

FEDERAL DEPOSIT INSURANCE CORPORATION
OFFICE OF INSPECTOR GENERAL
Policies and Procedures Manual

PART	IV	Investigations Policies and Procedures
SECTION	OIG-400	Investigative Operations
CHAPTER	400.6	Grand Juries and Subpoenas

1. Purpose. This chapter establishes the policies and procedures to be followed when seeking and executing Federal Grand Jury or OIG subpoenas. This chapter also discusses the disclosure and secrecy requirements relating to grand jury proceedings.

2. Federal Grand Jury Subpoenas and Materials. Rule 6 of the Federal Rules of Criminal Procedure governs the proceedings of Federal Grand Juries.

a. Subpoena Power. A Federal Grand Jury has the power to issue subpoenas requiring witnesses to appear and give testimony under oath. The grand jury also has the power to require production of physical evidence such as documents, handwriting exemplars and fingerprints. If approved by a prosecutor, subpoenaed parties may be allowed to submit subpoenaed items to a special agent in lieu of appearing before the grand jury.

b. Grand Jury Secrecy. Rule 6(e) of the Federal Rules of Criminal Procedure governs the secrecy aspects of grand jury proceedings. Under this rule, grand jurors, prosecutors and others (e.g., special agents, auditors, secretaries) working for the government shall not disclose matters occurring before the grand jury, except as otherwise provided. A knowing violation of Rule 6(e) may be punished as a contempt of court, and in some cases may constitute a violation of other provisions of Title 18. Secrecy is required for the following reasons:

- (1) to prevent tampering with witnesses;
- (2) to protect the reputation of the accused prior to indictment;
- (3) to encourage witnesses to appear and speak freely;
- (4) to encourage jurors to engage in uninhibited investigation and deliberation;
- (5) to prevent the flight of persons who may be indicted.

and

c. Authorized Disclosures

(1) Disclosure may be made to personnel who are deemed necessary by the prosecutor to assist him/her in the enforcement of federal criminal law. Matters occurring before a grand jury may be disclosed only to those individuals identified on a 6(e) list. The prosecutor is required to furnish the District Court with a list of all persons to whom disclosure of grand jury material will be made. The special agent should assist the prosecutor in compiling this list.

(2) Disclosure may be made to an attorney for the government to enforce federal criminal law. An “attorney for the government” includes the Attorney General, a United States Attorney, and their authorized assistants only. Disclosure may not be made to FDIC or civil attorneys.

(3) Disclosure may also be ordered by a Federal court in certain circumstances.

d. Prohibited Disclosure. Permission to disclose matters before the grand jury to any person not known to be on the Rule 6(e) list must first be obtained from the prosecutor. It is better to treat questionable information as within the scope of Rule 6(e) than not to safeguard it. Rule 6(e) prohibits disclosure of:

- (1) the focus of a grand jury investigation;
- (2) the nature of evidence produced before the grand jury;
- (3) comments or questions of grand jurors;
- (4) identities of witnesses or jurors; and
- (5) the substance and/or transcripts of testimony. This includes interview summaries and special agent notes which make reference to grand jury testimony.

e. Investigative and Audit Materials. Investigative and audit materials assembled independently of the grand jury do not generally become secret upon presentation to a grand jury. The fact that these materials were presented to a grand jury is secret. Care must be taken to ensure that there is no appearance of abuse of the grand jury process by obtaining information through a criminal proceeding for civil or administrative purposes.

f. Witnesses and Testimony. Witnesses are not precluded from discussing their testimony with whomever they choose.

g. Materials and Testimony at Trial. Grand jury materials and testimony introduced during a trial become part of the public record.

h. Service and Return of Grand Jury Subpoena. A subpoena may be served by any person designated by the U.S. Attorney's Office.

(1) Service of a subpoena shall be made by personally delivering a copy to the person named. If the subject of the subpoena is a corporation or partnership, service can be made on any corporate officer, partner or special agent designated for the purpose of service of process. With the consent of the prosecutor and the subject of the subpoena, service may be made on the subject's attorney and/or by mail (certified/registered with return receipt) or facsimile (fax). Subjects cannot refuse service of a subpoena. If a subject refuses to physically accept a subpoena, leave a copy of the subpoena at an appropriate place near the subject and advise them that they have been served.

(2) After service of the subpoena, the special agent should complete the "Return of Service" section on the reverse side of the original subpoena and sign the "Declaration of Service" section. The original served subpoena should then be returned to the prosecutor.

(3) If a subject does not comply with a subpoena, notify the prosecutor so that he/she may proceed with an enforcement action.

(4) Service upon a state, municipality or other government organization may be made upon the chief executive officer or his/her designated representative.

i. Forthwith Subpoenas

(1) A grand jury may issue a "forthwith" subpoena for the immediate production of physical objects. Forthwith subpoenas are usually used in situations where the government does not have enough probable cause to justify the issuance of a search warrant, but does have a reasonable, good faith concern that the subpoenaed materials may be altered, moved or destroyed if not obtained immediately. Forthwith subpoenas must only direct compliance on dates when the grand jury is sitting.

(2) A forthwith subpoena does not give the special agent authority to demand the material be turned over immediately to the special agent or conduct any type of search or seizure. It requires the served party to deliver the specified materials to the grand jury at the designated place and time.

j. Working With Grand Jury Material. Those individuals working with grand jury material must ensure that secrecy requirements are met and the integrity of the evidence is preserved. The case agent will be the custodian of all work products generated from the review of grand jury material.

k. Transmitting Grand Jury Material. When transmitting grand jury material, it must be placed in a double sealed envelope. The inner envelope should contain the case number in the upper right hand corner and be further annotated as follows:

"GRAND JURY MATERIAL - THIS ENVELOPE CONTAINS MATERIAL GENERATED FROM GRAND JURY PROCEEDINGS. THIS INFORMATION IS SUBJECT TO RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE."

l. Return of Grand Jury Material. Upon completion of judicial action, the special agent will coordinate the disposition of grand jury material with the prosecutor handling the case.

