

Government Investigations: A How-to Guide from Ober|Kaler



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PODCAST TRANSCRIPT

Responding to a Government Subpoena or Other Document Demand: Six Helpful Hints

Presented by Gina L. Simms and James P. Holloway of Ober|Kaler's Government Investigations and White Collar Defense Group, this podcast provides guidance to health care providers and other corporations on how to respond to a government subpoena, civil investigative demand or other government request for documents. Gina and James have extensive experience advising corporate and individual clients faced with civil and criminal government enforcement actions initiated by the Department of Justice, HHS-OIG, and other state and federal government agencies.

Introduction: This is the second in a series of Ober|Kaler podcasts that relate to government investigations. Today's podcast features highlights of a conversation between James Holloway and Gina Simms who provide guidance to health care providers and other corporations on how to respond to a government subpoena, civil investigative demand or other government request for documents. James and Gina are principals in Ober|Kaler's Government Investigations and White Collar Practice Group, who have extensive experience advising clients on how to respond to government investigations. To learn more about Gina and James, go to Ober|Kaler's website, www.ober.com/attorneys to view their biographies.

Gina: Hello. I'm Gina Simms.

James: And I'm James Holloway.

Gina: It is no secret that government investigations into highly-regulated industries like health care or government contracting have increased exponentially over the past few years. Today, James and I will be talking about six things that corporations and individual providers should do if they receive a subpoena, a civil investigative demand or another compulsory government request for documents. James, perhaps we should begin with your explanation about the different kinds of document demands that a business can receive from the government.

James: Sure. There are at least three different types of documents that could require your organization to produce documents to the government. The first type of document demand is a grand jury subpoena, which requires you to produce documents before a grand jury that's empanelled to investigate potential violation of federal criminal law.

Gina: What other type of subpoena could an organization receive?

James: You could also receive a subpoena from a regulatory agency, such as an Office of Inspector General. OIGs are investigative components of federal agencies, like HHS. The important thing to remember is the OIG can be involved in criminal or civil investigations, so an OIG subpoena could relate to a criminal investigation, even if it's not issued in relation to a grand jury proceeding.

Gina: Ok. And so a third type of demand for records is called a Civil Investigative Demand. Can you tell us about what that is and whether a recipient of such a demand can draw any inferences about what the government is investigating?

James: Sure. A Civil Investigative Demand, or CID for short, allows the U.S. Department of Justice to compel the production of documents for its investigation of potential fraud committed against the government in a False Claims Act case. The False Claims Act is a civil statute, not a criminal one, that sanctions individuals or organizations for knowingly false requests for government payment. So the receipt of a CID indicates that the government is investigating potential false claims.

Gina: Thanks, James, for the background information. Would you agree that regardless of whether it's a grand jury subpoena, an OIG subpoena or a CID, there are some essential steps that an organization should take in responding to the request?

James: Yes, I agree completely.

Gina: Well, so now let's talk about the six tips that you have on how to respond to a document demand from the government. What's your first tip?

James: First, don't wait until you receive a government request for documents and then scramble to respond. You need to get out front and prepare a game plan in advance. Ideally, the protocol for handling government document requests should be drafted by counsel experienced in dealing with government investigations.

Gina: What kind of issues should be addressed in that protocol?

James: For starters, it should identify the person at the company who is designated to ensure the collection of all evidence responsive to the document demand. In addition, it should instruct all employees to promptly deliver the government's record request to that designated person. The designated person can be the general counsel, if you have one, or if you don't have a general counsel, a managerial level or a senior employee who can serve as the designated person. It is imperative that the designated employee receive the document request as soon as possible to determine when and where the documents are to be produced. Sometimes there is a short deadline for producing documents, and you don't want to miss that deadline or there could be adverse legal consequences for your company.

Gina: For instance, you don't want to face the situation in which the government asks the court to compel the production of documents, or the government asks the court to hold the company in contempt for not responding to a subpoena or CID. Is that correct?

James: Yes, exactly.

Gina: Okay. So have a policy in advance with an employee designated to ensure collection is done.

James: Yes, and I should add that these policies and procedures should be distributed to employees and should also be kept readily available so that they can be reviewed immediately if a document demand arrives on your doorstep.

