

Know Your Rights: Immigration Administrative Subpoenas

This document lays out several steps that recipients can take in response to an ICE subpoena:

- Seek advice from your legal counsel.
- Notify the recipient of the subpoena and the public.
- You do not have to comply with the subpoena unless a court orders you to.
- If ICE seeks court enforcement, you can raise a number of possible objections.

ICE commonly relies on administrative subpoenas to obtain information from state and local governments, among other entities.¹ The agency's administrative subpoena power is limited, but ICE often uses the subpoenas to obtain more assistance than is legally required.² There are low-risk ways you can lawfully resist these subpoenas. Every entity should develop procedures in consultation with legal counsel to prepare for being served with immigration administrative subpoenas.

This document explains two key ways that recipients can resist immigration administrative subpoenas: First, any gag order in these subpoenas has no legal effect; you are free to publicize them and inform the target of the subpoena. Second, you do not have to comply with the subpoena at all, unless ICE goes to court—where you can raise a number of possible objections—and the court orders compliance.

Upon receiving a subpoena from ICE, it is important to first identify and correctly categorize the legal document you have been given. Warrants and court orders signed by judges generally must be complied with. But for ICE subpoenas, there are no consequences for an initial failure to comply. Only if a court orders you to comply and you subsequently fail to do so can penalties be imposed. ICE subpoenas are generally issued pursuant to 8 U.S.C. § 1225(d)(4) or one of several lesser-used statutes.³ They are signed by an ICE officer, not a judge.

¹ See Lindsay Nash, *The Immigration Subpoena Power*, 125 Colum. L. Rev. 1, 37–48 (2025).

² See *id.* at 53–54. For example, ICE uses subpoenas to attempt to compel surrender of objects (such as cell phones) and actions (such as scheduling a pretextual meeting) that the subpoena statutes do not permit.

³ ICE's legal authority for the issuance of subpoenas, summonses, and Form I-9 notices are 8 U.S.C. § 1225(d)(4)(A) for general immigration enforcement; 8 U.S.C. § 1324a(e)(2)(C) for I-9 audits; 50 U.S.C. app. § 2411(a) for the Export Subpoena; 21 U.S.C. § 967 for the Controlled Substance Enforcement Subpoena; and 19 U.S.C. § 1509 for the Customs Summons. See U.S. DHS, *Privacy Impact Assessment for the ICE Subpoena System 5* (Mar. 29, 2011), <https://perma.cc/BF4R-CUVE>. If the subpoena or demand is issued under a different authority, such as one of the National Security Letter statutes, or by a different entity, such as Congress, you may still have grounds to resist, but this Know Your Rights advisory does not apply.

- **You do not have to comply with the gag orders** contained in a ICE administrative subpoena: ICE officials do not have the legal authority to command your silence.⁴ This leaves you free to communicate with your lawyer, the public, or even the person whose information was subpoenaed.⁵ As all major internet communications providers do in an analogous context, you can and should develop and make public a policy of disclosure to the person or people whose information ICE has sought.⁶ Having a generally applicable policy places you squarely within the best practices of other entities that commonly receive demands for information and insulates you from claims of obstruction of a pending proceeding or investigation.
- **You do not have to comply with the subpoenas:** The subpoenas do not automatically compel you to comply with them. In legal terms, they are not “self-executing”.⁷ To

⁴ See above-referenced statutes, which lack any non-disclosure provisions. *See also Doe v. Ashcroft*, 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that “most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases,” for example, when a court so orders), *vacated as moot sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

⁵ Even absent a secrecy statute or order, someone who, *corruptly, or with the intent to obstruct an investigation*, alerts the target of an investigation that a subpoena has been issued could theoretically face criminal obstruction of justice. 18 U.S.C. § 1505 (“Whoever *corruptly, or by threats or force, or by any threatening letter or communication* influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States” commits an offense (emphasis added)). We were unable to find any case in which notifying the target of an immigration administrative subpoena was prosecuted under this statute. Nevertheless, a clear, generally applicable policy of notification developed in consultation with legal counsel will further mitigate the risk of being accused of corruptly obstructing justice in a pending proceeding.

⁶ *See e.g.* Google Privacy and Terms, Terms of Service, *How Google handles government requests for user information*, <https://perma.cc/5SXG-QZSV> (“When we receive a request from a government agency, we send an email to the user account before disclosing information.... We won’t give notice when legally prohibited under the terms of the request. We’ll provide notice after a legal prohibition is lifted, such as when a statutory or court-ordered gag period has expired.”); Snapchat, *Snap Inc. Law Enforcement Guide* 7 (updated Mar. 29, 2024), <https://perma.cc/42QC-BZ9J> (“Snap’s policy is to notify Snapchatters when we receive U.S. legal process seeking the disclosure of their records” except where legally prohibited or in exceptional discretionary circumstances); Meta Safety Center, *Information for Law Enforcement Authorities*, <https://perma.cc/VU3N-TZHX> (“Our policy is to notify people who use our service of requests for their information prior to disclosure unless we are prohibited by law from doing so or in exceptional circumstances...”).

⁷ *See United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 3 (1st Cir. 1996); *United States v. Sec.*

enforce the subpoenas, ICE first must file a motion or petition asking a court to compel your compliance. At that point, you will have an opportunity to oppose the motion. Whether or not you oppose, you cannot be punished for failure to respond to the subpoena unless the court grants the motion to compel *and* you fail to comply with the court order. If a court has already compelled your compliance in one or more cases, you should talk to your attorney about how that might affect the decision to challenge or disregard subsequent administrative subpoenas.

