

Jacksonville Sheriff's Office



Legal Bulletin



John H. Rutherford, Sheriff

10-12

CIVIL LIABILITY TRAINING BULLETIN

The City of Jacksonville's Office of General Counsel represents the Jacksonville Sheriff's Office and its officers on all legal issues including the defense of civil liability claims. Occasionally there are issues that arise in state or federal courts which impact the potential liability of the JSO and its officers. When this occurs, the Office of General Counsel will issue a civil liability bulletin to educate officers on issues that could expose them to civil liability. If you have a question about the issues below or any liability or legal issue, please contact the Office of General Counsel at 630-1700.

Use of State Attorney Investigative Subpoenas

Florida Statutes, section 27.04 confers upon the State Attorney the authority to subpoena witnesses to appear before him or her in investigations of violation of the law. This subpoena power is an extremely useful tool for law enforcement officers; however, officers must be careful in its use to avoid unintended consequences detrimental to their investigations or infringements on certain rights of those affected. This training bulletin will address some of the legal issues officers might encounter when using State Attorney investigative subpoenas.

A. Investigative Subpoenas for Testimony

State Attorney investigative subpoenas may be used to compel persons to testify regarding knowledge they have regarding violations of the law. As a general rule, individuals do not have to speak to the police. Officers cannot go to individuals that they suspect have information relevant to a criminal investigation, demand that they speak with the officer and arrest them if they do not provide information. If an officer arrests someone for not providing information under those circumstances, the officer could be subjected to liability for false arrest and/or a violation of the person's federal civil rights. If the individual appears to be cooperative to police and it turns out the information provided is knowingly false, that person could be prosecuted for opposing or obstructing an officer. However, if an individual is believed to have information relevant to the violation of law the officer is investigating, and the individual is refusing to voluntarily speak with the officer, the officer may seek an investigative subpoena for that individual

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to provide sworn testimony before the State Attorney (or her assistants). At that point, the individual must testify regarding what they know about the matter at hand, and failure to do so could result in a finding that the individual is in contempt of court. Likewise, the individual must speak truthfully and failure to do so could result in a prosecution for perjury. However, importantly officers must be aware that testimony compelled through the use of a State Attorney investigative subpoena confers “use immunity” on the subject of the subpoena. What this means is that information the individual provides pursuant to the subpoena, or derived as a result of information provided pursuant to the subpoena, cannot be used in a criminal prosecution of the person that was the subject of the subpoena. For example, if an officer is investigation a car theft ring and as part of the investigation seeks and obtains a State Attorney investigative subpoena for John Doe to testify about what he knows, if John Doe testifies that he was involved in the theft ring, that testimony cannot be used to prosecute John Doe for his involvement. However, if John Doe lied during his testimony, he could be prosecuted for perjury. Therefore, officers must be very careful when applying for an investigative subpoena for testimony to make sure that the subject of the subpoena is not someone that law enforcement may ultimately seek to charge with involvement in the matter under investigation.

B. Investigative Subpoenas for Records

The State Attorney’s subpoena power is not merely limited to testimony, but investigative subpoenas may also be sought for the production of records. These subpoenas, referred to as subpoenas duces tecum, are often issued to businesses or corporate entities seeking production of records regarding the violation of law under investigation. Officers need to be aware that there are legal restrictions and parameters in the use of investigative records subpoenas. Subpoenas for production of records must be confined to investigations into violations of law, and not for any other purpose.

Records sought by law enforcement as part of a criminal investigation can include medical records. However, in order to obtain medical records through an investigative subpoena duces tecum, the Florida Supreme Court has held that the provisions of Florida Statutes, section 395.3025 apply and notice must be provided to the subject of the medical records prior to the issuance of the subpoena in order to give the subject of the records an opportunity to object. This is because medical records enjoy confidential status by virtue of the right to privacy in the Florida Constitution. The State Attorney’s Office has a procedure in place to facilitate the required notice prior to the issuance of a subpoena duces tecum for medical records. Failure to provide the requisite notice prior to issuance of a subpoena duces tecum for medical records could result not only in exclusion of the evidence from the criminal prosecution, but exposure to liability for invasion of privacy.

Another type of record often sought by law enforcement as part of a criminal investigation includes subscriber information for telephone and/or internet service. Florida Statutes, section 934.23 provides that law enforcement officers may obtain basic subscriber information from a provider of electronic communications services or remote computing services upon issuance of a subpoena duces tecum without prior notice. Subscriber information includes the name and address of the subscriber and other basic information, but does not include the contents of electronic communications. In today's world of internet blogging, Facebook, Twitter, etc., officers must be cognizant of certain constitutional issues that could arise in seeking subpoenas for internet or telecommunications subscriber information. Some people communicate on the internet anonymously and investigations may involve determining their identity to solve crimes. The First Amendment to the United States Constitution provides for freedom of speech. The United States Supreme Court has held that the right to free speech includes the right of an individual to speak anonymously. Thus, if an officer seeks a subpoena to identify the author of anonymous speech, constitutional implications have to be taken into consideration. Courts have held that where the subpoena power collides with First Amendment rights such as the right to free speech or anonymous speech, the government must be able to demonstrate "an overriding and compelling interest in obtaining the material in the subpoena" or risk a determination that the constitution has been violated. While probable cause isn't required, courts have held that a good faith legitimate criminal investigatory purpose for the records subpoenaed may satisfy the compelling interest requirement. If an officer is unable to articulate a good faith legitimate criminal investigatory purpose for the subpoena, he or she could be exposed to civil liability for a violation of federal civil rights. Likewise, if information obtained pursuant to the subpoena identifies an anonymous speaker, and the law enforcement officer discloses that information to another person, the officer must be able to articulate a good faith legitimate investigatory reason for doing so.

These same principals apply to any investigatory subpoena sought for the production of records in which an individual may have a privacy interest therein. Other examples include bank records, credit card records, employment records, etc. In order to best protect themselves, officers should articulate their reasons for seeking the subpoena to the Assistant State Attorney when applying for the subpoena duces tecum. Officers should document the basis for the subpoena request on a subpoena request form, investigative notes or reports. If in doubt regarding whether a sufficient basis exists for issuance of the subpoena, the officer should spend considerable time discussing the issues with the applicable Assistant State Attorney.

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State attorney investigative subpoenas are a very useful investigative tool for law enforcement officers. However, these subpoenas have legal implications that officers must be aware of. For further information regarding the investigative subpoenas, please contact the State Attorney's Office. For questions regarding civil liability on this issue or any other issue, please contact the Office of General Counsel.

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