Gina: What else should we keep in mind, James?

James: Well, Tip Number 2, I strongly suggest that the company secure the immediate assistance of counsel who specializes in responding to record requests from the government. First, it's imperative to have the assistance of competent counsel who's familiar with the myriad legal issues related to government subpoenas and other record requests. Furthermore, you want to ensure that your internal preparations in responding to the government's document request are protected by legal privileges.

Gina: And isn't there a concern about employees discussing a government information request without the involvement of a lawyer?

James: Certainly, if employees talk about a subpoena or the government's underlying investigation without a lawyer being involved, those discussions are not protected by privileges. And down the road, the government may force an organization to disclose those discussions.

Gina: Well, what else can a lawyer do to assist an organization in responding to a subpoena or CID?

James: Counsel will often contact the government to try to negotiate how soon the materials need to be produced, in what format they need to be produced -- for example, in electronic, searchable format -- and whether there is any way to narrow the scope of the documents sought.

Gina: And narrowing the scope of the subpoena and understanding which documents you can withhold from the government based on, for instance, privilege ultimately can end up saving the client money. Is that correct?

James: That's right. Getting a subpoena from the government can be disruptive to your normal business operations. It's clearly in your best interest that your employees spend less time searching for records and spend more time on providing services to your customers. Experienced counsel can minimize the disruption to your organization. So the sooner you have counsel involved, the better.

Gina: Would you agree that one of the important issues to be handled by legal counsel is protecting against the destruction of documents requested by the government?

James: Absolutely. That's my Tip Number 3. Your outside counsel can assist you in preparing what's called a "document hold," which is a directive that you give to your employees telling them not to destroy, throw away or alter in any way any certain documents or records that they have in their possession because the government has requested the company to produce documents. You should tell your employees that this "document hold" applies to all records and documents, regardless of whether they are maintained in electronic or paper format, and can include data on any electronic device, such as a Smartphone.

Gina: Well, James, your answer raises two questions. First, would you encourage your client to preserve documents even before they contact an attorney?

James: Absolutely. Even before you contact counsel you should immediately avoid discarding or altering any documents, because that may create additional serious problems for your organization.

Gina: Well, that leads to my second question, which is, which employees should you issue the document hold to? Or should the document hold go out to all of your employees? I can easily see a scenario where a client would be reluctant to have everyone at the company know about the subpoena for fear that it might unnecessarily spook some of the employees.

James: It's important to take a balanced approach. The government will view you with suspicion if you only protect records held by an overly narrow group of employees. The government may accuse you of not preserving relevant documents or even deliberately trying to obstruct its investigation. At the same time, there's no need to alarm employees who have absolutely no connection to the government's investigation by ordering them to preserve documents that are not covered by the government's document request. Your legal counsel can assist you in making those difficult judgment calls.

Gina: And, I might add, that the designated employee should keep track of who receives the document hold notice and should require the recipients to acknowledge receipt of the directive.

James: That's a great idea.

Gina: Now, James, in addition to the relevant record custodians, is there another person or department or entity who you should instruct to hold relevant records?

James: Yes, and that relates to my Tip Number 4. Most clients who I have worked with have an IT department or even a third party vendor who maintains their electronic files on a server or network. Because of the sheer volume of emails and other electronic documents that get created on a daily basis, many clients have routine document deletion or overwrite functions, say, every 30 days all emails of a certain type are purged. So, upon receipt of a government document demand, you want to contact your IT personnel or vendor and tell them to both preserve all electronic records in existence as of the date you received the subpoena AND to suspend the regular, routine document destruction policy for electronic documents until further notice.

Gina: And so what's Tip Number 5?

James: Well, this may seem really simplistic, but the designated person should keep an inventory or log of the documents and records that have been collected. Outside counsel can assist you in creating an inventory of the documents and can number those records for identification.

Gina: And finally, Tip Number 6?

James: You need to produce all requested items, unless they are protected by some legal privilege. The government has the resources to try to find out if you are improperly withholding documents, so don't withhold something just because you don't want to turn it over and you think you won't get caught. You could have serious problems, like being charged with obstruction of justice.

Gina: And that's a felony, isn't it?

Gina: Well, thank you, James, for your great advice and for your time today.

James: Thank you.

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