

What To Do if a Federal¹ Search Warrant Is Served on Your Corporate Client

By Steven G. Johnson

Three dark-colored vans followed by an unmarked truck pull into the main parking lot of your most valuable client, Mount Olympus Systems, Inc. Nearly 20 men and women get out of the vans, walk into the lobby, identify themselves as FBI agents, flash a search warrant to the receptionist, and spread out through the company offices. They start rummaging through files and desk drawers. They pull files and documents, place them in boxes and cart them outside to be loaded into the back of the truck.

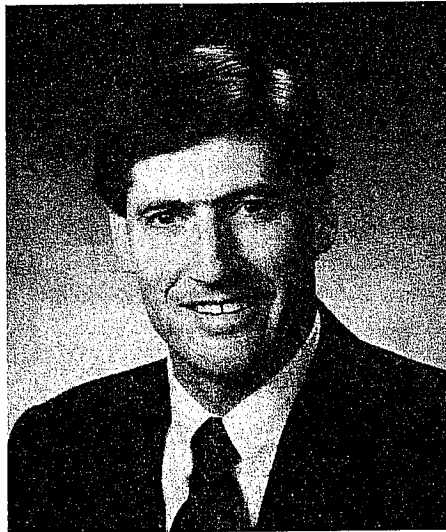
Three of the agents corner one of the company's regional salesmen and start asking questions about sales to certain customers.

Four agents proceed to disconnect the computer system and cart it out to the truck. They grab disks and backup tapes on their way out.

Just about this time a television crew pulls into the parking lot and starts filming the FBI agents as they load files onto their truck in front of your client's offices. A young reporter, followed by the camera crew which is filming as it goes, walks into the company offices, sticks a microphone in the face of the receptionist who is still in shock from the appearance of the agents, and starts asking what is going on.

A nearly hysterical company vice president calls you, frantically tells you these facts, and asks, "What can we do? We've got to stop them! They're taking all of our records. They're even taking our computer! We need these things to stay in business! Help!!" What can you do in this situation?

In the past, subpoenas were used by federal investigators to obtain information and documents from corporations in criminal matters. But subpoenas could be challenged in court. Prosecutors often waited months before they could receive the documents and information needed for their investigation. They grew tired of wait-



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ing for company lawyers to produce the requested documents.

Historically, prosecutors successfully used search warrants for such crimes as homicides, drug cases and other organized crime investigations, and began to see their usefulness in economic crime cases such as antitrust matters and fraud-in-procurement-of-defense-contract cases.

The number of search warrants obtained by federal prosecutors has increased dramatically in recent years, jumping 84% from 1988 to 1994. The execution of a search

warrant can be quite dramatic. For example, in January of 1995, 60 FBI agents executed a search warrant at the headquarters of Stop & Shop, New England's largest supermarket chain. Employees waited outside in the cold as agents searched the premises. Agents seized over 200 boxes of documents in a fraud and bribery investigation. A few months later, over 50 federal agents simultaneously appeared at a half dozen Northrop Grumman Corporation facilities as part of a criminal investigation of suspected testing and billing irregularities on military aircraft.

A search warrant can be very helpful to prosecutors. It allows them to obtain the information they need immediately. There is no need to fight objections in court as is frequently the case with a subpoena. In addition, agents can obtain the records without their being filtered by the company attorney.

During the execution, agents will sometimes interview employees as they are searching for documents, not giving the employees an opportunity to consult legal counsel. Employees may be intimidated to unknowingly make damaging statements to agents. Agents can also seize additional evidence which is in plain view, even if it is beyond the scope of the search as specified in the warrant.

A search warrant can be used when the subject of the search is not a target of a criminal investigation. All the government must show is that there is probable cause to believe that a crime was or is being committed, and that there is a probability that evidence which may assist in securing the apprehension or conviction of the perpetrator will likely be found at the search site.²

There is no requirement that, without a warrant, evidence might be concealed or destroyed. There is no mandate that prosecutors first use a subpoena or some other less obtrusive method to obtain information.

