



# **The Complete Handbook of Investigations & Privacy Rights**

Demystifying the Legal Parameters of  
Criminal, Civil and Private Investigations

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## INTRODUCTION

### A: ABOUT INVESTIGATIONS

In a society guided by the rule of law there exists a dynamic – a struggle if you will – between the rights of society as represented by investigating parties and the rights of individuals within that society. In any given contest within this dynamic – over a stop, a search, an arrest, a surveillance, a seizure, or an interrogation – an advantage will go to the party who knows the rights and obligations of the respective actors.

Perhaps nowhere is the playing field of knowledge *less* level than in the area of investigations. Generally, the investigators know the rights and obligations of the actors. Police, prosecutors, and private investigators are well trained and that training is updated and reinforced. Investigators have power and authority. With the events following September 11, 2001 and the enactment later that year of the Patriot Act, that power and authority has increased.

Members of the public, on the other hand, are not systematically taught and generally know little about their rights and obligations. The investigators often are at a decided advantage.

Investigators use – and from time to time misuse – this advantage. People talk to the authorities when it is in their best interest to exercise their right to remain silent. People consent to searches when it is in their best interest to exercise their right to refuse. People have their rights ignored – or are subjected to the investigators overstepping their own prerogatives – without their knowledge. *In order to preserve, protect, and defend one's place in a society guided by the rule of law, a person must know what the rule of law is.*

This Handbook attempts to level the playing field by setting out the law as it pertains to criminal and civil investigations. It also provides practical guidance for situations that frequently arise.

### B: ABOUT PRIVACY

For individuals, privacy is the right to control personal information that is not, without consent, subject to release to third parties or is otherwise discoverable by the investigator. Privacy rights are marked by certain legally defined boundaries. As these rights contract, information available to outsiders expands. As information available to outsiders expands, so expands the reach of the investigator.

Thus, privacy rights and investigative power share a common boundary. The contours of the boundary depend on who is doing the investigating. For this reason, the Handbook discusses the other side of the investigation coin: the laws affecting privacy. The Handbook attempts to set forth a guide for understanding and preserving one's fundamental rights to privacy.

Our system of checks and balances is a good system. It cannot work well, however, until citizens, residents, and visitors, as well as the authorities, have knowledge of the system.

## GUIDING PRINCIPLES OF THE LAW

### A: TEXT OF THE PORTIONS OF THE U.S. CONSTITUTION THAT MOST AFFECT THE LAW OF INVESTIGATIONS AND PRIVACY RIGHTS

#### 1: Fourth Amendment

The Fourth Amendment applies to both searches and seizures of property and to arrests of persons.

“The right of people to be sure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

#### 2: Fifth Amendment

The Fifth Amendment applies to testimonial evidence. With limited exception, *it does not apply to information in written or electronic form, or other physical evidence.*

“No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....”

#### 3: Sixth Amendment

The Sixth Amendment applies to criminal proceedings.

“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for this defense.”

### B: GLOSSARY OF TERMS

#### The Police

For purposes of this Handbook, the term *police* refers to all non-military law enforcement authorities. On a federal level, these authorities include the Federal Bureau of Investigation (FBI), the U.S. Marshals Service, the Central Intelligence Agency (CIA), the Internal Revenue Service (IRS), the Bureau of Alcohol, Tobacco, and Firearms (BATF), the U.S. Customs Service, the U.S. Immigration and Naturalization Service, the Secret Service, Post Inspectors, the offices of the U.S. Department of Justice (including the various United States Attorneys), and the offices and agencies of the U.S. Department of Homeland Security. On a state and local level, these authorities include the enforcement arms of various state agencies, sheriff and police officers, and state, county, and municipal prosecuting attorneys.

#### Search Warrant

A search warrant is a written authorization from a judicial officer given to the police to conduct a search (and to seize property) that, absent the warrant, might otherwise be constitutionally prohibited.

**Arrest Warrant**

An arrest warrant is an authorization from a judicial officer given to the police to arrest a specific individual.

**Subpoena**

A subpoena is a court order, often issued without actual court oversight or approval, directing the appearance of a witness, or the production of documents or other things, subject to penalty for non-compliance. A subpoena issued without actual court oversight or approval is sometimes referred to as an administrative subpoena.

**Summons**

A summons is a notice issued by an officer on behalf of a government agency directing the appearance of a witness, or the production of documents or other things. A summons typically is enforceable by court order and subject to penalty for non-compliance.

**Privileged Communications**

A privileged communication is a communication, written or oral, that is protected in most circumstances from disclosure to third parties. In the federal courts these privileges include communications with a person's attorney, spouse, clergy member, or mental health professional. In state courts the privilege may also include communications with a person's physician or accountant.

**Privacy**

Privacy is the right to be left alone or to control knowledge of or access to personal information. In U.S. jurisprudence, the modern discussion of privacy rights begins with possibly the most famous law review article ever written. In *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), Louis Brandeis and Samuel Warren argued that both the common law and (perhaps) constitutional principles implicitly contain certain privacy protections. This article is still widely read and quoted.

**Affiant**

An affiant is a person who, under oath, makes a written declaration or statement of facts.

**Tort**

A tort is a legal wrong committed on a person or property independent of contract. A tort involves a violation of a duty owed to the injured party. A remedy for the violation usually exists in the form of a claim for damages.

## **FOURTH AMENDMENT PROTECTION AGAINST SEARCH AND SEIZURE**

The Fourth Amendment provides a person's fundamental protection against unreasonable searches and seizures. If a government actor violates this right, any evidence obtained or that arises from the illegal search and seizure might be excluded from evidence at trial.

Three interrelated questions exist in most Fourth Amendment inquiries:

- Did a reasonable expectation of privacy exist?
- Did a search or seizure occur?
- Was the search or seizure lawful?

