

FEDERAL SEARCH WARRANTS AND GRAND JURY SUBPOENAS – A QUICK GUIDE

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Federal search warrants and grand jury subpoenas are standard law enforcement tools used in most federal investigations. It is important to be prepared in advance to quickly, effectively, and appropriately respond to the government's investigation in the event a search warrant is executed at your business premises or a grand jury subpoena is served. Set forth below is a quick guide which can be used as a primer for implementing a protocol for responding to a search warrant or subpoena.

FEDERAL SEARCH WARRANTS

The Law

A federal search warrant is issued by a district or magistrate court judge, within the federal district where the premises to be searched and the items to be seized are located. The standard for issuing a search warrant is "probable cause." There are two elements to the probable cause standard: 1) probable cause to believe that specific crimes have been committed; and 2) evidence of such crimes is located on the premises to be searched. The warrant also must state with particularity the place to be searched and the items to be seized. The warrant is based on the sworn written affidavit of a federal law enforcement officer, which often is filed under seal. If the affidavit is filed under seal, only the warrant, not the affidavit, must be served. Generally search warrants and supporting affidavits are reviewed and approved by the U.S. Attorney's Office for the district in which the warrant will be executed to ensure that the warrant and affidavit comply with local standards, even when the warrant is based on an investigation being conducted by federal prosecutors located in another district or at the Department of Justice.

The warrant must be executed within 10 days of issuance, and unless a nighttime search is authorized, it must be executed during the day, between the hours of 6:00 a.m. to 10:00 p.m. Under Federal Rule of Criminal Procedure 41(f)(1)(C), the agents must provide a copy of the warrant to the person from whose premises the property was seized. If the affidavit is not under seal, the affidavit in support of the warrant should accompany and be incorporated into the warrant. Under Federal Rule of Criminal Procedure 41(f)(1)(B) and 41(f)(1)(C), the agent should provide a list or inventory of the items seized. The agents are required to "return"

the warrant to the judge who issued the warrant, with a copy of the inventory. Upon request, the judge must give a copy of the inventory to the person whose premises was seized.

What to Expect When Being Searched

Numerous armed federal law enforcement agents will arrive at the target premises to be searched, usually early in the morning. If the premises are closed at the time designated for the search to begin, the agents may contact someone from the target company to open the premises. The agents are permitted to break into the premises if refused entry or if no one is available to provide access. In most instances the agents will “secure” the premises when they enter the building. Securing the premises means all employees will be asked to move away from their desks and work stations. Sometimes the employees will be asked to gather in a common area, such as a lobby or lunch room, other times the employees will be instructed to leave the premises. If an employee attempts to leave the premises carrying a briefcase, purse or container in which items listed in the warrant could be secreted, the containers are subject to being searched before the employee can remove the container from the premises.

Generally, the agents will sweep the premises to ensure that there are no safety hazards or firearms present prior to executing the warrant; and forensic computer agents also will secure all computers so that no electronic data can be destroyed or corrupted. Many times, the agents will photograph or film the premises at the start and end of the search. One or more agents will diagram the premises, noting the location of offices, common areas and storage areas; and to whom the offices are assigned. Many times the diagrams will include labels for desks and file cabinets within specific areas from where records were seized, and the names of employees associated with those locations.

If the agents anticipate finding attorney-client privileged documents, there may be one or more agents designated to handle the privileged documents. If the agents anticipate seizing classified documents, there usually will be agents with the necessary security clearance and representatives from the classifying agency on site to handle this material. Also, with the court’s permission, technical experts can accompany the agents if specific expertise is needed during execution of the warrant to identify items to be seized. Sometimes, the search also will involve local and state law enforcement agents.

