

## What to Do When the Government Comes Calling

**I**n today's complex world of e-commerce and international competition, increasingly governmental agencies (both state and federal) are resorting to "dawn raids" (i.e., unannounced service of search warrants) on businesses to aid them in their investigations. The tactic is becoming more common and is typically used by the FBI for investigation of antitrust violations, securities fraud, cyber threats and a variety of other crimes. Unfortunately, often "innocent" companies are subjected to this method of investigation—even if they are not the actual targets of the investigation. These raids usually occur without warning around the opening of business when a group of armed FBI agents arrive with a search warrant and demand all of the company's records, files, data, servers, cell phones. Typically the agents also request to "interview" officers and employees. More and more frequently, we are being asked by our clients for advice on what to do and what not to do if their company is the subject of such a raid.



by Michael M. Briley

First of all, it helps to understand how this process begins. Usually, as the result of a complaint (which could come from a competitor, an employee, a former employee, a vendor or a customer), a company becomes either the target of an investigation and is suspected of participation in an unlawful activity or it is chosen as a potential witness. A secret grand jury is convened by the government (unknown to anyone else) and warrants are issued for the collection of company records and "evidence." Sometimes the agencies obtain search warrants from courts as the result of secret wire taps on employee phones (including cell phones) and

other information from informants—some who have obtained immunity under amnesty provisions. Most federal agencies (like the Department of Justice, the FTC, SEC, EPA, etc.) use the FBI to conduct these early stage investigations and to execute search warrants.

In order to enhance the ability to capture the best evidence "by surprise," the warrants are then served by well-trained FBI agents familiar with both the investigation and the law. The recipient of one of these warrants is at an enormous disadvantage because typically he or she is unprepared, confused, and frightened. However, there are certain things that you can do to prepare your company for this type of event in a way that complies with the law yet enhances the ability of your lawyers to successfully deal with the investigation.

It is also important that you protect your employees in this circumstance by making certain that they know in advance what their rights are and what they are required to do and what they do not have to do. Advance planning is critical so that panic and bad choices do not follow the arrival of the agents. It is "too late" to start trying to protect your interests when the investigators show up. Every company needs to develop a "Search Warrant Action Plan" ("SWAP") as a part of its crisis or emergency response plan so that everyone will know in advance what to do. Accordingly, we recommend that you adopt a SWAP that includes the following protocols and explanations and advise your employees with respect to each—before the government arrives.

1. First and foremost, if you do not already have a crisis or emergency response team and protocols, develop them immediately. It is critically important that your employees avoid panic and keep as calm and collected as possible in these situations. The first person who will be confronted by investigators will likely be a receptionist or similar employee who will be understandably terrified at the sight of a dozen armed federal agents coming through the door and demanding records. The first step to a good plan is to develop a written

emergency response notification list which includes the names, titles, phone numbers (including cell numbers), email and text addresses for your immediate response officers in your order of preference for contact. Since your first choice on your list may not be available, the receptionist (or other “greeter”) should be trained to locate the first available name on this list. If you have in-house counsel, that person would likely be first, otherwise a high level officer who is experienced and trained to deal with this situation. You also need to try to contact your outside counsel immediately (if you do not have in house counsel), but you likely will need to respond before your outside counsel can be located and present. The agents will normally allow a reasonable amount of time for a responsible officer to arrive, but that period of time is not great!

2. The SWAP officer (if not your in-house lawyer) must then contact legal counsel immediately. Someone will need to verify the validity of the search warrant and verify its purpose and scope. The officer should ask to see the agents’ credentials (to be certain that they are who they say they are) and to obtain a copy of the search warrant. A search warrant authorizes the agents to locate and seize (take) all materials described in the warrant. You may not refuse or resist. But, you also do not have to provide materials beyond what the warrant specifically dictates. Some are more specific than others, but all warrants will describe the type of materials to be produced. The agents may look in all files, offices, drawers, safes, cabinets that are likely to contain or may possibly contain relevant materials and you must provide access to them to such places—even if previously locked or secured. It is important, however, that you do not inadvertently expand the scope of the warrant by trying to “help” or by agreeing or consenting to seemingly



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- harmless requests to look at other things. In order to be valid, a search warrant must be signed by a judge or magistrate with jurisdiction over the premises to be searched and it must state “with particularity” the place to be searched and the nature of the materials to be seized. It must also be executed within ten days of issuance.
3. The SWAP officer should clearly express to the agents that it is the company policy to cooperate. Cooperation is very important, but “helping” the investigation is not only unnecessary but also not advised.
4. The agents should be directed to the precise location of the records sought by the warrant. If you can collect (assemble) these records in one room that is suggested; however, do not allow the agents to “wander” away from the appropriate offices to look at other areas, etc.
5. All employees need to be advised (preferably in writing and before any raid) about their rights in the event of a raid. You may not at any time tell employees that they cannot or should not talk to investigators (that is deemed to be obstruction of justice), but you may tell them:
  - (a) They are not required to talk to the agents or to answer any questions.
  - (b) A statement (by the agents) that there is presumption of guilt on the part of anyone who refuses to answer in question is nonsense. Agents often tell employees that “if you won’t talk to us you must be guilty” as an intimidation tactic which should be anticipated and ignored.
  - (c) They are entitled to have their own lawyer present before they answer any questions. It is okay if they want to use the

company lawyer for this purpose at this stage of an investigation, but because the company lawyer may deem it to be a conflict of interest to represent company employees under certain circumstances, it is a good idea to pre-select several local criminal law attorneys and to have their contact information available to employees. Most criminal lawyers are happy to be included on such a list and it is okay for the company to agree to pay their fee at this juncture.

(d) Statements by agents that such interviews are “off the record,” offers of immunity or statements to the effect that “you are not the person who we are interested in for this” are to be disregarded. No statement to a government official is ever “off the record” and investigative agents have absolutely no authority or ability to grant immunity to witnesses or to give assurances that are not or that they will not become targets of the investigation.

(e) If they choose to answer questions, however, they must tell the truth. Often lying to agents has a more serious consequence than the crime that is being investigated. Answers should obviously be limited to facts (not opinions) that they actually, personally know to be true.

6. Employees should be told that they do not have to stay at work during an investigation and may leave (or go home) if they choose. If they choose to leave, however, they must leave behind any company computers, or other company devices or documents and files. They may take strictly personal items, however.
7. It is important to keep an accurate log of everything that the agents take. If

you have the time and ability to copy files (either electronically or hard copy), do so. You can demand a reasonable amount of time to make copies of what is being taken and it will be of enormous value to your lawyers going forward.

8. It should be discussed with the agents that a procedure needs to be agreed upon to protect potentially privileged documents or material and/or trade secrets and business confidential material.
9. Arrange for the search to be videotaped if possible.
10. Request that the agents not attempt to interview employees without counsel present.
11. Send an email out to all employees that advises of the search, expresses the company policy to cooperate, expresses the belief that the company has not committed any wrongful acts and that advises employees to contact a SWAP team member with any questions or concerns.

The foregoing guidelines will apply to the “dawn raid” situation where agents arrive unexpectedly at the company. The more common method of investigation involves the service upon the company of a subpoena, civil investigative demand (“CID”) or informal written or telephone request for information and/or documents. Obviously any such requests should be forwarded to counsel immediately for handling. Because counsel will have some time to respond to these types of requests, your SWAP involvement will not be necessary. It will be necessary, however, in such event to suspend your record retention program and advise employees to not destroy documents (including emails and texts) as pertains to matters which are the subject of the investigation.

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