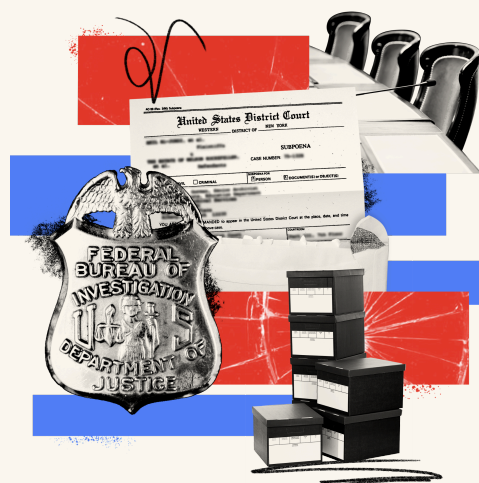


What if ... your organization is served with a subpoena?

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Understanding subpoenas

What are subpoenas?

Subpoenas are a common tool used in civil and criminal litigation, as well as federal and state government investigations. This primer will focus on the latter investigatory subpoena. They are formal, written demands that compel an individual or an organization to do various things, including: give testimony about a particular subject at a stated time and place, or produce documents, electronically stored information, or other material. Subpoenas may require someone to testify as a witness at a deposition, trial, or government hearing, including as part of a congressional inquiry.

There are different types and forms of subpoenas, depending on which government entity issues the subpoena, the authority for the subpoena, and the scope of the information or testimony requested (e.g. [grand jury](#) subpoenas, [civil investigative demands](#) (CIDs), IRS administrative [summonses](#) (all of which will be referred to here as “subpoenas.”)). The following are sample subpoenas from three government entities: [Congress](#), the Massachusetts [State Attorney General](#), and the [Department of Homeland Security](#).

(This [resource](#) includes additional information on the difference between administrative and judicial subpoenas in the immigration context.)

How does an organization receive a subpoena from the government?

Organizations may receive a subpoena through the mail, by in-person delivery, or, depending on the agency, via email. Subpoenas may be directed towards an organization as an entity or towards a specific individual within an organization. Sometimes, subpoenas are served by government agents who visit a place of business without making an appointment or giving prior notice. Less frequently, a subpoena may be served by any individual over 18 who is not a party to the inquiry. These people generally are known as **process servers**.

This primer focuses on organizational responses to subpoenas served in-person, but a majority of the guidance is the same regardless of how organizations receive a subpoena.

Do organizations have to respond to subpoenas?

Subpoenas are different from informal requests (including written requests) for information or attendance at an interview or hearing on a voluntary basis. While organizations can choose not to respond to a subpoena, there may be serious risks associated with doing so. For example, failure to comply with a subpoena in a timely fashion may result in [adverse consequences](#), including criminal or civil enforcement proceedings and general escalation of government

activity against organizations. **If an organization does receive a subpoena from a government entity, staff should inform legal counsel as soon as possible to understand what options exist for responding.**

There are multiple ways to respond to a subpoena, in addition, of course, to complying with its terms — but organizations generally have to choose one type of response to start. Depending on the form of subpoena, the options include objecting to some portion of the subpoena (potentially while complying with the rest), moving to quash or void it entirely, seeking to modify or narrow its scope, or requesting a protective order or confidentiality agreement. Generally speaking, when the parties disagree, these options require the involvement of a court. A judge might void or limit a subpoena on various grounds, including because it: 1) fails to allow an individual or organization reasonable time to comply; 2) requires the disclosure of privileged or other protected information; and/or 3) is unreasonable or subjects an individual or organization to undue burden. See, e.g., [Administrative Subpoenas in Criminal Investigations](#); [Authorities by Executive Branch Agencies and Entities](#).

It is also common for the parties issuing and receiving a subpoena to negotiate the scope of the subpoena as well as the amount of time the receiving organization has to respond.

Why does an organization's response to a subpoena matter?

Subpoenas are commonplace tools federal and state governments use to conduct investigations. They often also represent an escalation in a government inquiry. The government, including [Congress](#), may begin an investigation with informal and voluntary requests for information or interviews and then follow up with a subpoena. In order to minimize risk to organizations and their staff, it's important for organizations to understand their options when responding to government subpoenas. (To learn more about responding to congressional investigations, read [What if ... your organization is the subject of a congressional investigation](#)).

