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What healthcare entities need to know about search warrants

by Jonathan A. Porter, Jeff Jensen, and Gregg N. Sofer

A few years back, following a sad occurrence in which a nurse administered incorrect medication that killed a patient, state investigators descended upon a prominent academic medical center armed with a search warrant. Law enforcement showing up with a search warrant and taking health records was not something this medical center saw coming, as surely law enforcement raids were reserved for shady medical practices and not prestigious health systems tied to top-ranked universities. Right?

In recent years, federal agents have executed search warrants at many healthcare facilities, including hospitals,^[1] physician groups,^[2] dental groups,^[3] pharmacies,^[4] laboratories,^[5] medical equipment companies,^[6] hospices,^[7] nursing homes,^[8] and even the offices of a managed care plan.^[9] State and local investigators have done the same.^[10] Search warrants are not just for shady pill-mill-doctors and fly-by-night kickback schemers; they are increasingly for legitimate, compliant providers of all types. Warrants that allow the search of healthcare facilities are being granted for the acts of rogue employees^[11] and the acts of patients.^[12] So if your healthcare entity has employees or patients, you need a plan because even a basic plan—on how to communicate with the agents, what privileges to assert over medical records, whether to speak to employees and how to address any media fallout—is going to help in a crisis. And a company's response to a search warrant could alter the outcome of the government's investigation.

This article provides the basics of what healthcare entities need to know about search warrants.

Understand the basics

Why is law enforcement allowed to take your documents? Because a law enforcement officer previously went before a judge and presented sufficient information to allow the judge to conclude that certain documents *probably* contain evidence of a crime. Upon such a finding, the judge will issue a search warrant, which describes exactly what law enforcement is allowed to search and seize. This process occurs in secret. The target isn't entitled to advance notice of the search and cannot halt the search to present a defense to the judge. Impeding or obstructing a lawful search carries the risk of a criminal conviction and other headaches.

In cases where the healthcare entity or its senior leaders are the targets of the investigation, the search warrant is likely a culmination of significant covert investigative activity, a signal that the covert investigation has reached critical mass and is ready to proceed to the next steps. In other cases—like if an employee is committing crimes on employer property or a patient commits crimes using the healthcare entity’s server—then a search may be a less-critical event. The key to distinguishing between the two is reviewing the warrant for clues. (See Step three.)

Federal search warrants almost always come in four parts, but you will only have immediate access to three of them. Unless a judge orders otherwise, you will be provided by the law enforcement officer executing the search: (1) the warrant itself, usually on Form AO 93; (2) an identification of the person or property to be searched, usually on Attachment A to the warrant; and (3) an identification of the person or property to be seized from the location being searched, usually on Attachment B to the warrant. These three things are required by law to ensure that the search has lawful bounds.

The fourth part of a federal search warrant is something you are not likely to have access to immediately (or potentially ever). That is the agent’s search warrant application and accompanying affidavit. Federal agents commonly provide requisite allegations to support probable cause in signed affidavits given to a judge. This signed document is often kept under seal during the search. Do not be surprised if you do not receive a copy of the affidavit during the search; the affidavit exists to convince a judge that probable cause exists to conduct the search, not to convince you that probable cause exists.

A fifth part of the search warrant will be created after the search. That is a receipt describing the seized property as part of the search.

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