

DEALING WITH A FEDERAL GRAND JURY INVESTIGATION



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Grand Jury v. Petit Jury



Topics Covered

- Breadth of Grand Jury's Investigative Power
- Grand Jury Subpoena *Duces Tecum*
- Limits on Grand Jury's Power (Privileges)
- Grand Jury Secrecy
- Special Rules for Financial Institutions

Power of the Grand Jury



Powers of Investigation

The scope of the Grand Jury's investigative power "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation...."

Blair v. United States, 250 U.S. 273, 282 (1919).

Powers of Investigation cont'd

The longstanding principle that “the public ... has a right to every man’s evidence,” except for those persons protected by a constitutional, common law, or statutory privilege, is particularly applicable to grand jury proceedings.

Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

Powers of Investigation cont'd

“Because its task is to inquire into the existence of ***possible*** criminal conduct and to return only well founded indictments, its investigative powers are ***necessarily broad....***”

United States v. Dionisio, 410 U.S. 1, 9-10 (1973).

What about tainted evidence?

- Illegally seized evidence
- Information obtained in violation of Fifth Amendment
- **BUT** – DOJ Policy

“You’ve been served”



Grand Jury Subpoena

- Federal Rule of Criminal Procedure 17
- *“Ad Testificandum”*
- *“Duces Tecum”*

Rule 17(c)(1)

(c) Producing Documents and Objects

(1) In General. A subpoena may order the witness to produce any ***books, papers, documents, data***, or other objects the subpoena designates....

ATTACHMENT A

ALL OPEN AND CLOSED ACCOUNTS

For the years: 2000, 2001, 2002

Any and all records including, but not limited to, account transaction records existing as electronic text data and items relating to account debits and credits existing as electronic image data pertaining to the following individuals and business entities whether held jointly or severally or as trustee or fiduciary as well as custodian, executor or guardian as well as any other entity in which these individuals or entities may have a financial interest.

John R. Glutz, 12 Maple Drive, Anytown, NH

Julie P. Glutz, 12 Maple Drive, Anytown, NH

To include all accounts in which these individuals or entities had signatory authority, right of withdrawal, or both, including, but not limited to:

ACCOUNT # XXXXXXXXX

Examples of the requested records include, but are not limited to:

ELECTRONIC/INTERNET RECORDS: Information associated with online banking services or online bank accounts, including all usernames and other identifying information associated with the customer(s) and account(s) during the time period specified above, email addresses associated with the customer(s) and account(s) during the time period specified above, access logs for authentication to the account(s), including internet protocol (IP) addresses associated with sessions during which access to the account(s) was accomplished or attempted and the date, time, and duration of each session.

VOICE ACTIVATION RECORDS: All records pertaining to the telephonic activation of and access to customer accounts.

SAVINGS ACCOUNT RECORDS: Including signature cards, ledger cards or records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited (**front and back**), withdrawal slips, and checks issued for withdrawals, Forms 1099 issued.

CHECKING ACCOUNT RECORDS: Including signature cards, bank statements, deposit slips, checks deposited **(front and back)**, checks drawn on the account **(front and back)**, records pertaining to all debit and credit memos, Forms 1099 issued.

LOAN RECORDS: Including applications, financial statements, loan collateral, credit and background investigations, loan agreements, notes or mortgages, settlement sheets, contracts, checks issued for loans, repayment records, including records revealing the date, amount and method of repayment (cash and check), checks used to repay loans and a record disclosing the total amount of discount or interest paid annually, records of any liens, loan correspondence files, and internal bank memoranda.

SAFE DEPOSIT BOX RECORDS: Including contracts, access records, and records of rental fees paid disclosing the date, amount, and method of payment (cash or check).

CERTIFICATES OF DEPOSIT AND MONEY MARKET CERTIFICATES: Including applications, actual instrument(s), records of purchases and redemptions, checks issued on redemption, checks used to purchase certificate, any correspondence and any Forms 1099 issued, records revealing the annual interest paid or accumulated, the dates of payment or date interest is earned, checks issued for interest payments.

U.S. TREASURY NOTES AND BILLS: All records of the purchase of U.S. Treasury Bills and Notes and the subsequent sale, if any, of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments, records of interest paid or accumulated revealing the dates and amount of interest paid or accumulated.

CREDIT CARD RECORDS: Including customer application, signature card, credit or background investigations conducted, correspondence, monthly billing statements, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment, checks used to make repayments **(front and back)**.
PURCHASES OF BANK CHECKS: Purchases of bank checks, cashier, teller, traveler's check records, or money order records including the check register, file copies of the checks or money orders, records revealing the date and source of payment for such checks or money orders.