This Handbook will address each question separately. Because the questions often are interdependent on one another, the task is sometimes difficult. Keep in mind that although the police usually can overcome Fourth Amendment problems by obtaining a search warrant, often this does not occur *because lawful searches can occur without the need to obtain a search warrant*.

### **A: REASONABLE EXPECTATION OF PRIVACY**

#### **1: Introduction**

If no reasonable expectation of privacy exists, or no search for information is made that involves a trespass on persons, houses, papers, or effects, a Fourth Amendment search or seizure probably did not occur.

Legal principles defining a person's reasonable expectation of privacy are fluid and evolving. Consequently, understanding the evolution of the doctrine is helpful.

It is also important to recognize that the equivalent to a reasonable expectation of privacy can be enacted by statute under the rubric of privacy or property rights. *Olmstead v. United States*, 277 U.S. 438 (1928), was the first telephone wiretap case to reach the U.S. Supreme Court. The defendant argued that his Fourth Amendment rights had been violated because the police overheard a wired telephone conversation held inside his home. The Supreme Court held that the Fourth Amendment applied only to "places" and "things," not to intangible "conversations." Justice Brandeis' dissent in the case to this day is widely read and quoted. The dissent is one of the clearest discussions concerning the intersection of constitutional protections and privacy rights. "The right to be left alone," stated Brandeis, "...[is] the most comprehensive of rights, and the right most valued by a free people."

In *Katz v. United States*, 389 U.S. 347 (1967), the Court rejected the *Olmstead* holding. The Court in *Katz* also considered a telephone wiretap. The Court held that unauthorized electronic eavesdropping is an illegal search or seizure under the Fourth Amendment. The Court announced that the standard was one of justifiable reliance on a person's reasonable expectation of privacy.

The *Katz* Court determined that the Fourth Amendment protects *people* – not, as the *Olmstead* Court had held, “places” or “things.” Because the police had not obtained a search warrant before conducting the subject wiretap, the Court threw out the wiretap evidence. Despite the Court’s clarification that the new test was that of reasonable expectation of privacy, it continued to be difficult to determine what privacy expectations would meet the test.

The Court, accordingly, took the matter one step further in *Smith v. Maryland*, 442 U.S. 735 (1979), and adopted a two-prong test. This *two-prong test* includes both subjective and objective elements:

- a person must have an *actual expectation of privacy that society accepts as objectively reasonable* based upon:
  - Accessibility to the public;
  - Conveyance to a third party; and
  - Exposure or disclosure to the public.

Courts often decide search and seizure cases by defining situations in which no reasonable expectations of privacy exist. These examples are important. They can define, for instance, the limits of conduct of private investigators that do not enjoy the special powers of the police to obtain a warrant. Be aware, however, that most cases on the issue are decided on facts arising from police conduct.

## **2: The Plain View Doctrine**

A basic principle of the reasonable expectation standard is that a person cannot have a reasonable expectation of privacy if the item is in “plain view.” Some examples of plain view, which will be explained later in more detail, are:

- Things that can be seen from an *aerial overview* or from the perspective of a person stationed on public property – even into a house or dwelling.
- Things a person *says or does while in public*.
- Information police learn by *other senses* provided that the police are in a place they have a right to be (e.g. drug-sniffing dogs).
- *The use of a flashlight* does not violate the plain view doctrine.
- Police use of an *electronic beeper on a vehicle* to trace the vehicle has been found not to violate the driver’s reasonable expectation of privacy based on the plain view doctrine.

### **3: Protected Areas and Interests**

#### ***i: Consent***

It is important to recognize that if the person to be searched or the owner (or, on occasion the occupier) of the property to be searched gives consent, all protections are waived (forfeited). The police, when asking for consent to search, do not have to tell the person that he or she has a right to refuse. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). From the point of view of the person subject to the investigation, it may well be wise to decline to consent.

This holds true for individuals who wish to protect the person being investigated. For instance, in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court held a warrantless search of a subject's premises to be valid based upon consent given by a third party the police reasonably believed to possess common authority over the premises.

Traffic stops are the most common factual circumstance in which consent searches are solicited. Two major objections are raised in connection with consent searches. The first is that the consent may not in fact be voluntary. Almost all motorists who are asked for consent give it – even those with something to hide. Most motorists, it seems, believe that they have little choice but to consent. The second objection is that the police can use a minor traffic violation as a pretext to stop a vehicle and ask for a consent search. What the police may really be after is illegal drugs, guns, cigarettes, or other contraband. But for the traffic infraction, the police would have no grounds to stop the vehicle.

For these reasons certain state supreme courts, including those in Hawaii, Minnesota, New Jersey, and Ohio, citing their respective state constitutions as legal authority, have ruled that the police may ask for a consent search only upon a “reasonable and articulable suspicion” that a criminal offense is being or has been committed prior to the request. *See, e.g., State v. Carty*, 170 N.J. 632, 790 A.2d 903 (2002). This is a lower standard than “probable cause” that a crime is being committed but a higher standard than a hunch.

#### ***ii: Automobiles***

In the case of automobiles, warrantless searches are the rule rather than the exception. The reasons are several. First, vehicles are by definition mobile. Therefore unless police are given broad powers, a subject vehicle can be driven away and its contents dispersed. Second, a person is believed to have less expectation of privacy in a car than in a home or office. *California v. Carney*, 471 U.S. 386 (1985).

The police cannot make random stops in order to check driver's licenses and vehicle registration. Instead, the police must reasonably believe that the automobile broke a traffic law. *Delaware v. Prouse*, 440 U.S. 648 (1979).

Once the police have validly stopped an automobile for a traffic violation, the police may order the driver and any occupants out of the vehicle. *Maryland v. Wilson*, 519 U.S. 408 (1997).