A search warrant must describe with particularity the places to be searched and the items to be seized.³ But the description may be so broad as to allow the search for and seizure of "the fruits and instrumentalities" of statutory violations.⁴ The only legal basis for objecting to the warrant at the time of execution is that the warrant misidentifies the location to be searched, or that the search is being conducted at a time not authorized by the warrant.⁵ If these options are not available, the effects of a search warrant can only be mitigated by negotiating with the prosecutor or, if necessary, by appeal to the issuing magistrate or judge.

Before discussing what should be done when a search warrant is served, it would be good to review some ideas which may reduce the effects or eliminate altogether the execution of a search warrant. Following are a few suggestions:

1. COMPANY COMPLIANCE PROGRAM.

Each company should prepare and implement a company compliance program. As part of the compliance program, all officers, directors and employees commit to full compliance with applicable laws, rules and regulations. The compliance program should be effectively communicated to all employees and agents. Each part of the business should be regularly audited to assure full compliance. A discipline system should be implemented to respond to inappropriate behavior. It is hoped that through such a program, employees will be encouraged to obey laws and regulations.⁶

2. PROPER HIRING.

Check references of all potential employees to verify there is not a prior history of problems.⁷ Perform background checks by reviewing public court records or by requesting information from a criminal history record through the Law Enforcement and Technical Services Division.⁸ Keep all I-9 Forms in a separate file from other employee records. This may restrict a search of business records by the Immigration and Naturalization Service (INS) to only the files containing such forms, rather than to all personnel records in general.

3. BACKUP OF RECORDS.

All company computer disks and tapes should be regularly backed up and stored offsite. This will help the company to quickly resume day-to-day operations after a fire, natural disaster, or seizure of computers and software pursuant to a search warrant.

4. DOCUMENT RETENTION PROGRAM.

Each company should institute a document retention program through which all documents which are no longer necessary from a business standpoint and not required to be maintained by tax, environmental or other laws are regularly destroyed. Not only will a retention program significantly reduce storage problems, it will also enhance a company's ability to locate needed documents for business purposes and to better cooperate with federal investigators executing a search warrant if the need should arise. As discussed below, such cooperation can possibly help avoid many headaches which could occur upon execution of a search warrant.

*"Do NOT consent to the search
or to an expanded search
beyond the scope of the warrant."*

5. STANDARD OPERATING PROCEDURES

Develop company-wide standard operating procedures to follow if a search warrant is served. Train all employees (and particularly the receptionists) in these procedures. The procedures should cover who should be notified in case a warrant is executed, what supervisors should do and say (especially if company attorneys are not readily available), whether photographs may be taken, and who should communicate with the law enforcement officers.

6. PRIVILEGED DOCUMENTS.

All hard copies of attorney-client privileged materials and work product materials should be kept separate from the company's general files.⁹ Such copies should be maintained in a separate file and clearly marked with such notations as "Privileged Attorney-Client Communications." Copies should only be distributed to those who need to

receive them. Extra copies and drafts should be destroyed. Privileged materials in the computer system should likewise be identified as privileged, and protected by a system of passwords.

Proprietary information, such as trade secrets, is rarely sought as evidence in a criminal matter, so it is not likely to be listed in a search warrant. But if such information is on your computer system, it may be subject to seizure pursuant to a warrant. This information should also be kept on hard files separate from general company files and clearly labeled as "Confidential Proprietary Information." Use a system of passwords to block access to privileged information which is maintained on the computer system. Keep the passwords in a place where they are not likely to be seized in a random search.

If a search warrant is actually served, the following should be done:

1. Notify counsel immediately. If you are inhouse counsel and not experienced in criminal matters, notify outside counsel and request that agents delay the search until competent counsel arrives. Agents have no obligation to wait for counsel to arrive, so proper training of management and receptionists is strongly suggested. Each of the steps discussed in this article should be understood so employees can act appropriately in the absence of counsel.

2. Examine the government agents' credentials. Their identity and the identity of the agency by whom they are employed may suggest clues as to the scope of the investigation. Write down names, badge numbers, and any other information about the agents which is provided.

