

Despite the large number of search warrants executed upon companies each year, the vast majority of companies never suspect that such an intrusive event could happen at their facilities. Many companies make the incorrect and dangerous assumption that the government only searches companies owned or operated by “bad people” who commit “traditional” or “real” crimes. However, with increasing frequency, the government is using search warrants (along with grand jury subpoenas) as part of an aggressive strategy to investigate all types of potential crimes.

One reason the government relies upon search warrants is because of the strategic advantages that accompany the elements of surprise, chaos and confusion. At the time of the search, most companies are grossly unprepared to protect their legal interests, as well as those of their executives and employees. In the absence of advance planning and adequate training, a company and its employees are far more likely to commit one of the following typical (and costly) mistakes in response to a search warrant:

- Due to a general misunderstanding of the applicable legal standards that apply to a search, a company may incorrectly try to resist or obstruct the government agents;
- Company employees may be unaware of their individual rights and may incorrectly assume that they are obligated to speak with government agents;
- Alternatively, certain employees may attempt to confront the agents or display a “cowboy” mentality in hopes of playing the role of the “company hero.”
- Company management may inadvertently expand the scope of the search warrant by agreeing or consenting to certain (seemingly harmless) requests made by government agents.
- The company may lose an important and valuable opportunity to gain insight into the underlying allegations that prompted the investigation and search, as well as the opportunity to minimize the disruptive impacts of the search.

The following tips are organized by when they should be implemented – before; during or after a search warrant is executed.

BEFORE THE SEARCH

Tip 1: Be Prepared & Plan Ahead With a Search Warrant Response Plan.

Whenever the government executes a search warrant upon a company, the stakes are high and time is of the essence. Accordingly, one important step that companies can take in advance of a search warrant is to develop a detailed search warrant response plan. This plan would include specific internal procedures and training for company officials and employees so that they are better educated and better prepared to respond to a search warrant and protect the company’s legal rights and defenses. The ultimate goals of an effective search warrant response are to:

- Manage the event as smoothly as possible;
- Prevent panic by keeping employees calm and informed;
- Provide documents and items that government is legally entitled to receive;
- Expedite the search to minimize business impacts;
- Protect and preserve legal rights of company and employees;
- Maintain integrity of privileged and proprietary information and documents;
- Gain valuable insight into underlying allegations that prompted investigation.

In short, with adequate preparation and an organized response, a company can create a more level playing field, regain some control, and counteract the element of surprise arising from the search.

DURING THE SEARCH

Tip 2: Request and obtain agents' identification and review scope of search warrant.

The agents serving the warrant, as well as non-company persons involved in the search, should be asked to identify themselves and to sign a visitor log (in accordance with company policy). The agents should be requested to present their government identification and official business cards, and this information should be recorded or copied for future use, reference and communications.

If the agents serving the warrant do not provide a copy of the warrant, request one. Federal Rule of Criminal Procedure 41(d) requires that the officer taking property under a warrant must give a copy of the warrant, as well as a receipt for all the property taken from the premises.

Tip 3: Gain as much information as possible – through conversations and affidavit.

During conversations with the lead agents, try to gather important facts, including the nature of the investigation, whether the company is a target/subject, whether any company employee is a target/subject, etc. Do not be concerned if the agents do not provide any information initially.

A warrant may be served with its accompanying affidavit, which provides valuable insight into the underlying basis and justification for the search. The warrant defines and limits the scope of the search and informs the recipient of the range of items that may be lawfully seized. If no affidavit accompanies the warrant, inquiry should be made as to why there is none. This should be followed by a request for a copy before the search is initiated. In some investigations the affidavit may have been filed under seal, in which case it will not be made available until further court action is sought (i.e. motion to unseal). You may obtain a copy of the affidavit underlying the search warrant request if the affidavit is not sealed or if the Court orders disclosure. The affidavit will be sealed if the government can establish a compelling interest to keep the affidavit sealed. The government will

argue in appropriate cases that it must protect the identity of a confidential informant or that the affidavit presents a roadmap of the government's case in an ongoing criminal investigation. As a compromise in situations where the government objects to unsealing the affidavit, the government may offer to provide certain information to the party searched in lieu of disclosing the text of the affidavit.

Tip 4: If warrant is defective or overly broad, object and attempt to negotiate a narrowed scope.

A narrowly drawn search warrant may describe certain documents relating to only certain contracts or particular types of documents. In such instances, the government is not permitted to go through all file cabinets or records where other materials are located. In the presence of a narrow search, the company is often better off by cooperating with the government agents in directing them to the particular areas where the records in question are stored. Obviously, the company should vigorously object to any attempts by the government to go beyond the specified scope of the search. Accordingly, the company's SWAT Team (with assistance from counsel) should attempt to reach an agreement with the government agents on what physical areas will be searched, based upon the terms of the warrant (and/or affidavit). If agreement cannot be reached, a request should be made that the search of the area in question be postponed until it can be resolved by company legal counsel and government counsel or the magistrate or judge who issued the warrant.

If there is any overt defect in the warrant, this should be pointed out to the agent and an objection to any search should be made. For example, if the premises the government agents demand to search are not described in the warrant, it is illegal to execute the warrant. Should the agents proceed despite the defect and notwithstanding the warning, the fruits of the search may later be suppressed from use in any case. Similarly, if the agents conducting the search go beyond the specifications of the warrant -- the premises or list of items to be seized -- or have passed the 10-day limit on the warrant, contact the responsible government attorney to insist that they respect the terms of the warrant. Remember that the agents cannot search any files or any facilities they find interesting -- they are strictly limited to those designated in the warrant.