Substantive grounds to oppose administrative subpoenas can include:

- ***The subpoena asks for records or demands other assistance outside the scope of what the statute permits.*** Read the subpoena and the statute it invokes carefully, to ensure that the statute authorizes the specific request the agency is making.⁸ A statute that authorizes disclosure of records does not authorize a demand to collect records that do not yet exist, or to create new records not kept in the normal course of business.⁹ A statute that authorizes a demand for testimony does not require anyone to actively help locate people or conduct arrests.
- ***The subpoena seeks records that are not “reasonably relevant”*** to a permissible and particular investigation.¹⁰ Bulk requests about a class of individuals rather than targeted demands for records about a particular person may fall within this objection.¹¹
- The subpoena is issued for ***an abusive purpose***, i.e. “abus[ive] to such an extent as to be arbitrary and capricious and violative of due process.”¹²

State Bank and Trust, 473 F.2d 638, 642 (5th Cir. 1973) (“The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.”).

⁸ See, e.g., *United States v. Minker*, 350 U.S. 179, 184 (1956) (section of Immigration and Nationality Act conferring subpoena power on any commissioner of immigration or inspector in charge strictly defines purposes for which officers can subpoena witnesses and thereby does not give them power to issue subpoenas as aids in investigating other offenses).

⁹ *erinMedia, LLC v. Nielson Media Research, Inc.*, No. 05-CV-1123-T-24, 2007 WL 1970860, at *4 (M.D. Fla. July 3, 2007) (“A subpoena addresses itself to documents in existence as of the date the subpoena is responded to, not documents created thereafter.”); see also *ACLU v. Clapper*, 785 F.3d 787, 813 (2d Cir. 2015) (subpoenas for “records that do not yet exist” are invalid because the relevance of records not yet in existence cannot be known at the time they are requested).

¹⁰ See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

¹¹ *ACLU v. Clapper*, 785 F.3d 787, 813 (2d Cir. 2015).

¹² *United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979) (quoting *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978)); *Sec. & Exch. Comm’n v. Howatt*, 525 F.2d 226, 229 (1st

- The subpoena is “*unduly burdensome*” to comply with.¹³
- The subpoena seeks records protected under federal law or records in which an individual has a *reasonable expectation of privacy* under the Fourth Amendment, such as granular location history or the contents of electronic communications¹⁴; and
- There may be an argument that such subpoenas commandeer state or local government action in *violation of the Tenth Amendment*, which prevents the federal government from forcing states to help administer federal programs.¹⁵

There may be other grounds to challenge specific subpoenas. You should consult with an attorney each time you receive one.

Cir. 1975) (agency inquiry must be for “a proper purpose”); *United States v. Stuart*, 489 U.S. 353, 360 (1989) (abuse takes place “if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.”). The federal circuit courts express the test for abuse of process in different ways. *Compare United States v. Zadeh*, 820 F.3d 746, 759 (5th Cir. 2016) (setting forth a three-part test).

¹³ *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008) (subpoena imposes an undue burden by being overbroad and requesting records beyond those containing subject matter relevant to the underlying action); *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, 262 F.R.D. 293, 300 (S.D.N.Y. 2009) (court should “balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it,” and “consider whether the information is necessary and whether it is available from any other source”. *Cf.* Fed. R. Civ. P. 45(c)(1), 45(c)(3)(A)(iv); Fed. R. Crim. P. 17(c).

¹⁴ *Carpenter v. United States*, 585 U.S. 296, 317–18 (2018) (“[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.”).

¹⁵ Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. Pa. L. Rev. 103 (2012); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020).

Best Practices:

- Create a policy under which you will disclose the subpoena to the parties whose records have been requested.¹⁶ An attorney can help you craft a disclosure policy that works for your specific situation.
- Announcing a policy of disclosure on your webpage, law enforcement contact page, or other publicly accessible place can dissuade casual or frivolous subpoenas.
- Have a policy for responding to ICE subpoenas and related communications. You can safely ignore administrative subpoenas absent a court order, but you may prefer to provide a written response that explains your grounds for objecting to the subpoena, and states that you will notify the person whose records were sought. You may want to provide a short but reasonable time in which the officer can seek a non-disclosure order from a court before disclosing to the affected person.
- Prepare your legal counsel to oppose any court motion to compel compliance. Whether you actively contest the motion to compel or simply wait for a court order enforcing the subpoena, this may deter ICE from sending you frivolous subpoenas.
- Train all staff that if immigration agents show up, they should immediately inform a designated, trained contact person and not answer questions or otherwise assist the agents.
- Have an attorney review any requests from immigration enforcement agents, including any warrant or subpoena, before complying.
- Limit the information you collect and keep only what is necessary. Data minimization is the best way to protect your constituents. If you don't have it, they can't get it.

¹⁶ See *supra* nn.4, 6. Note that you can always discuss the subpoena with your attorney, even if DHS did have authority to bar disclosure to others. *Doe v. Mukasey*, 549 F.3d 861, 867 nn. 6, 7 (2d Cir. 2008). Note that you *do* have to comply with a non-disclosure order if it was issued by a judge.