Once entry is made and the premises are secured, the agents will begin to search for the items to be seized listed in the warrant. Many times, the

agents will attempt to interview employees to obtain additional information useful to the investigation, including information about business operations, the individual subjects or targets of the investigation, and the existence and location of additional storage facilities which may contain evidence relevant to the investigation. When the agents locate items outside the scope of the warrant, it is common for them to ask for consent to seize the items, and consent to search additional premises not known to the agents at the time the warrant was drafted. The agents also may seek what generically is referred to as a “roll-back” warrant from the court, to seize documents or search premises outside the scope of the original warrant.

Generally, there will be an Assistant United States Attorney (“AUSA”) assigned to the case or on duty at the United States Attorney’s Office who is available by phone to answer questions from the agents or the target of the search warrant. On occasion, the AUSA may accompany the agents on the search. There also is a designated case agent who coordinates the search, maintains contact with the AUSA during the search, and is responsible for clearing the premises at the end of the search.

Search Warrant Protocol

No one wants to receive a telephone call at 6:00 a.m. advising them that a swarm of armed federal agents are standing at the door of their business premises with a search warrant in hand. Nonetheless, it is important to establish a clear protocol that will be followed by management and all employees in the unlikely event that the business becomes the target of a search warrant. Set forth below are some guidelines for developing a protocol:

- Establish a contact person or response team, with 24 hour contact information, who will be contacted immediately in the event of a search warrant. The response team generally should include a member of the in-house legal department and outside counsel with experience in handling criminal cases. The contact list also should include a designated person to handle media contact.
- Procedures should be established for closing the premises during the execution of a search warrant, including discharging employees for the day. The agents are permitted to temporarily detain and search employees leaving the premises to ensure that none of the items to be seized are being secreted out of the premises. The agents can search briefcases, purses and other personal items for the same reason. However, as a general matter, the agents cannot detain the employees.

Note, a search warrant does not require the employees to make any statement to the agents or submit to an interview. The protocol should include procedures to advise the employees that the warrant does not give the agents the right to conduct interviews, employees are not required to speak with the agents, and can refuse to be interviewed. The employee also can request the presence of an attorney during the interview. The decision to be interviewed is for the employee to make and management personnel should not interfere with the interview. However, outside counsel is allowed to be present at the interview. If an employee chooses to speak with the agents, ask the agents to wait until outside counsel is contacted and can be present during the interview. If the agents refuse, contact outside counsel immediately to handle the situation, including contacting the AUSA regarding any further contact by the agents with the employees. The presence of outside counsel with white collar criminal law experience is important so that the scope and content of any employee interview can be accurately recorded.

- Do not give consent to search any area or seize any documents without discussing the issue with outside counsel. No one is required to provide consent to search the premises or seize items beyond the scope of the warrant; and no one is required to direct the agents to the location of the items to be seized. However, there may be times in which it is in the company's best interest to provide limited information to the agents to facilitate the execution of the search warrant.
- Obtain a copy of the search warrant and ask for a copy of the affidavit. If the agent refuses to provide the warrant, politely remind the agent that Federal Rule of Criminal Procedure 41(f)(1)(C) requires the agent to provide a copy of the warrant, and contact outside counsel to assist in obtaining a copy of the warrant. If the affidavit is under seal, the agent is not required to provide a copy of the affidavit.
- Ask all agents to show identification, **but do not** interfere with any law enforcement agents during the execution of the search warrant. Count the number of agents on site, request business cards, and try to determine for which agencies the agents work.
- Ask the case agent to wait until in-house or outside counsel arrive before executing the search warrant. **Note**, however, the agents are not required to wait until outside counsel is present before executing the search warrant. Therefore, do not attempt to prevent or obstruct the execution of the warrant.

- Without interfering with the search, have members of the response team accompany the agents during the search. Prepare a detailed log of the locations searched; the documents and records seized, if possible; and statements made by the agents during the execution of the warrant. Note if the agents photograph or videotape any area or evidence.
- If the search exceeds the scope of the warrant, state your objection to the search or seizure, and make a written record of the objection, e.g., to whom the objection was made, the time and location of the objection, and the substance of the objection. Again, do not interfere with the execution of the warrant or seizure of the items; rather politely state and make a record of your objection.