3. Trial Subpoenas. After indictment, grand jury subpoenas may no longer be used to compel witness testimony or the production of physical objects. Trial subpoenas are used to compel the attendance of witnesses at trial. Trial subpoenas can be used to compel the production of physical objects when the subpoenaed materials are relevant, admissible and specific. Evidence obtained by trial subpoenas is not subject to the secrecy provisions of Rule 6(e). Procedures for the service and return of trial subpoenas are the same as described in paragraph 2.i. above.

4. Inspector General Subpoenas. Section 6(a)(4) of the Inspector General Act gives the Inspector General authority to subpoena the production of all documentary evidence and other data. A refusal to obey an OIG subpoena is enforceable through a United States District Court.

a. OIG Policy. Information sought by OIG subpoenas must be relevant to an ongoing audit, investigation, or other activity within the statutory authority of the Inspector General. Subpoenas must not be overly broad or excessive in scope. If the records sought are records of a financial institution subject to the Right to Financial Privacy Act they can be obtained only by subpoena or with written consent of the individual.

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e. Right to Financial Privacy Act (RFPA). Financial records may be obtained from a financial institution by an OIG subpoena (12 USC § 3405). The term "Financial Institution" includes a bank, credit card issuer, loan company, trust company, savings association, credit union, or consumer credit institution, etc. (12 USC § 3401(1)). The Act applies to the financial records of individuals and partnerships of five or fewer individuals (12 USC §§ 3401(4), 3402). Generally, the Act requires prior written notice to the customer that their financial records have been subpoenaed and that the customer has the right and opportunity to challenge the subpoena in court. Whenever the RFPA applies to an OIG subpoena, the following will also apply:

(1) The RFPA documents package subpoena must include:

(a) A Certificate of Compliance with the RFPA of 1978;

(b) A Privacy Act Notice;

(c) Instructions for completing and filing the attached Motion and Sworn Statement;

(d) The Customer's sworn statement for filing a challenge in the United States District Court, prepared for customer's signature; and

(e) The Customer's Motion to Challenge Government's Access to Financial Records, prepared for customer signature.

(2) Upon receipt of the subpoena package, a copy of the subpoena must be served on the customer (i.e., individuals and partnerships of 5 or fewer individuals) along with the originals of items (b), (c), (d), and (e) listed above.

(3) The financial institution must be served with the original of the subpoena, and a copy of the Privacy Act Notice.

(4) After service, the Act requires a waiting period to give the customer an opportunity to file a challenge before the records are released. In the case of personal service, the waiting period is 10 calendar days. In the case of service by certified mail, the waiting period is 14 calendar days. If the last day of the waiting period falls on a weekend or holiday, the waiting period is extended to the close of the next business day.

(5) If the customer challenges the subpoena, the challenge motion and statement must be filed with both the court and the Inspector General. If a challenge is received, the OIG Counsel's Office will immediately inform the field, and no further action will be taken pending further instructions.

(6) If a challenge is expected, the field should immediately contact the OIG Counsel's Office and the AIGI.

(7) It is advisable for special agents to wait at least 21 calendar days in order to be sure that no challenge has been filed. Verification through inquiry with the court is required. They should then provide the financial institution with the original Certificate of Compliance if no challenge is filed within the statutory period.

f. Serving an IG Subpoena. The following steps should be taken when serving a subpoena:

(1) The entire original subpoena package should be served on the person named on the front of the subpoena.

(2) Personal Service. Personal service means actual delivery of the subpoena to the person named on the front of the subpoena, and, in the case of subpoenas subject to the RFPA, to the "customer" whose records are required. Personal service is always the preferred means of service. All reasonable means of personal service should be attempted.

(3) Other Types of Service. Service via fax or certified mail is also a means of service with receipt acknowledged by the recipient.

(4) Execute a Return of Service Form attesting to service of the subpoena.

(5) Signature on Return of Service Form. Ask the person accepting the subpoena to sign the statement at the bottom of the receipt form. If the person accepts service but declines to sign the Return of Service Form, note this on the form. Documentation should be as detailed as possible to include date, time, place and circumstances.

(6) The Return of Service Form should be included in the case file. A certified mail return receipt should be attached to the receipt of service when applicable.

(7) The date on which the records must be produced is shown in the subpoena. Service should allow sufficient time for compliance, and 10 working days (14 by mail) is generally considered reasonable although circumstances may warrant either a shorter or longer period.

g. Obtaining Documents

(1) As expeditiously as possible, review and determine whether the documents and/or related materials that are furnished satisfy the terms and conditions of the subpoena.

(2) Problems encountered in obtaining compliance with the subpoena will be immediately reported to the SAC. Consideration can be given to requesting a certificate of compliance from the subpoenaed party. Any such request must be coordinated with the OIG Counsel's Office.

(3) If the subpoenaed party does not comply or flatly refuses to supply all or a portion of the required documents, the special agent or the SAC will notify the OIG Counsel's Office to determine whether to enforce the subpoena in Federal District Court.

h. Returning Documents. When the documents are no longer needed, they should be returned. The return of such documents should be documented in the case file.

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5. Other Grand Juries and Subpoenas. On occasion, special agents may be called upon to work with state or local prosecutors and grand juries. Since state and local rules vary, guidance should be solicited from the prosecutor involved