

Newport News clerk spearheads change on sealing of court orders for police phone records



Last year five Hampton Roads police departments agreed to share telephone records obtained in criminal investigations (Joe Fudge/Daily Press)

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NOVEMBER 26, 2014, 8:16 PM | NEWPORT NEWS

A long-standing practice in Newport News Circuit Court to seal most court orders for telephone records obtained by police has recently been overhauled — in a move spearheaded by the court's longtime clerk.

For years, police and prosecutors have gotten orders for phone records under two distinct provisions of law — one that allows the application and order to be permanently sealed, and one that does not.

But after a recent request from the Daily Press asking to see the unsealed applications and court orders, Clerk of Court Rex A. Davis said the practice of combining such applications and orders make it impossible to ferret out the part that's supposed to be unsealed after 90 days.

"They wrapped it all into one," he said. "Why they did it that way, I don't know. ... But when you've got one part of the order that's sealed, and one part of the order that's supposed to become unsealed, it makes it impossible to bifurcate them into two. You can't unseal half."

Davis' numbers show roughly 250 court orders for phone records filed in Newport News Circuit Court between 1995 and 2014, nearly all of them combined under the two statutes. Similar sealing mechanisms appear to be used in other area cities, including Hampton, Norfolk and Chesapeake.

To fix that problem in Newport News — at least for future filings — Davis said he asked one of his counter clerks to relay to police officers that two separate orders will be needed from now on. One, he said, will remain sealed, while the other will become unsealed according to law.

"We were processing them as they submitted them, and when all this started to be a subject of public interest, we took time to look at what they were doing," Davis said. "And it didn't appear that what they were doing allowed us to do what we're supposed to be doing. So we asked them to change, and they changed."

Davis — who has been the city's elected Circuit Court clerk for nearly 27 years — said he did not have any meetings with prosecutors, judges or police officials about the change. But, he said, the officers "apparently went back to the police department and sat down, and they took part of the language out of one order and put it in another order."

On Wednesday, Davis clarified that while one set of applications and court orders will become unsealed, those records won't include the names and phone numbers of people whose records are being investigated. Instead, he explained, the unsealed case will refer back to the related sealed case number — with the names and phone numbers kept in the sealed file.

Until recently, Davis said, he had not closely examined the issue, saying court orders for phone records "are not the only thing we do around here," and "honestly no one ever asks to see one."

"It was after you started asking about it, and we started looking at it, and we started comparing it with the Code of Virginia," he said.

Under one of the provisions of law being used, judges can grant police investigators the authority to install devices — called "pen registers" and "trap and trace devices" — on people's phone lines. Such devices allow live-stream access to phone log records — such as who is calling whom, when and for how long.

Under that code section, "the order and application (shall) be sealed until otherwise ordered by the court."

But there's no such permanent sealing mechanism for "historical" phone log records. Those are lists, similar to a customer's bill, that includes the call log information over a certain time period.

Under that provision, "the order and any written application or statement of facts may be sealed by the court for 90 days for good cause shown," upon a prosecutor's request, at a hearing without a defense lawyer. The applications and orders can be sealed for additional 90-day periods upon subsequent showings of good cause.

For years, Davis said, the combined orders under those statutes quote verbatim from Virginia law, with one part of the order referring to the permanent sealing and another part referring to the required unsealing after 90 days. "Page after page after page is what the language of the order says," Davis quipped.

One local criminal defense lawyer, Timothy Clancy, said that with the second statute, "the General Assembly certainly does not contemplate these being sealed permanently."

Of combining the two court orders into one, he said: "In my reading of the statute, they don't have the authority to do that. I don't think they should be doing that, because it's two separate applications, two separate mechanisms — two separate authorities — for getting phone records."

Likewise, Newport News Chief Deputy Public Defender Robert Moody asserted that using a combined order that seals both sets of records violates the 90-day provision for court orders for historical phone call records.

Newport News Chief Deputy Commonwealth's Attorney Valerie Spencer Muth — whose office is involved with police in obtaining the orders — said she was reaching out to her prosecutors this week for more information about the practice and whether they had intended the orders all be permanently sealed.

Newport News Circuit Court Judge H. Vincent Conway Jr., one of the court's four judges, said he's also looking into what was intended with the combined court orders.

Conway said he doesn't recall any concerns being raised at hearings with police and prosecutors over the years about the discrepancy between the statutes in terms of sealing. "I don't know that there's been any specific discussion on that, and certainly there hasn't been in my presence," he said.

Before signing off on such orders, Conway said, his main review has been regarding the facts of the case itself. Typically, he said, he puts the police officer under oath and "reviews the factual allegations in the application."

But Conway acknowledged that the review of the language of the court orders "would probably be cursory," given that "it was prepared under the authority of the commonwealth's attorney" and quoted "boilerplate" language from state law.

Conway said he would raise the issue at a judges' meeting Monday to get the consensus of the court's other judges on whether the past practice was proper — and what remedies might exist if it's not. "Obviously I don't think anyone has any vested interest in being incorrect," he said.

Davis, for his part, said there was no effort to improperly seal records, and said the recent change should fix some of the concerns going forward.

"As far as I know, there's no grand conspiracy out there to circumvent the Code of Virginia," Davis said. "Sometimes it's just that one hand doesn't know what the other hand needs, and that sometimes causes little bumps in the road. But we appreciate you showing us that bump, and we've now smoothed the bump out."

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What is the sharing agreement?

In early 2013, five local police departments -- in Newport News, Hampton, Norfolk, Chesapeake and Suffolk -- signed an agreement to share telephone records obtained in criminal investigations.

This does not include wiretaps, in which an actual call's contents is recorded. Instead, it includes phone log data -- the phone numbers, time and date of calls and text messages, call length, and subscriber details.

The departments also share data from seized cellphones, including call logs and text messages -- but not photos, videos or browsing history. Police investigators upload the records to a master database in Hampton.

The agencies say the program doesn't invade the privacy of law-abiding citizens, that it makes sense for agencies to cooperate to fight regional crime, and that the records are all properly obtained by court orders, search warrants and other legal methods.

Opponents of the agreement contend phone numbers of innocent people can be caught up in the dragnet, and that constitutional protections against unreasonable searches are threatened by a data pool accessible to agencies that didn't obtain the records.

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