

Handling State and Federal Subpoenas in Business

Niall McMillan: Hey, welcome back to Litigator's Lounge, devoted to discussing litigation news across Offit Kurman's Commercial Litigation Group. I'm Niall McMillan. Joining me today is my partner, Anders Sleight. Anders, welcome.

Anders Sleight: How you doing, Niall? Thanks for having me.

Niall McMillan: Yeah, great to have you.

So these Days government investigations are in progress at the federal, state, local level. What should business do if they receive a investigatory or administrative subpoena?

Anders Sleight: Sure. Great question, Niall. I mean, we're seeing these pop up more and more, particularly on the state level from attorney generals, but it can also be on the federal level or even the local level from the local administrative agencies that might enforce various provisions, particularly around housing.

But, if one of these lands on your desk as a government subpoena, they typically fall into [00:01:00] three separate categories, right? You might have a civil investigative demand which is typically used by the DOJ or the state attorney general in a civil enforcement action or an investigation, maybe under the False Claims Act relating to a government contract or some other state-related investigation.

So that's one type. Second type might be an administrative subpoena issued by an agency. It's typically investigation-related. It could be something to do with personnel or other investigations. but those are another thing to look out for. And finally, you might have a grand jury subpoena that could be issued, and of course, those are issued in a criminal context and will have higher stakes.

So we won't delve into those much, but I just wanted to mention them. But, if one lands on your desk, first thing you need to do is stop, take a breath, and really pause and analyze what is being sought, what are the records that they're looking for. Sometimes it can be quite broad, right?

And that may be an opening or just a [00:02:00] sort of an invitation, if you will, for a discussion with the government investigator to see if either the scope can be narrowed or what specific documents and records they may be looking for, right? So it's important to assess, get a game plan with that government subpoena before you start responding or, submitting responses.

And you probably want to talk to counsel as well before you take any steps. But, the timing is important because these subpoenas often have a response deadline. And you may want to lodge certain objections to the subpoena or the civil investigative demand in, one context or another.

So it's important to act quickly, but you don't need to necessarily panic if it comes across your desk.

Niall McMillan: Exactly. And so, I know it can be intimidating sometimes to see the attorney general's office looking for your records. But, something that you touched on with the scope of the subpoenas, in the civil context, we know that there's more rules and restrictions on what they can search for.

But I believe under the federal law, it's [00:03:00] a case law that's just mere interest if you're compliant with the law or not is enough under most of the statutes. So I guess what are some of the ways that you can, try to work to limit the scope or make it reasonable enough to what they're trying to actually achieve?

Anders Sleight: Yeah, absolutely. Not surprisingly most of the statutes that deal with these, particularly in the federal context are broad and give broad decision-making, broad sort of discovery power to the investigating authorities. So not particularly shocking. But I think the first thing that you've got to do is internally identify your decision-makers and your custodians early, right?

Think about who has access to the information that's being sought, who was involved in the particular subject of the investigation, so that you can begin to start, preserving those records, making sure that those are maintained. At the same time, while you're doing that, it's a good opportunity to reach out and contact the government office that's initiated or issued a subpoena.

Typically, you would want to have counsel reach out on your behalf, but [00:04:00] at least start that discussion to see what they're looking for, what the scope is of the investigation, if there's any narrowing of the records that are being sought. Because again, usually the subpoena will start at a very high level of what is they may be looking for.

But oftentimes there is an opportunity to negotiate or to sort of narrow the scope of the government subpoena, see how you may be able to cut to the core of what the investigation may be looking for. And that will limit your costs in terms of responding and locating records, responsive to that subpoena.

So, find who your custodians are, who your internal team members are that may have access to it, reach out to the government's attorney office that may be initiating the investigation. Try to work with them on, seeking to narrow that subpoena and the records that they may be looking for.

Niall McMillan: Exactly. And where it is broad and they have powers, it's not that you always have to roll over, and that it's a statute-specific context for each one of them and that there are options like a motion to [00:05:00] quash. It's not necessarily gonna be that successful each time, but, that is the overlying threat to help the negotiations go through.

Anders Sleight: Absolutely, You remember you have the right to object or file a motion to quash, but as Niall said, a lot of times it may be just as effective to get a narrowing on the subpoena and get an agreement there rather than going through the court system. If you have one that comes across your desk, just take a breath, take a pause, look at what they were looking for, and then just develop a game plan for responding to that subpoena.

Niall McMillan: Well, thanks Anders. That was very helpful information to hear. We appreciate you being here. Just so everyone knows, Offit Kurman is a full-service law firm with offices from coast to coast specializing in litigation services such as employment, financial services, construction, government contracting, and business dispute matters, as well as your civil and investigatory matters as well with the government.

Please reach out to me or Anders if you have any litigation matters that require attention. Thank you.

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