When a lawful traffic stop is not extended beyond the time necessary to issue a ticket or to conduct ordinary inquiries incident to such a stop, the use of a narcotics-detection dog to sniff around the exterior of the vehicle does not infringe on a motorist's legitimate privacy expectations or, therefore, on a motorist's Fourth Amendment rights. *Illinois v. Caballes*, 543 U.S. 405 (2005).

The police may search the entire automobile without a warrant if the police have probable cause to believe that an automobile contains "fruits, instrumentalities, or evidence of a crime, or contraband." *Carroll v. United States*, 267 U.S. 132 (1925); *United States v. Ross*, 456 U.S. 798 (1982). Incident to the search, the police may also open and inspect closed containers (including luggage) that belong either to the driver, *United States v. Ross*, 456 U.S. 798 (1982), or to a passenger – even if the police have no grounds to suspect the passenger of wrongdoing. *Wyoming v. Houghton*, 526 U.S. 295 (1999). The rule, in fact, even applies if the initial stop was for a minor traffic violation and the police admit that the minor violation was a pretext for stopping the motorist because at the time of the stop no probable cause existed to search the vehicle. *Whren v. United States*, 517 U.S. 806 (1996).

Types of automobile stops or searches:

**a: Driver not arrested**

If police make a routine stop and issue a traffic ticket but do not make an arrest, the police do not have the right to search the car. *Knowles v. Iowa*, 525 U.S. 113 (1998). **A driver (or a passenger) does not have to speak with the officer or give consent to a search of the vehicle.**

**b: Driver arrested but car not taken to station**

Where the police have made a lawful custodial arrest of the occupant of an automobile, the police may, incident to that arrest, search the entire passenger compartment and the contents of any containers found in that compartment. For 28 years, courts interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize an expansive search of a vehicle upon the arrest of one of its occupants. Because the police have the right to arrest individuals for even minor traffic citations, such as a seatbelt violation, *Atwater v. Lago Vista*, 532 U.S. 318 (2001), pretextual stops allowed officers to search vehicles for evidence of a crime even where probable cause of that crime was absent.

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court clarified its *Belton* holding. Specifically, it held that the scope of a search incident to arrest is guided by its dual purposes of (1) *officer safety and prevention of access to a weapon* and (2) *prevention of the destruction of evidence*. Therefore, with respect to officer safety, a search of a vehicle complies with the Fourth Amendment only where there is a reasonable risk to the officer and the arrested individual maintains a present ability to retrieve a weapon from the location being searched. A vehicle search is permissible incident to arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. The police may also search areas of the vehicle where evidence of *the offense the individual was arrested for* might be found. A search of the trunk, however, is generally not permitted without a warrant. In instances where an individual is arrested for a minor traffic violation, for example, it is unlikely a search for evidence or a weapon would be justified after *Gant*. A driver (or a passenger) does not have

to speak with the officer or give consent to a search of the vehicle.

**c: Driver is arrested and both driver and car are taken to the police station**

If the police arrest the driver, take the driver and the car to the station, and wish to search the car at the station, no search warrant generally is required. At the station, the police may search the entire car, including the trunk, without a warrant. *Florida v. White*, 526 U.S. 559 (1999). *A driver (or a passenger) does not have to speak with the officer or give consent to a search of the vehicle.*

**d: Car Impounded**

Even if probable cause for the search is absent, or if the car is simply impounded by the police (e.g. for illegal parking), the police may conduct a warrantless inventory search of the car, *South Dakota v. Opperman*, 428 U.S. 364 (1976), including a search of the entire vehicle and all closed containers within the vehicle. *Colorado v. Bertine*, 479 U.S. 367 (1987).

**iii: Household**

Generally, a person has a reasonable expectation of privacy in and immediately around his own residence. *Silverman v. United States*, 365 U.S. 505 (1961).

However, the U.S. Supreme Court has laid out several exceptions. In *Minnesota v. Carter*, 525 U.S. 83 (1998), the Court held that people have *no expectation of privacy* in their homes when:

- the transaction engaged in within the home is *purely commercial*,
- a relatively *short period of time* was spent on the premises, or
- there existed a *lack of a previous connection* between the visitors and the house owner/lessee.

Nonetheless, an overnight guest in a home still has a limited reasonable expectation of privacy. *Minnesota v. Olson*, 495 U.S. 91 (1990).

**iv: Greenhouse and Curtilage**

A reasonable expectation of privacy has been found to attach to the curtilage of a dwelling. The curtilage of a dwelling refers to the land and ancillary buildings that are associated with the dwelling. In general, a person has an expectation of privacy with respect to the curtilage, but not with respect to open fields outside the curtilage. *Oliver v. United States*, 466 U.S. 170 (1984).

On the other hand, keep in mind that this is not a completely settled rule. In *Florida v. Riley*, 488 U.S. 445 (1989), the police conducted a surveillance of a greenhouse containing marijuana plants. The surveillance was conducted from a helicopter hundreds of feet above the subject's property. The surveillance led to the application for, and the grant of, a search warrant. The defendant

contested this warrant. The Court held no reasonable expectation of privacy existed in light of the fact that the marijuana plants could be observed by the naked eye from the helicopter.

**v: *Business Premises***

The Court has found the expectation of privacy in commercial premises to be different from and indeed less than the expectation of privacy in an individual's home. *New York v. Burger*, 482 U.S. 691 (1987).

An employee may consent to a search of his or her employer's premises if the employee is in a position of substantial authority. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946).

**vi: *Trespass or Physical Intrusion***

If the police have committed a trespass or a physical intrusion against a person's property, such conduct is more likely to be found to violate the person's reasonable expectation of privacy than if no trespass or physical intrusion takes place. But the trespasser's physical intrusion is not determinative – it is just one factor to be considered.