3. Get the name and phone number of the prosecuting attorney who is handling the case or investigation.

4. Do *NOT* consent to the search or to an expanded search beyond the scope of the warrant. You can *cooperate* without giving consent. Consent may eliminate the right to object to disclosure of privileged materials. Consent may waive the company's right to object to a search without a warrant or to a warrant which has been wrongfully issued. Specifically inform the agents that the company does *not* consent to the search. Assure the agents of the company's intention to cooperate after having an opportunity to review the search warrant.

5. Obtain and review a copy of the

search warrant. Federal Rules of Criminal Procedure, Rule 41(d) requires the agents to provide a copy to you. It must show (a) the issuing judge, (b) the specific location and areas authorized to be searched, and (c) documents or objects for which the agents are authorized to search.

6. Try to negotiate ground rules and procedures with the agents to make sure the search is confined to its proper bounds.

7. Try to obtain a copy of the affidavits supporting the search warrant at the beginning of the search. The affidavits must show that a crime has been committed and that evidence of the crime will be found at the search site. The information in the affidavits will be very helpful in preparing a defense if the company is a target of a criminal investigation.

If the agents or prosecutor indicate that the affidavits are sealed, you should consider a motion to unseal the affidavits.¹⁰ You may request an expedited hearing and request a stay of the execution of the warrant pending the hearing, subject to guarantees of non-destruction and non-moving of items listed in the search warrant.

8. Without knowing the information contained in the affidavit, you do not know whether the company, its employees, officers or directors are mere custodians of records which provide evidence against a third party (such as a customer or vendor) or whether they are the target on whom the prosecutor has substantial evidence linking them to a crime.¹¹

Ask the prosecutor or agents if the corporation or its officers or directors are under criminal investigation. A corporation has no legal right to this information. But it has a compelling reason to know, since an act or oversight of an officer or director might be imputed to the company.¹²

9. Convene a meeting of all employees. Emphasize that although the agents may ask questions in an intimidating, authoritative manner, employees are under no obligation to answer. Employees have a right to have counsel present, and should be reminded not to answer questions without counsel's presence. This is also true in situations where agents visit employee homes after business hours, when it may be difficult to contact counsel. Employees should be advised to refer all questions asked by the agents to legal counsel. Employees should be instructed not to destroy, remove or handle any documents

or things during the search so that there is no government claim that the company is destroying crucial evidence.¹³

10. Consider sending employees home until after completion of the search by the agents, if the employees are not necessary to monitor the search. They will not feel a need to talk to agents, and they will not unintentionally impede the search.

11. Monitor the search without obstructing its progress. Assign an employee to each location of the search to watch and record the scope, duration, area searched and items examined in these areas. Keep an inventory of each item and document seized, the manner and location of seizure, and the identity of the seizing agents. Employees should take care not to interfere with or object to the search,¹⁴ but you should object to the seizure of anything not specifically described in the warrant. Employees should be cautioned not to take agents to areas which are not specifically included in the areas covered by the search warrant.

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Videotape the search. Agents will generally act in a reasonable manner if they know they are being videotaped. There will be less of a dispute as to how the search was conducted. Videotape the agents if they attempt to prohibit the videotaping. Agents have no legal right to prevent videotaping as long as it does not interfere with the search. If agents prohibit a monitor of the search, memorialize this refusal to permit a monitor, and keep this information for use at a suppression hearing.

12. Ask the agents if they intend to search for potentially privileged documents and, if so, whether the court was informed of this intent before the warrant was issued. A quick call to the judge or magistrate may give you an opportunity to set up guidelines for the handling of privileged documents.

13. Request the agents that no interviews of employees be conducted on corporate premises. Inform the agents that employees are agents of the company and are repre-

mented by the company's legal counsel when they are being interviewed about matters learned in their corporate capacity.

14. Inform the agents that certain files, including computer data, may contain privileged documents, and that the company does *not* waive any applicable privilege (including but not limited to the attorney-client privilege, the work product privilege, and the self-evaluation privilege). Request an opportunity for counsel to review documents first. If the agents refuse, ask that documents which are claimed to be privileged be placed in a sealed envelope so that a magistrate can determine whether they are privileged.