Note, classified documents are not exempt from search and seizure.

If classified documents are being searched and/or seized, advise the case agent of the classified nature of the documents and request that only those agents with the appropriate level of clearance should have access to the documents. Advise the AUSA of the search and seizure of the classified material and notify the classifying agency of the seizure. Also, be sure to advise outside counsel that classified documents or evidence were seized.

- Request a copy of the search inventory and a receipt for the seized evidence at the end of the search, **but** do not sign anything without consulting outside counsel.
Do not destroy any documents or records during or after the search, as it could give rise to obstruction of justice charges.

FEDERAL GRAND JURY SUBPOENAS

The receipt of a federal grand jury subpoena is a sign that a government investigation is underway, but it does not necessarily mean that your company is the target of the investigation. The target of the investigation may be another company and the government is seeking information about your company's relationship with that company, or documents in your company's possession that may be relevant to the investigation.

Generally, a federal grand jury subpoena is prepared and approved by an AUSA. However, federal agents often have a hand in drafting the items to be seized. Thus, the subpoena may be prepared at the request of a federal agent or on the AUSA's initiative as part of an investigation. The subpoena may request documents, the testimony of a witness before the grand jury, or both. The subpoena generally is served by a federal law

enforcement agent on the custodian of records for the company; and will specify the documents and records to be produced, the relevant time period for such documents and records, and the date for the production. Often the scope of the documents requested is quite broad, AUSAs generally will agree to a rolling production and may narrow the scope of the documents with some negotiation by outside counsel.

Like search warrants, a grand jury subpoena does not permit the agent to interview any employees. All employees have the right to refuse to be interviewed and can request that an attorney be present if they decide to participate in an interview. Again, the presence of outside counsel is important during any such interview so that the scope and content of the interview can be accurately recorded. In addition, do not destroy any documents once the subpoena is served and suspend any standard document retention/destruction policies to prevent the inadvertent destruction of any documents requested in the subpoena.

Preparing a protocol for responding to a grand jury subpoena also is a good business practice. Similar to a search warrant, a contact person or response team should be predesignated to handle subpoenas. The team generally should include a member of the in-house legal department, who can then contact outside counsel. In most instances, the subpoena will require a review of hard and electronically stored documents. Someone who can act as a custodian and testify in front of the grand jury should be designated to coordinate gathering the documents within the company. It is highly advisable to have outside counsel review the documents for responsiveness and privilege prior to producing the documents to the grand jury.

The custodian should maintain a log describing the location of responsive documents. The documents also should be copied and Bates numbered prior to the production. Generally, the AUSA will accept copies with an agreement that the original documents will be maintained and made available upon request. A privilege log also should be prepared and provided to the AUSA upon request for all documents withheld from the production on the grounds of attorney-client privilege or attorney work product.

In the event the custodian of records is required to testify before the grand jury, it is advisable to have outside counsel assist in preparing the custodian to testify, and to be readily available to provide guidance and assist the custodian at the time of his or her appearance before the grand jury. Note, outside counsel is not permitted to be present in the grand jury room while the custodian is providing testimony to a grand jury. However,

outside counsel generally is permitted to wait in close proximity to the grand jury room in the event the custodian has questions or needs assistance. In addition, in the event employees are subpoenaed to testify before the grand jury, it is highly advisable to have experienced outside counsel assist in preparing the employee for his or her grand jury appearance, and to be present and available during the grand jury session to assist the employee if necessary.

Conclusion

Clearly, no company wants to be the target of a federal criminal investigation. However, in this era of aggressive federal prosecution and the increased “criminalization” of government regulations, it is important to be prepared. Developing protocols for handling search warrants and grand jury subpoenas can help minimize disruptions to business operations, contain unfavorable media coverage, and provide for a means to quickly begin communicating with government prosecutors to minimize the company’s exposure.

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