On the other hand, the U.S. Supreme Court has held that devices (such as thermo-imaging devices) utilized by the government to explore details of the home that could normally only be seen through physical intrusion, are presumptively unreasonable without a search warrant. *Kyllo v. United States*, 533 U.S. 27 (2001).

**vii: *Tracking Beeper***

In *United States v. Knotts*, 460 U.S. 276 (1983), the Court held that the use of a locating or tracking beeper, installed in a container, did not interfere with a person's reasonable expectation of privacy and that the monitoring of a beeper did not constitute a search. (The beeper has been placed in the container, with the consent of the then-owner, before the container came into Knotts' possession.) The court reasoned that because police could follow a car on public streets and highways without violating a reasonable expectation of privacy, the use of a beeper to follow that car did not change anything. The Court held that the police are not prohibited from using technology in "augmenting their sensory faculties."

The court amplified this analysis in *United States v. Karo*, 468 U.S. 705 (1984). It reaffirmed that an *installation of a beeper did not constitute a search or seizure* because there was only a potential for an invasion of privacy. In other words, installing a beeper did not convey any information in and of itself. Interestingly, *there has to be a conveyance of information to constitute a search*. Furthermore, the installation is not a seizure of property because there is no meaningful interference with an individual's possessory interest in property. At most, the Court conceded that it might be a trespass. However, it is important to note that a trespass is not sufficient to constitute a constitutional violation. The *Karo* Court held, however, that the monitoring of a beeper or tracking device in a private residence (a location not open to visual surveillance) is a Fourth Amendment search or seizure – at least in regard to those individuals

who have a justifiable interest of privacy in the residence. In such circumstances, the police must obtain a warrant before acting.

The Court imposed *three conditions* necessary to obtain a warrant for the installation and monitoring of a beeper in a private residence.

- One must *identify the circumstances* of why he or she wants to install the beeper;
- One must *identify the object* in which the beeper will be placed; and
- One must *identify the duration* of monitoring.

The technological advancements in electronic surveillance will require reexamination of these doctrines. Most recently, for instance, the United States Supreme Court determined that the prolonged use of a modern-day GPS tracking device installed in the undercarriage of a car is, in fact, a Fourth Amendment search that requires a warrant. *United States v. Jones*, No. 10-1259 (*slip opinion* January 23, 2012).

**viii: *Transfer of Information to Third Parties***

The fact that a person has transferred property or information to a third person may indicate that the individual no longer has a reasonable expectation of privacy with regard to that property.

**ix: *Secret Agents, Informants, Cooperating Witnesses***

An individual assumes the risk of the “unreliable ear.” *United States v. White*, 401 U.S. 745 (1971). In other words, an individual assumes the risk that the person to whom he is speaking is unreliable. Therefore, even if the person is an informant, a cooperating witness or a secret agent, the individual cannot claim a reasonable expectation of privacy as to the conversation. No Fourth Amendment protection exists for a “wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” *Id.*

The government may legally use information received from a private party even if the private party obtained the information in an illicit or illegal manner provided that the government is a passive recipient of the information and did not encourage or acquiesce in the private party’s conduct. *Burdeau v. McDowell*, 256 U.S. 465 (1921). As a practical matter, this principle usually will only “cloak” the transfer of information at the private party’s initial meeting with the government. Thus the doctrine is known as the “one-bite” rule.

**x: *Telephone Numbers***

A person who makes a telephone call transfers to the local telephone company information in connection with the number from which the call is placed and the number called. (The ability to obtain a log of outgoing calls is known as a “pen register.” The ability to obtain a log of incoming calls is known as a “trap and trace.”) Consequently, the person has no expectation of privacy with respect to those telephone numbers and the police (or a private party in a civil suit) may subpoena

the telephone company records to determine what numbers were called and the number from which the call originated.

With the availability of “Caller ID,” the number from which a call originates is often readily available without the need for a subpoena. Although a caller can generally obtain “privacy” as to the caller’s name or number using a line block or a \*67 call block, this option does not prevent “calling party number delivery systems,” i.e., telephone companies, from providing information “in connection with legally authorized call tracing or trapping procedures specifically requested by a law enforcement agency.” 47 C.F.R. § 64.1601(d)(2).

*xi: Business or Financial Records*

Outside of statute, it is uncertain whether a person has a reasonable expectation of privacy over business or financial records. Privacy laws or laws protecting property rights, however, may give such expectations legislative force by prohibiting the voluntary disclosure by the custodian of many business or financial records to the police or to private third parties. The following is a non-exhaustive list of these laws:

- The Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, is an attempt to bring new communications technologies under the umbrella of federal wiretap laws. The law prohibits private-sector providers of electronic communication services from divulging certain information absent court order.
- The Bank Secrecy Act, 12 U.S.C. § 3413(d), authorizes the Treasury Department to require financial institutions to maintain records of personal financial transactions that “have a high degree of usefulness in criminal, tax, and regulator investigations and proceedings.” Toward this end, the Treasury Department requires financial institutions to report any “suspicious transactions relevant to a possible violation of law or regulation.” 31 U.S.C. § 5318(g)(1). Such reports, called Suspicious Activity Reports (SAR) are filed with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN).

A financial institution files SARs without the consent or knowledge of the customer whose activity triggers the filing. The reports are available electronically and without condition to a wide array of law enforcement agencies.

The obligation to report personal information on a SAR is easily triggered. It can involve a transaction in an amount no greater than \$5,000. Former senator and democratic party presidential nominee Bob Dole and former defense secretary Frank Carlucci both were the subject of SARs that arose from withdrawing too much walking around money. Simpson, *Bob Dole Goes Banking – and Trips the Alarm*, Wall Street Journal, September 3, 2004, at p. C1.