Tip 5: Advise Employees of Their Rights During Search.

- Contrary to popular assumptions, there is no obligation for employees to give an interview during a search. Each employee can decide to consent, decline or postpone an interview. If an employee agrees to an interview, the employee can stop the interview at any time, and can set limits on what he or she will agree to discuss with a government agent. Even though an employee is not legally obligated to speak with government agents, he or she may voluntarily choose to do so.
- If an employee agrees be interviewed, any information must be accurate and truthful.

- No matter what assurances may be provided by government agents, nothing said during the interview is “off the record.” Search warrants can be stressful events. Accordingly, many employees often speak candidly and openly with the agents in hopes of getting assurances that they will not get into trouble. However, employees must remember that agents do not have the authority to bind the government with promises of immunity or leniency. In short, the government agents can, and often do, use any statements made during interviews against that person and/or against the company in a criminal proceeding.
- To that end, employees must be careful to speak only about facts that they know first-hand, and to avoid guessing or speculating. Giving false or misleading statements can be a separate crime.
- An employee has the right to counsel and the right to have counsel present during any interview with a government agent. In addition, as company employees, each person has the right to be advised by the company's counsel or to have individual counsel before being questioned or responding to any questions.
- Unless an agent makes a statement to the contrary, an employee is free to go at any time.
- An employee should not speak with the press.

Tip 6: Monitor the execution of the warrant.

When the agents serving the warrant are conducting the search, the company's SWAT Team should closely monitor the actions and statements of the agents through the search. For example, the company may want to assign responsible employees to follow each agent or group of agents for the entire period of the search to observe their conduct and listen to their questions and statements. These monitors should also take extensive notes regarding the places searched, the employees the agents questioned, statements made, the time involved in each part of the search, and the conduct of each agent, etc. If possible, monitors should also use videotapes, photographs and/or dictation recorders to assist them in this task. However, all of these notes and materials should be directed and forwarded to company legal counsel and clearly labeled as “attorney-client communications.” Since a search can take many hours or even days, it is crucial that the employees monitoring the search should not disturb anything the agents have compiled.

Tip 7: Streamline the flow of information (both internally and externally).

The government agents in charge of the search and all company employees should each be told to direct any questions and requests to the company's “lead person.” In addition, as soon as possible, the company's public affairs department should be contacted and alerted about the search. Since search warrants are newsworthy items, the company may get calls from the press. In general, the company's public affairs department should be advised, at least initially, not to comment upon or confirm anything. Within a few hours after the search is executed, and after some of the basic facts are obtained, the company representatives should prepare an appropriate public statement. If

necessary, this initial statement can be supplemented once the search is over and additional facts are gathered. However, the company should not actually issue the prepared statements or press releases until the media inquires about the search warrant. In some instances, there is no press inquiry at all.

Tip 8: Request Copies of Items to Be Taken and Detailed Search Inventory.

The company should try to obtain copies of the seized documents before they are removed from the company premises. In addition, if the agents are removing documents or records that are critical to the on-going operations of the business (i.e., computers, computer software or engineering drawings) the company has a strong and legitimate basis for such a request. Moreover, the company has the right to have its original documents and materials returned when the government has no further use for them. Counsel for the company should submit a written request for the prompt return of such items, as well as the timeframe for their return. If the government does not comply, company counsel can file a motion for return of the seized property on various legal grounds, including Rule 41(e) of the Federal Rules of Criminal Procedure.

Before the agents leave the company site and remove any seized items, the company is entitled to receive, and should request, a detailed inventory of all the items to be taken, including the types of documents. No company employee is required to sign a receipt for the inventory and nor should anyone do so if requested. However, company representatives should ask the agents to confirm that the inventory is a complete list of everything seized.

Tip 9: Avoid Typical Mistakes During Execution of Search Warrant.

In the absence of advance planning and adequate training, a company and its employees are far more likely to commit one of the following typical (and costly) mistakes in response to a search warrant:

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AFTER THE SEARCH

Tip 10: Memorialize the Search.

As soon as the search is concluded and the agents leave, the SWAT Team and company counsel should undertake an initial audit of the search to document exactly what happened during the search, as well as to determine the scope of the government's investigation and its overall strategy. This initial assessment must involve a number of important tasks, including:

- Identifying all offices and other areas that were searched, as well as the people who work in each area;
- Identifying what was seized and interview each person about the items seized;
- Identifying and interviewing employees with knowledge of the search events;
- Preparing a detailed report of what was asked and how the employees answered.

Beveridge & Diamond routinely defends clients in administrative, civil and criminal enforcement actions brought by federal and state agencies. Our team includes, among others, a former federal environmental crimes prosecutor (who worked both as an Assistant U.S. Attorney and as a Trial Attorney in the U.S. Department of Justice's Environmental Crimes Section); a former Internal Revenue Service Criminal Investigator; a former Chief Counsel of the Federal Highway Administration; a former Deputy Associate Solicitor of the U.S. Department of the Interior; numerous former state agency officials; and a "cavalry" of lawyers with vast experience and regulatory depth.

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