Obligation of Recipient

- Must produce if in actual or constructive possession
- May not divest him/herself of records once served
- Continuing obligation to produce

Rolling Production of Voluminous Records

- Consider seeking an agreement with AUSA allowing production of records in installments – no rule against it, and may be in both parties' interest
- Seek from AUSA the relative priorities assigned to different categories of records described in subpoena – no rule against it, and may be in both parties' interest

Limits on Grand Jury Power



Rule 17(c)(2)

(c) Producing Documents and Objects

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. ...

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Legal Requirements

- Reasonableness – Fourth Amendment
- Presumption of regularity
- Burden on recipient to show subpoena unreasonable
- Factors
 - Relevance to Grand Jury's investigation
 - Particularity of description & time frame
 - Burden of compliance

When Grand Jury Subpoena May *Not* Be Used

- To gather evidence post-indictment (i.e. trial preparation)
- To compel an interview with a witness
- To harass or intimidate a witness
- To locate a fugitive (USAM)
- To obtain evidence in a civil proceeding

Powers of Investigation cont'd

The longstanding principle that “the public has a right to every man’s evidence,” **except** for those persons protected by a constitutional, common law, or statutory **privilege**, is particularly applicable to grand jury proceedings.

Recognized Privileges (Federal)

- Fifth Amendment
- Attorney-Client
- Marital
- Psychotherapist-Patient
- Priest-Penitent

Fifth Amendment

Not available to corporations and other “artificial entities.”
Braswell v. United States, 487 U.S. 99 (1988).

BUT: Sole proprietorships may have privilege based on
“act-of-production” theory.

Attorney-Client Privilege

Available to corporations. Upjohn v. United States, 449 U.S. 383 (1981).

Applies where communications:

- (1) Were made by corporate employees;
- (2) To counsel for the company acting as such;
- (3) At the direction of corporate supervisors;
- (4) Concerning matters within scope of employee's corporate duties;
- (5) In order to secure legal advice from counsel; and
- (6) Were considered highly confidential when made and have been kept confidential by the company.



Non-disclosure Language

“DO NOT DISCLOSE TO ANY PERSON THE FACT THAT YOU HAVE RECEIVED OR COMPLIED WITH THIS SUBPOENA BECAUSE PRIOR DISCLOSURE COULD IMPEDE THE INVESTIGATION BEING CONDUCTED BY THE GRAND JURY.”

Federal Rule of Crim. P. 6(e)(2)

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

Rule 6(e)(2)(B)

Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- i. a grand juror;
- ii. an interpreter;
- iii. a court reporter;
- iv. an operator of a recording device;
- v. a person who transcribes recorded testimony;
- vi. an attorney for the government; or
- vii. a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

Witnesses

“Witnesses are not under the prohibition [against disclosure] unless they also happen to fit into one of the enumerated classes.” United States v. Sells Engineering, 463 U.S. 418 (1983).

Special Rules for Financial Institutions



Special Rules for Financial Institutions

- Right to Financial Privacy Act (RFPA), 12 USC § § 3401-3422
- Financial Institution Reform, Recovery and Enforcement Act (FIRREA), 18 USC § 1510

RFPA

- Provides privacy and other rights to **customers** who maintain accounts at **financial institutions**
- Definition of “financial institution” is narrow
- A “customer” means an individual or a partnership of 5 or fewer individuals

RFPA cont'd

- Records must be physically returned to the Grand Jury, unless impractical.
- Records used only for determining whether to return an indictment.
- Records must be destroyed or returned when investigation is complete, if no prosecution.
- Bank is entitled to compensation for cost of complying with subpoena.

Gags on Financial Institutions

- Government can apply for *judicial* gag order
- Forbid FI from notifying customer
- Government must establish that notice would:
 - Endanger life/safety of any person;
 - Result in flight from prosecution;
 - Result in destruction/tampering with evidence;
 - Result in witness intimidation; or
 - Otherwise seriously jeopardize an investigation

RFPA Gags cont'd

- *Automatic statutory gag* under § 3420(b)
- Civil penalties for violation
- Investigation relates to:
 - possible crime against FI or supervisory agency;
 - violation of the Controlled Substances Act;
 - violation of Controlled Substances Import and Export Act;
 - certain financial structuring crimes; or
 - conspiracy to commit the above crimes

Gag Provision Under FIRREA

- Criminal provision, 18 USC § 1510(b)
- *Automatic statutory gag*
- Disclosures constitute obstruction of justice
- (b)(1) establishes a felony for intentional obstruction of a judicial proceeding
- (b)(2) establishes a misdemeanor for “***innocent***” disclosure

Disclosure Bar Applies to Following Crimes Under Title 18

- § 215 – Bribery of bank employee/agent
- § § 656 & 657 – Theft by employee of FI
- § § 1005 & 1006 – False statement by employee of FI
- § 1007 – FDIC fraud
- § 1014 – Loan and credit application fraud
- § § 1341 & 1343 – Mail/Wire fraud affecting FI
- § 1344 – Bank fraud
- § § 1956 & 1957 – Money laundering
- § 371 – Conspiracy regarding the above crimes

QUESTIONS?