- The Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401, requires federal government agencies to provide individuals with notice and an opportunity to object before banks or other institutions disclose financial information to other federal government agencies. The

law was weakened in the late 1980s to allow the postponement of notice to bank customers in investigations dealing with drug trafficking and espionage, and again by the U.S. Patriot Act, to allow the postponement of notice when terrorism is a suspicion.

The RFPA contains a large loophole. The loophole accommodates the filing under the Bank Secrecy Act of Suspicious Activity Reports (SARs).

- The Fair Credit Reporting Act, 15 U.S.C. § 1681, governs how credit reports may be maintained and used. The Act limits access to credit reports, absent the written consent of the individual, to anyone who does not have a purpose specified in the Act.
- The Driver's Privacy Protection Act, 18 U.S.C. § 2721, generally prohibits states from disclosing certain personal information that their drivers submit in order to obtain driver's licenses. The law is, however, full of exemptions and loopholes.
- The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, prohibits government officials, absent probable cause that the actor is involved in the subject criminal offense, from searching or seizing the writings and documents of people "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." In other words, the Act prevents investigators from searching newsrooms to uncover information or sources that a news organization has assembled.
- Substance abuse privacy is somewhat protected under 42 U.S.C. § 290dd-2. With some exceptions, the Act requires records of the identity, diagnosis, prognosis, or treatment of any patient maintained under any federal substance abuse program to be kept confidential.
- Veteran medical privacy is somewhat protected under 38 U.S.C. § 7332. The Veterans Administration Health Privacy Act requires confidentiality in Veterans Administration records of the identity, diagnosis, prognosis, or treatment of any patient relating to drug abuse, alcoholism or alcohol abuse, infection with the HIV virus, or sickle cell anemia. The Act, however, is full of exceptions.

### *xii: Bank Records*

The Supreme Court has stated that a person has no reasonable expectation of privacy with regard to his or her bank records, thereby granting police the ability to subpoena checks, deposit slips and financial statements given by a person to his or her bank. *See United States v. Miller*, 425 U.S. 435 (1976). The Fourth Amendment does not prohibit the government from obtaining information revealed to a third party, even if that information is revealed on the assumption that it will be used for a limited purpose and the confidence placed in the third party will not be betrayed.

The police (or a private party in a civil suit) may subpoena or summon business or financial records – and frequently do. *Business or financial records usually are not privileged from disclosure in the context of a legal proceeding.*

***xiii: Intellectual Property/Trade Secrets***

Intellectual property often is of proprietary nature. In this context, it is commonly referred to as a trade secret. A trade secret may be a secret process, information about the marketplace, or any other knowledge that a business may have that assists it in competing in the marketplace.

A qualified (limited) privilege or similar protection may exist with regard to trade secrets. This privilege is discussed in the privileges section. The privilege may prevent the disclosure of the information or limit the information's use.

***xiv: Medical Records***

Privacy laws may protect many medical records and other protected health information from the keeper's voluntary disclosure to third parties. Health care privacy regulations issued by the Department of Health and Human Services (HHS) under the Health Insurance Portability and Accountability Act (HIPAA) extend to a broad range of health care information. The privacy rules, in general, preempt all contrary state law except for state laws that provide greater protection for individuals.

An individual can waive the rules and permit disclosure of health care information – possibly by oral agreement.

*The privacy rules contain sweeping exceptions.* The rules do not require consent, authorization or informal agreement for access to medical records in situations involving, for instance: law enforcement, national security and intelligence, judicial and administrative proceedings, disclosure by an employed provider to the employer regarding medical surveillance of the workplace or workplace injuries, reports to worker's compensation programs as authorized by or needed to comply with law, or as required by law.

The police (or a private party in a civil suit) may subpoena or summons medical records – and frequently do. Medical records, other than those reflecting confidential communications, usually are not privileged from disclosure and for this reason may be obtained by legal process. Interestingly, HIPAA does not provide an individual the right to sue for damages arising from a privacy violation. *University of Colorado v. Denver Publishing Co.*, 340 F.Supp. 2d 1142 (D.Colo. 2004).

***xv: Tape Recordings/Bugs/Wires/Telephone/Cell/Hidden Cameras***

As mentioned earlier, an individual has been found not to have a “reasonable expectation of privacy” if he is transferring information to a third party. This also holds true if that third party is wired or bugged.

The monitoring or recording of telephone calls, electronic communications, or conversations, (otherwise known as wiretapping or eavesdropping), is a special subject. There are three distinct differences among the fifty states regarding the type of consent required among parties in recording situations.

Most states, plus the District of Columbia, permit the recording of telephone conversations with one-party consent. “One-party consent” means that one party to the conversation must have knowledge and give consent to the recording. In almost all circumstances it is illegal in these states to record a conversation to which you are not a party, do not have consent to tape, or could not naturally overhear.

Twelve states require two-party (or, more accurately, “all-party”) consent. Two-party consent means that every party to the conversation must have knowledge and give consent to the recording. The twelve states that require all-party consent are: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington.

California and Arizona, however, permit no-party consent for limited circumstances involving criminal activity.

Federal law makes it illegal for private parties to record telephone conversations except in cases in which the controlling law is that of a one-party consent state.

Situations involving calls that cross state lines, particularly when one state is a one-party consent state and the other state is an all-party consent state, can create complicated legal issues. Federal law likely would factor into the analysis since the call crossed state lines. Because the law is unsettled, it is best to assume in each situation that the stricter rule would apply.

The federal wire tap law, as amended in 1986 and 1994, makes it illegal to record both wireless (cordless) and cell phone conversations outside of one-party consent. 18 U.S.C. § 2510. Many of the state laws also specifically apply to cellular or cordless calls. Other state statutes are broad enough to cover these means of communication.