15. Offer to have company employees photocopy the documents wanted by the agents so that the company can keep the originals which are necessary for the operation of the business on a day-to-day basis. If agents insist on keeping the originals, ask to make copies for the company so that it can continue in operation. Records essential to the operation of the business include personnel records, payable and receivable records, customer lists, sales information, and records necessary to bill customers.

16. Offer to help the agents find the documents they need. As a practical matter, this will speed up the search, get them out of the company offices sooner, and perhaps keep the agents from taking documents they do not need.

Offer to print a file list of computer-stored information from which the agents can select data for down loading. Most software can produce "sorts" of information that, although not used in the daily operation of the business, may be helpful to the agents. As a possible negotiating tool, you might offer to run a sort which will give agents all the information they want on one document. This may eliminate their desire to take documents, software and computer hardware out of the office. Offer to help identify privileged or irrelevant materials on the computer system.

17. Agents must prepare a receipt and inventory for all documents and property seized.¹⁵ The company should also take its own inventory to verify that the inventory prepared by the agents is accurate.

18. During the course of the seizure, ask the agents about the investigation. Ask what they were told in their meeting about the execution of the warrant. Ask what the

case is about, and what the government is looking for.

19. Object to any expansion of the search beyond areas described in the warrant. Some agents and inspectors may be tempted to probe beyond their legal authority.

20. Do not allow the media to record the search. The media should not be involved in any way.¹⁶

21. If you cannot quickly obtain outside counsel with experience in criminal matters, ask the agents to allow you to segregate the requested documents on site in a secure area pending retention of experienced counsel. You will need to give sufficient assurances that the documents will not be concealed or destroyed.

22. If crucial documents are taken as part of the seizure, attempt to negotiate with the prosecutor to obtain their quick return. If you are unsuccessful, move the court quickly, before any prosecution is launched, to order the return of any property necessary for day-to-day business operations which may have been illegally seized.¹⁷

Ask the court for an expedited hearing

and for the return of the property and documents seized on the ground that seizure of, for example, the company's entire computer system was unlawful and overbroad.¹⁸

23. Employees do not have a legal obligation to sign a written statement provided by the agents, even where the agents exert pressure by saying that a refusal or failure to sign will not be viewed favorably by the government and will be viewed as a refusal to cooperate. No statements should be signed until reviewed by counsel. Employees should never agree that a statement prepared by the agents is accurate.

24. Immediately after the agents leave, debrief all employees who spoke or worked with the agents while the events are fresh on their minds. Determine exactly what the employees said to the agents. Learn what the agents said to the employees, what questions they asked them, and what the employees heard the agents say to each other. Identify the types of documents for which the agents were looking. All of this information will assist the company in preparing a plan for the future, including preparing a criminal defense if necessary. Make written notes of this information.

By taking these steps, although it may be impossible to delay or prevent the execution of the search warrant, counsel may be able to minimize disruption of the client's business, prevent the government from inappropriately expanding the search, and learn enough about the government's investigation to help the client prepare an appropriate response, or, where necessary, a proper defense.

¹This article is limited to federal search warrants. Many principles discussed, however, can be applied to state search warrants. For state-issued warrants, see Utah Code Annotated, §§ 77-23-201, *et seq.*

²*Naugle v. Whitney*, 755 F. Supp. 1504 (D. Utah 1990).

³U.S. Constitution, Amendment 4; Constitution of Utah, Art. I §14; Rule 41(c)(1), Federal Rules of Criminal Procedure.

⁴*See, e.g., In re Search Warrant for Law Offices*, 153 F.R.D. 55 (S.D.N.Y. 1994).

⁵Rule 41(c), Federal Rules of Criminal Procedure.

⁶An effective company compliance program is the best shield against steep fines under the Federal Organizational Sentencing Guidelines, found in Title 18 of the United States Code.