Best practices

Planning ahead

There is broad agreement that the most important thing organizations can do to prepare for the possibility of a subpoena is to develop **a plan in advance in consultation with legal counsel** and ensure that all relevant staff, including front desk staff and supervisors, are aware of the plan and their individual roles. Organizations with in-house counsel should work with their attorneys to formulate such a response plan in advance.

A key part of a response plan is the designation of specific staff (typically, supervisors or in-house counsel) to be the first point of contact if an organization is served with or receives a subpoena from the government.

Getting a lawyer

Consulting with legal counsel before responding to a subpoena is critical. Legal counsel can help evaluate an organization's options in a privileged and confidential way, including determining whether any information sought may be protected from disclosure. Counsel can and should help craft an organization's response to a subpoena. Additionally, many rules governing the subpoena process vary depending on the government entity issuing the subpoena, including between executive branch agencies and Congressional [chambers](#). Legal counsel can help organizations navigate these specific rules.

If an organization has in-house counsel, that should be the first call. If not, organizations should have a list of outside lawyers ready ahead of time so they can reach someone immediately.

Remaining calm

It can be scary to receive any request from the government, regardless of whether it is a voluntary questionnaire or a legally-enforceable demand. Remember that **remaining calm and level-headed will help ensure good decision-making and avoid disrupting the organization's regular work**. In moments of panic, staff may be tempted to engage in communications about the subpoena, but it's important to remember that **anything in writing may have to be disclosed**. Even emails and text messages on platforms that promise encryption may qualify as discoverable documents. Ideally, all communications about a subpoena or other government inquiry should include legal counsel.

Lastly, staff may also be tempted to delete or alter documents (including electronic communications) or other materials upon receiving a subpoena. Such actions could lead to sanctions, potentially including [criminal charges](#). Staff should continue to follow regular document retention policies unless told otherwise based on advice from legal counsel.

Accepting in-person service of a subpoena

Process servers (individuals who deliver subpoenas) may ask staff if they will “**accept service**” of the subpoena (*i.e.* formally accept the document on the organization’s behalf). Accepting service of a subpoena is **NOT** the same as responding to it. The following are important considerations when accepting service of a subpoena:

Designating specific individuals to accept service.

Part of an organization’s response plan should include designating specific individuals who are authorized to accept service (*e.g.* legal counsel or a supervisor).

Notifying designated supervisors immediately.

Staff should be trained on who those designated individuals are (either attorneys or supervisors) and how to contact them if a process server arrives with a subpoena. Depending on the instructions and advice of legal counsel, staff should also be prepared to decline to accept service on behalf of the organization if they have not been previously designated to do so.

Remaining calm and cooperative.

Maintaining a calm, polite, and cooperative demeanor throughout the exchange can help diffuse any potential conflicts. Additionally, while organizations should involve legal counsel as quickly as possible, staff should be trained not to interfere or obstruct agents from serving the subpoena.

Identifying a waiting area for process servers.

Staff should be ready to direct process servers to a designated waiting area. Staff should identify whether there is a clear reception or entryway where the process server can wait while staff review the subpoena and/or contact designated supervisors. If not, staff should identify an alternative space, such as an empty office or hallway, where the process server can wait.

Communicating with process servers.

Generally, individuals serving a subpoena are only there to deliver paperwork, not conduct an investigation themselves. Therefore, staff generally are not required to speak to process servers, beyond politely acknowledging them and, if authorized by legal counsel, accepting service on behalf of an organization. Staff can also politely refer any further questions or conversations from process servers to an organization's legal counsel.

Reviewing the subpoena.

Designated supervisors should review the subpoena to determine whether it is addressed to the organization or an individual staff member.

Accepting service of a subpoena directed to an individual staff member.

If a subpoena is directed to an individual, staff should determine if the individual staff member is available and, if so, be prepared to ask process servers to wait until that person is present.

If the individual is not present, staff should be prepared to decline to accept service on their behalf (unless otherwise authorized by legal counsel) and direct further inquiries to legal counsel for additional follow up.

Signing acknowledgment forms.

Process servers may ask organizational staff to sign an acknowledgment that they are accepting service of the subpoena. In those instances, staff should consider whether: 1) they are authorized to accept service of the subpoena; 2) legal counsel has had a chance to review the subpoena and/or give instructions; and 3) they have carefully reviewed the paperwork to ensure it is nothing more than an acknowledgement of service or a receipt of process.

For legal advice and additional best practices around accepting service of subpoenas and communicating with process servers, organizations should consult with legal counsel.



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