Federal law and many state laws also make it illegal to disclose the contents of an illegally intercepted call or communication. Federal law and many state laws that would otherwise protect taping having exceptions for circumstances where the taping is done for a criminal or tortious purpose.

Federal law permits businesses to monitor phone calls that are business related when the monitoring is part of the ordinary course of business. (However, this rule may not apply in two-party consent states.) When the employer determines that the content of the conversation is of a personal nature, however, the monitoring must stop. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 583 (11th Cir. 1983).

At least fifteen states have laws making it illegal to use hidden cameras in private places. The audio portion of the videotape will be treated under the regular wiretapping laws in any state. Many of the statutes concern unattended hidden cameras rather than cameras hidden on a person engaged in a conversation.

Regardless of criminal laws concerning wiretaps or cameras, undercover recording of a private communication or a private place can be actionable civilly for invasion of privacy, trespass, or lack of consent.

If, as is often the case, a no-party consent seizure of electronic information (i.e., wiretapping, e-mail interceptions, or other forms of no-party consent electronic surveillance) violates an individual's reasonable expectation of privacy, then it is a search under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967). This determination is made on a case-by-case basis.

The police, for example, must obtain a valid warrant to install a wiretap, *Berger v. New York*, 388 U.S. 41 (1967), or to initiate e-mail interception surveillance. 18 U.S.C. § 2510. See later section, Warrant Required to Conduct a Wiretap for more information.

***xvi: Computer Hard Drives/E-Mail Messages***

The police (or a private party in a civil suit) may subpoena or summons electronically stored information in computer hard drives including e-mail messages – and frequently do. *These records usually are not privileged from disclosure.*

***xvii: Photographs***

As previously discussed, the U.S. Supreme Court has interpreted the Fourth Amendment to restrict the government from invasion of an individual's reasonable expectation of privacy. This principle extends to photographs or videotapes of individuals where a reasonable expectation of privacy is violated. Unfortunately, the parameters of the reasonable expectation of privacy are unsettled. It can often turn on the facts and circumstances of a given situation. Generally, the expectation of privacy is greatest in the context of the interior of private residences.

***xviii: Common Law Privacy Torts***

A second set of laws bind private parties. These laws create civil actions, in this context known as tort actions, for invasion of privacy. A privacy tort occurs when a person or entity breaches a duty to leave another person alone. If emotional or monetary injury results, the breaching party may be liable for damages.

Each state has developed its own privacy torts, either through common (judge-made) law, statutes, or both. Courts have recognized the following four major branches:

- Unreasonable intrusion on seclusion. An example might be the owner of a tanning salon who secretly photographs an undressed patron. Some but not all states have statutes that ban the surreptitious use of cameras in private places.
- Unreasonable disclosure of private facts. An example might be the public and highly offensive disclosure that a person has a rare disease. Note that the claimant likely must also show that the private facts are not “newsworthy.” Newsworthy generally means any matter as to which there is a “legitimate public interest.” Courts have given this standard a broad interpretation. *See, e.g., Sipple v. Chronicle Publishing Co.*, 154 Cal.App.3d 1040 (1984).
- Unreasonably placing another person in a false light before the public. An example might be the publication of a person's picture in an adult magazine without permission. *See, e.g.,*

*Douglass v. Hustler Magazine Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986).

- Misappropriation of a person's name or likeness. An example might be the unauthorized use of a person's name, likeness, or other features associated with that person's identity. *See, e.g., Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

Other photograph-related common law privacy torts can include trespass or intentional infliction of emotional distress.

***xix: Video Rental Records/Book Purchases or Borrowing***

Congress enacted the Video Privacy Protection Act, 18 U.S.C. § 2710, in response to the controversy that arose when Judge Robert Bork's video rental records were released during hearings for his Supreme Court nomination. The Act is often referred to as the "Bork Bill."

The Act forbids a video rental or sales outlet from disclosing information concerning what tapes a person borrows and buys, or releasing other personally identifiable information without the informed written consent of the customer. Consumers can sue for damages for violation of the Act.

The Act did not change the reach of the common law tort of invasion of privacy. Invasion of privacy, at least for non-public figures, could provide an independent claim for unauthorized video record release. The Act does, however, extend the reach of the law to public figures.

No similar federal law would appear to protect privacy in connection with the purchase or borrowing of books.

***xx: Abandoned Property***

In *California v. Greenwood*, 486 U.S. 35 (1988), the Court held that individuals could not have a reasonable expectation of privacy to their abandoned property, such as trash.

***xxi: Mail***

A person who sends a letter or package through the mail is normally entitled to assume that the government will not open and inspect it. *Walter v. United States*, 447 U.S. 649 (1980). The principle does not extend to a test for contraband. *United States v. Jacobsen*, 466 U.S. 109 (1984).

**B: DID A FOURTH AMENDMENT SEARCH OR SEIZURE OCCUR?**

Separate from, but related to, the question of a person's reasonable expectation of privacy is the question of whether a search or seizure under the Fourth Amendment actually occurred. The answer is not always obvious.

Some Fourth Amendment searches or seizures require a warrant. Other Fourth Amendment searches or seizures do not. Still other searches or seizures are not considered “Fourth Amendment” searches and seizures.

## **1: Search Warrants**

A search warrant is an authorization from a judicial officer given to the police to conduct a search that may otherwise be constitutionally prohibited.

### ***i: Warrantless Searches***

A warrant *is not* required before a search or seizure where:

- “*exigent circumstances*” exist; or
- *where a person’s “reasonable expectation of privacy” would not be violated.*

Because these two exceptions are broad, *a warrant often is not required by the police as a precondition to a legal search.*

Indeed, because courts over the years have narrowed the “reasonable expectation of privacy” element, *private parties* legally can conduct *investigations* that closely resemble police searches or seizures.