⁷*See* Utah Code Annotated §34-42-1 for immunity from liability with respect to good faith references concerning former employees.

⁸Utah Code Annotated §53-5-214.

⁹NOTE: Documents to which a claim of self-critical analysis privilege is made (e.g., an internal investigation to review an incident) must generally be turned over to a government agency. *In re Grand Jury Proceeding*, 861 F. Supp. 386, 388 (D.Md. 1994). But this is not a well-settled area of the law. This privilege may be more widely accepted in the future.

¹⁰*See* Rule 309 of the Rules of Practice of the United States District Court for the District of Utah.

¹¹If both the company and one or more of its officers, directors or employees are targets of the criminal investigation, counsel for the company faces the ethical dilemma created by conflicts of interest. In these circumstances, counsel should carefully follow the Rules of Professional Conduct, particularly Rules 1.7 and 1.13.

¹²*See, e.g., U.S. v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert den.* 409 U.S. 1125, 93 S. Ct. 1689, 35 L.Ed.2d 256 (1973); *See also Halliburton Company v. Dow Chemical Company*, 514 F.2d 377 (10th Cir. 1975).

¹³Employees should be advised that they have the right not to answer questions asked by the agents, but, if they so desire, they may answer the questions. They have a legal right to have an attorney present to give them guidance during the questioning. If the employees elect to answer agents' questions, they should be given the same advice given to all witnesses:

a. Always tell the truth.

b. Do not speculate or give opinions. Give only facts of which you have knowledge. Do not feel you must have a ready answer to every question. It is okay to say, "I don't know" if you really do not know.

c. Do not volunteer information when not asked a specific question. Answer only the specific questions asked.

d. Do not lie or mislead. This, as well as speculation as to an answer, could lead to criminal charges being filed against you.

e. Give brief, accurate answers.

¹⁴*See* 18 U.S.C. §2231, which makes it a crime to assault, resist, oppose, prevent, impede, intimidate or interfere with any person authorized to serve or execute a search warrant.

¹⁵Rule 41(d), Federal Rules of Criminal Procedure.

¹⁶*In Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. den.* 115 S. Ct. 1689, 131 L.Ed.2d 554 (1995), the Second Circuit Court of Appeals held that a secret service agent could be sued for allowing a television crew to film the execution of a search warrant.

¹⁷Rule 41(e), Federal Rules of Criminal Procedure. *See also* Rule 12(b)(3) of the Federal Rules of Criminal Procedure, which discusses post-indictment motions to suppress seized evidence. It may be that the invasion of the attorney-client privilege is an irreparable injury justifying the return of privileged documents. *See, e.g., Matter of 636 South 66th Terrace*, 835 F. Supp. 1304 (D. Kan. 1993).

¹⁸*In U.S. Postal Services v. C.E.C. Services*, 869 F.2d 184 (2nd Cir. 1989), the court held that a search warrant authorizing the seizure of all a company's records did not violate the 4th Amendment since the entire company was involved in the alleged crime. Where documents to be seized are so intermingled with other documents not subject to the search, courts have held that the records may be seized. For example, an entire floppy disk was allowed to be seized where it contained one letter which was the subject of the warrant. *U.S. v. Goff*, 677 F.Supp. 1526 (D. Utah 1987), *on reconsideration* 736 F.Supp. 1087 (D. Utah 1990). Also, where a business was relatively small, and many of the records being sought by government agents were intermingled in bound notebooks with sales records of other items sold by a pawn shop, agents were allowed to seize all of the bound volumes for later inspection relative to the sales discussed in the affidavit supporting the search warrant. *U.S. v. Searle*, 804 F. Supp. 1437 (D. Utah 1992). On the other hand, in *U.S. v. Tamura*, 694 F.2d 591 (9th Cir. 1982), FBI agents seized large numbers of documents which were not described in the search warrant because company employees refused to help identify the documents which were specifically listed in the warrant. The 9th Circuit Court of Appeals held that this wholesale seizure for a later examination of records which are not described in a search warrant is precisely the kind of investigative dragnet that the 4th Amendment was designed to prevent.



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