



Best Practices for Responding to Subpoenas

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Introductions



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Topics

- Common Types of Subpoenas
- The Duty to Preserve and Preservation Best Practices
- Negotiation of Scope of Production
- Challenging Types of ESI
- Technology Assisted Review



Common Types of Subpoenas



Common Types of Subpoenas in Gov Con Investigations

- **OIG Subpoena**
 - Inspector General Act of 1978 (5 U.S.C. app. 3 § 6)
 - Used in civil and criminal investigations
 - Documents
- **Civil Investigative Demand**
 - Civil False Claims Act (31 U.S.C. § 3733)
 - Used exclusively in civil investigations
 - Documents, interrogatories, testimony
- **Grand Jury Subpoena**
 - Fed. R. Crim. P. 17
 - Used exclusively in criminal investigations
 - Documents or testimony

United States of America
Department of Defense
Office of the Inspector General

SUBPOENA DUCES TECUM

TO: Custodian of Records, [REDACTED]
[REDACTED]

YOU ARE HEREBY COMMANDED TO APPEAR BEFORE Special Agent [REDACTED] or
any Special Agent of the United States Army Criminal Investigation Command (USACIDC)
acting on behalf of the Inspector General, pursuant to the Inspector General Act of 1978 (5

CIVIL INVESTIGATIVE DEMAND

United States Department of Justice
Washington, D.C. 20530

TO: [REDACTED]

Civil Investigative
Demand No. 20 [REDACTED]

AO 110 (Rev. 06/09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT
for the
District of Columbia

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

The Duty to Preserve and Preservation Best Practices



The Duty to Preserve

- Triggered by reasonable anticipation of litigation – or investigation
 - Remember this is also a requirement for attorney work product protection
- Potential consequences of failure to preserve relevant evidence.
 - Evidentiary sanctions (e.g., adverse inferences)
 - Prosecutor’s view of credibility, cooperation, culpability
 - Collateral investigation of obstruction of justice



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Document Preservation – First Basic Steps

- Review subpoena with knowledgeable personnel
- Identify relevant custodians and data sources
 - Consider using custodian tiers
- Understand relevant IT infrastructure, policies and practices
 - Include technical expert who can ask the right questions
- Issue document preservation instructions
 - Relevant custodians, IT personnel, third parties
- ESI preservation – preserve in place or collect
 - Email, DMS, shared server repositories, structured data, local storage
- Challenging categories of ESI . . .
- Carefully document steps taken
 - Goal is a well-documented and defensible process that will withstand scrutiny



Document Preservation Memoranda – Pitfalls and Pointers

- Use a defined distribution list – do not “cascade” the memo
 - Ask recipients if anyone is missing from the distribution list
- Use plain English and a user-friendly format, not dense legalese
- Include a stern warning regarding adverse consequences to emphasize importance of compliance
- Require confirmation of receipt and commitment to comply
- Add custodians and adjust scope as matter evolves
- Send periodic reminders
- Include IT staff, or send them a separate preservation memo
 - Establish a written protocol for preserving departing employees’ ESI



Document Preservation – Working with Custodians

- Begin with low-hanging fruit: core documents for immediate use
- Conduct custodian interviews or incorporate document collection into initial witness interviews
 - Locations of relevant material
 - Personal document storage practices
 - Mobile devices and other emerging sources
- Don't forget about paper files
- Beware the pitfalls of self-collection
 - Rarely a good idea in investigation setting: risk of withholding or spoliation
 - Lack of defensibility even if undertaken in good faith
 - Potential alteration of metadata



Negotiating Scope of Production



Negotiating Scope of Production

- Key Concepts
 - Who issues
 - Evidence needed to issue
 - No statutory deadline
 - Target/Subject/Witness
 - Target requires United States Attorney approval
 - No 5th Amendment Protection for Corporations
 - All non-privileged responsive documents must be produced
 - This includes responsive documents kept in employees' "personal files" at home and personal devices



Negotiating Scope of Production

- Perspective of government lawyers and agents
 - Move investigation along
 - Corroborate information provided by informants/witnesses
 - Subpoena v. Search Warrant
 - One broad subpoena v. multiple narrow subpoenas
 - Interested in an efficient process
 - Deadlines
 - Statute of limitations
 - Internal



Negotiating Scope of Production

- Common areas for negotiation
 - Production deadline and rolling productions
 - Prioritization
 - Custodians
 - Date ranges
 - Search terms
 - Other issues
- Protective Order
- Motion to Quash



Challenging Types of ESI

The Future is Now



More complex data created and stored outside of company servers

- **Mobile Data: increasing use of personal smart devices by work force**
 - Call logs, email, SMS/MMS texts, GPS information, photos, video files, voicemail, web history, contacts, calendars, location
- **Messaging applications** - e.g., Skype, Whats App, WeChat, Discord
 - Includes ephemeral (Telegram, Wickr, Snapchat)
- **Growing use of cloud-based business applications**
 - E.g., document sharing, messaging, and collaboration tools like Teams, Slack, Dropbox, Google Drive, Yammer
- **Social media** – engagement surged with pandemic (Twitter, LinkedIn, Facebook, Instagram, Tiktok – often combine posting and messaging)
- **Video conferencing:** Zoom, teams, GoToMeetings, Skype -- recordings
- **Data Storage Systems** - e.g., automated billing and reporting systems
- **Coming soon: metaverse?**



AI and Technology Assisted Review

What to Expect When You are Expecting (Lots of Data)



Often Right for Mid/Large Data Subpoena Response

- Technology Assisted Review (TAR)
 - AI that “uses software that can be trained by a human being to distinguish between relevant and non-relevant documents.” Progressive, (D. Nev. 2014)
 - Cull, prioritize, categorize and QC document
- TAR 1.0, TAR 2.0 (CAL)
 - Not all e-discovery vendors are capable
- Transparency and defensibility
- Use with other techniques
- Limited re new data sources, privilege



Questions?



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