### ***ii: Exigent Circumstances***

The exigent circumstances exception is enjoyed by the police, but not by private parties. The U.S. Supreme Court has determined that “*exigent circumstances*” include:

- Search incident to a valid arrest; or
- Search to avoid the destruction of evidence.

For a person’s reasonable expectation of privacy, the reader should turn to the analysis in the previous section.

### ***iii: Warrant Required to Conduct a Wiretap***

In *Berger v. New York*, 388 U.S. 41 (1967), the Supreme Court issued requirements needed to obtain a warrant to install a wiretap. These requirements include:

- A showing of probable cause to believe that a specific crime has been or being committed;
- The suspected person whose conversations are to be overhead must be identified;
- the warrant must describe with particularity the conversations that can be overhead;

- The wiretap must be limited to a short period of time;
- Provisions must be made for the termination of the wiretap when the desired information has been obtained; and
- A return must be made to the court, showing what conversations have been intercepted.

## **2: “Stop and Frisk”**

The police have the authority to stop someone briefly for investigatory purposes. This is called a Terry stop. This stop does not need to be based on probable cause; rather, the police only need a reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968). Further, this reasonable suspicion does not have to be based on the police officer’s own knowledge. It can be based on a flyer, a police bulletin, or an informant. *United States v. Hensley*, 469 U.S. 221 (1985). A state may require a suspect to disclose his name in the course of a permitted “stop and frisk” (Terry stop). *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177 (2004).

## **3: Inspections and Regulatory Searches**

### ***i: Health, Safety, Fire, Special Licenses, Etc.***

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the U.S. Supreme Court held that health, safety, fire, special license, or other such inspectors could not insist on entering private premises without a search warrant. Probable cause of a violation, however, is not a necessary requirement to obtain a warrant. Rather the inspector must demonstrate that “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Id.* No warrant is required in cases of emergency or if, as is commonly the case, the owner gives consent to the inspection. The showing necessary for a warrant for the inspection of a commercial premise is less rigid than that for a private structure. *See v. City of Seattle*, 387 U.S. 541 (1967). This is also true for OSHA (Occupational Safety and Health Agency) inspections. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

If a business is subject to special licensing provisions, like weapons dealers, warrantless inspections are permitted even if unannounced and frequent. *United States v. Biswell*, 406 U.S. 311 (1972).

Although unsettled, it is likely that a warrantless post-fire investigation into a fire’s cause may be conducted if the owner is given reasonable advance notice to enable the owner to be present. *Michigan v. Clifford*, 464 U.S. 287 (1984).

### ***ii: Immigration and Borders***

Immigration or customs officials may search vehicles, baggage, and persons at the border (or its functional equivalent, like an international gateway airport) without probable cause, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), or reasonable suspicion. *United States v. Flores-Montano*, 541 U.S. 149 (2004). These searches can include alimentary canal searches. *United*

*States v. Montoya de Hernandez*, 473 U.S. 531 (1985). The alimentary canal is the passage in the body extending from the mouth to the anus through which food passes.

**iii: Checkpoints – Vehicles**

Vehicles inside the U.S. and not known to have recently crossed its border may be stopped and searched only if there is probable cause to believe illegal aliens or smuggled objects are present. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

- Roving patrols. A stop made not to search but to question briefly the occupants does not require probable cause, but rather a “particularized and objective basis” for suspecting an occupant has committed an immigration violation. *United States v. Cortez*, 449 U.S. 411 (1981).
- Fixed Checkpoint. When a fixed checkpoint (road block) is set up, all cars may be stopped. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). This includes so-called sobriety checkpoints. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990). Random stops, however, are not permitted. *Delaware v. Prouse*, 440 U.S. 648 (1979). Nor are stops permitted to detect evidence of ordinary criminal wrongdoing – as opposed to border control or insuring roadway safety. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Stops whose primary law enforcement purpose is to ask vehicle occupants for information about a crime in all likelihood committed by others, however, are constitutional. *Illinois v. Lidster*, 540 U.S. 419 (2004).

**iv: Factory Survey**

Assuming the Fourth Amendment rights of the owner of the premises are not violated, no warrant is necessary for immigration officials to ask brief questions of factory employees. *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

**v: Search of Vessel in Water**

Authorities may board for inspection of documents, even in the absence of suspicion of wrongdoing, any vessel that is in waters that provide “ready access to the open sea.” *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). The U.S. Supreme Court analogized these searches to fixed checkpoint vehicle searches. *Id.*

**vi: Search of Mail from Abroad**

Mail from foreign nations may be intercepted and opened by customs agents without a warrant if there is “reasonable cause to suspect” that the envelope contains narcotics or other contraband. *United States v. Ramsey*, 431 U.S. 606 (1977). If customs agents discover contraband, they may reseal the package and carry out a “controlled delivery.” The addressee can therefore be identified when he or she receives the package and be prosecuted, if appropriate. *Illinois v. Andreas*, 463 U.S. 765 (1983).

**vii: Supervision of Parolees and Probationers**

Parolees and probationers may be subjected to warrantless searches by officials responsible for them even if probable cause is lacking. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

**viii: Schools and Educational Institutions**

- The police. Although unsettled, the police (acting with or outside the cooperation of school officials) most likely would need probable cause and a warrant to search a student's personal possessions.
- School officials. The permissibility of searches or seizures conducted by school officials in the setting of schools or educational institutions is a balance between the Fourth Amendment rights of students on one hand, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (“[I]t can hardly be argued that either students or teachers shed their constitutional rights...at the schoolhouse gate.”), and the public interest in safe and effective schools on the other. Students possess a limited expectation of privacy within the school environment. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Yet, with the proliferation of drugs or weapons in the schools, teachers and school officials commonly need to conduct searches of students, lockers, bags, and backpacks as a means to maintain a safe and pedagogically appropriate environment.

