seal the arrest warrant information and utilizes language taken from *Commonwealth v. Fenstermaker, supra*.

Paragraph (C) permits only an attorney for the Commonwealth to request the sealing of the arrest warrant information at the time of the issuance of the arrest warrant. The arrest warrant affidavits must include the good cause for sealing.

Because the access to a sealed arrest warrant is severely limited, even to law enforcement agencies, paragraph (C)(1)(b) places the burden on the attorney for the Commonwealth, if he or she wants the sealed arrest warrant information to be disseminated to other law enforcement agencies, to specifically request that the sealing order provide for the release of the sealed information to these agencies.

Upon a determination of good cause, the judge shall issue the sealing order which shall contain the expiration date of the seal as well as a designation of the issuing authority before whom the defendant should be brought upon execution of the warrant.

⁴ The rule also permits the motion to be made to an appellate judge.

Originally, the Committee proposed that the rules provide that the common pleas judge would issue the sealing order only, and that the police would then file the order, complaint, and probable cause affidavit with the proper issuing authority for approval and processing. However, after further consideration, the Committee concluded that a more realistic procedure is to provide that most of the initial procedures and processing of the paperwork in a case in which the arrest warrant information is sealed should remain at the common pleas court, at least until execution of the arrest warrant. In other words, once the common pleas judge orders the sealing, the arrest warrant information will be filed in the clerk of courts' office as a miscellaneous docket case. When the warrant is executed, the attorney for the Commonwealth or the police officer will take copies of all the original filings to the issuing authority designated in the sealing order, and, thereafter, the case will proceed as any other case before the issuing authority. If the case is held for court, the clerk of courts will merge the case from the magisterial district judge with the miscellaneous case previously filed in the clerk of courts' office.

Paragraph (D) states the time limitations on any sealing order as well as the procedures for requesting an extension of the time limitation. Upon issuance of the sealing order, the arrest warrant will remain sealed for a period of not more than 60 days. The attorney for the Commonwealth may seek to extend the sealing of the warrant for additional periods of 30 days but each extension must be supported by a showing of good cause.

Paragraph (E) provides that, upon the request of the attorney for the Commonwealth, the arrest warrant shall be unsealed.

Rule 513.1(F), which is modeled on a similar restriction to sealed search warrants found in Rule 211(H)(2), recognizes that the defendant's access to the sealed arrest warrant information may be limited in exceptional circumstances even after execution and the preliminary arraignment. The paragraph provides that, upon a further finding of good cause, the defendant may be denied access to the arrest warrant information for a period of no more than thirty days or the date of the preliminary hearing. The Committee concluded that, as in the search warrant situation, there might

be some unique situations, such as the protection of a confidential informant, that necessitate such a severe restriction. The Committee believes that there are sufficient procedures available to seek further review of such an order. However, as a further caution, the *Comment* to Rule 513.1 specifically states that this procedure should only be used in exceptional cases.

Correlative Changes

Correlative changes are also made to the *Comments* to Rules 540 (Preliminary Arraignments) and 547 (Return of Transcript and Original Papers) have been revised to include cross-references to new Rule 513.1.