

## WHEN THE KNOCK AT YOUR NONPROFIT DOOR IS NOT SOME PIZZA, but SUBPOENA.

Most nonprofits are busy doing good – sponsoring the arts, feeding the hungry, and counseling the wounded. Thus, they are particularly caught off guard when law enforcement appears at their door with a warrant to search an employee computer for participation in something as dark as child pornography. Even organizations not working with children or young people can be “subpoenaed” into an investigation of an employee for sex trafficking or solicitation of minors, all from the “privacy” of their work computer.

A “simple” subpoena can trigger a host of legal, factual, and ethical decisions. Typically, most investigations start with subpoenas and graduate to search warrants. A grand jury, for example, has immense authority and power to collect information. A subpoena requesting business records requires the nonprofit to collect records from all its files and computer systems and deliver them to the grand jury, investigative agency, or government agent. Not only must the organization turn over the documents, it must move swiftly to develop a tracking strategy for how they are produced. Documents must be carefully preserved, and a “litigation hold letter” may be required or recommended. This is necessary because the government can compel the organization to explain to a grand jury under oath how it went about collecting its documents

Producing the documents may sometimes end the matter, but follow up is usually required. The organization may be required to produce a “custodian” to authenticate the documents in court. In virtually all instances the nonprofit will want to be of record that it has audited or reviewed its policies and procedures, and has implemented appropriate changes, adopting best practices to minimize future misuse of its technology or other entity resources.

Sometimes the organization becomes an actual target of the investigation. Even as an “entity of interest” the documents that the nonprofit initially turns over may lead to findings of wrong-doing and ultimately fines, forfeiture, and loss of reputation. Unfortunately, a finding of “wrong-doing” can arise merely from missteps in answering the subpoena, rather than any underlying illegal acts. Even communications that appear to the average reader as seemingly innocuous can lead to serious consequences when scrutinized through the suspicious lens of a grand jury proceeding.

Knowing ahead of time whether the organization may become a target of an investigation is key to making a prudent response. An attorney can talk with the investigating agent to ascertain the nature of the inquiry without exposing the client to risk. The experienced lawyer can often determine from seemingly benign clues whether latent risks exist when the agent refuses to provide much in the way of responsive information.

In the law enforcement world there is no prohibition against an agent stretching or “guarding” the truth to obtain evidence. The best agents never breach their ethical duties, but can speak and act in ways that may imply certain information or positions hoping to invite incriminating statements and admissions that can later be woven into a case against the organization.

A nonprofit under investigation must also ensure that the employee who is the original target of the prosecution does not take advantage of relationships with co-workers who may still be in his corner. Such an employee may take business documents or try to elicit statements from friends that can shift the blame from him to the

nonprofit. Legal counsel can immediately provide guidance regarding administrative leave, securing employer property and data, instituting appropriate interim restrictions on access to premises, property, data, and other employees, etc. Internal and external communications must also be thoughtfully handled in view of the several new risks spawned by the investigation and subpoena.

Legal counsel will also know and set the appropriate boundaries so that while all legal duties are discharged the authorities are not given gratuitous or unlimited access to the nonprofit's members, employees, other agents, or protected communications and documents. Legal counsel will also explain how to protect an organization's computer system from being seized *en masse*, when the government is trying to locate what is usually a small amount of material.

In sum, when a subpoena arrives, experienced counsel can:

- ensure that documents are produced responsively and with a proper audit trail, while protecting attorney-client and other privileged communications;
- serve as a single point of contact for the authorities in order to minimize miscommunication;
- advise the organization on proper personnel actions to take in light of the investigation;
- help navigate the publicity waters that are churned up in its aftermath;
- help fulfill the nonprofit's duties to its donors and beneficiaries to not be caught off guard but prudently respond to any such government investigation.
- ultimately, strategically manage the risk and protect the nonprofit from being swept up into an investigation that can jeopardize its reputation, integrity, and its ability to continue its work.

**Bob Flores**, Of Counsel to Gammon & Grange, has more than 30 years of experience prosecuting, investigating, and overseeing national investigative efforts involving child sexual abuse and exploitation for the Manhattan District Attorney's Office and the United States Department of Justice. Of Counsel **Christine Johnson** has employment law litigation experience from the Illinois Attorney General's Office and is well-versed in navigating issues arising out of employee misconduct. They are available to work with you and your nonprofit to protect your organizational rights while properly and wisely responding to government inquiries.

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