Thus, the grounds upon which the search is permitted is less strict for school officials, as in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), or *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), than it is for the police.

- Searches of property. Generally, random or individualized searches of bags or backpacks are permissible. School officials acting alone, for instance, may search the person or property (like a purse or backpack) of a student without a warrant. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of a student's purse). All that is required is reasonable grounds “for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 342. Even though it is a Fourth Amendment search, the search will be permissible in scope “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* This rule has been extended to such searches incident to field trips. *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987).
- Searches of lockers. A number of states have enacted statutes that remove a student's expectation of privacy – and thus permit random or individualized searches – of a student's locker. Such statutes often require a written policy to be in place and made known to the affected students. *See, e.g.*, Wis. Stat. § 118.325 (2005).
- Sniff searches. The permissibility of olfactory searches, including dog-sniffing searches, is another common issue. The random or individualized sniffing of the air space surrounding a

student's locker, backpack, bag, or automobile generally is permitted because no legitimate expectation of privacy is thought to exist. Courts are split on the issue of random or suspicion-less sniffs of a student's person. Until the courts clarify the issue, it is probably best to assume that such searches are not permissible.

- Strip searches. Strip searches or body cavity searches may or may not be permissible given the circumstances. A search must be reasonably related in scope to the circumstances which justified the inference in the first place. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). Applying this standard, the U.S. Supreme Court held the strip search of a teen unconstitutional under circumstances where schools officials suspected the teen of possessing painkillers. The alleged contraband did not pose a serious threat to the student (or other students) and the school officials had no reason to suspect the student had the pills in her undergarments. *Safford Unified School Dist. #1 v. Redding*, 129 S.Ct. 2633 (2009). The strip search of schoolchildren without individualized suspicion has also been found unconstitutional. *Thomas v. R.G. Roberts*, 261 F.3d 1160 (11th Cir. 2001), remanded for reconsideration, 536 U.S. 953 (2002), opinion reinstated, 323 F.3d 950 (11th Cir. 2003). Certain states have enacted statutes prohibiting the strip search of any student by school personnel. *See, e.g.*, Wis. Stat. § 118.32 (2011).
- Drug Testing. A school district may require all student athletes to submit to a drug test if the results of the test are not shared with law enforcement authorities and the testing is conducted in a relatively non-intrusive manner. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). Individual suspicion of drug use is not necessary. The Court in *Acton* decided that although the testing was a search within the meaning of the Fourth Amendment, the search was reasonable. The Court has extended this rule to drug testing of students who wish to participate in any extracurricular activity. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).
- Camera or Video Surveillance. Camera or video surveillance of classrooms or common areas, treated as public places, generally is permitted. Absent an individualized suspicion of a violation of the law or school rules, camera or video surveillance of locker rooms or restrooms, given the reasonable expectation of privacy that exists, generally is not permitted. But even in the event of an individualized suspicion, the law is unsettled and legal advice should be sought. In some states it is a criminal violation to capture a representation depicting nudity of a person in a circumstance in which the person has a reasonable expectation of privacy and the person depicted does not consent. *See, e.g.*, Wis. Stat. § 942.09 (2005). It is uncertain how such laws operate in a school setting.
- Educational Records. "Educational records" of agencies or institutions receiving federal funds are given special treatment under federal law. The Family Educational Rights and Privacy Act (FERPA) (also known as "The Buckley Amendment"), 20 U.S.C. § 1232g, limits access to "educational records." These are records that (1) contain information directly related to a particular student, and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. The Act does not prohibit an institution's voluntary disclosure of "directory information" that relates to a particular

student and includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activity or sports, weight and height for members of athletic teams, dates of attendance, degrees and awards received, and the most recent educational agency or institution attended by the student. Other information can be voluntarily disclosed in connection with health or safety emergencies. 34 C.F.R. § 99.36.

Otherwise, only upon the presentation of a subpoena or court order would an institution be clearly obligated to turn over a student's (a) ID number, (b) Social Security number, (c) ethnicity, race, or citizenship, or (d) gender. *See* 34 C.F.R. § 99.31(a)(9).

Peer-graded classroom work is not a record protected by FERPA. *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002).

Department of Education guidance on educational privacy laws suggests that releasing information voluntarily about students in a way that singles them out based on their citizenship, gender, or race, for example, would be considered "harmful or an invasion of privacy." *See* 34 C.F.R. § 99.3. Curiously, the Act in its current form does not give individuals the right to sue for violations. *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

Certain states have enacted statutes creating state law rules for the confidentiality of student records. *See, e.g.*, Wis. Stat. § 118.125 (2005).

#### ***ix: Government Employees***

The police generally need probable cause and a warrant to search a government employee's workplace.

The employer, on the other hand, needs neither a warrant nor probable cause to search the office of a government employee as long as the search is somehow work-related and reasonable under all the circumstances. *O'Connor v. Ortega*, 480 U.S. 709 (1987). This principle extends to an investigation concerning work-related misconduct or inventorying of the contents of a terminated employee's office. Employers generally are permitted to monitor or read an employee's e-mail.

#### ***x: Non-Government Employees***

An employer can search or consent to a search of an employee's work area if the search is for items related to the job. Such consent does not likely extend to areas where the employee is permitted to store non-work-related items. *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951).

No federal law makes it illegal for an employer to gather and compile personal information about employees. This is the case even if the information is unrelated to the job. Employers can monitor an employee's family life, organizational associations, and medical history. Employers can conduct background checks on an employee's personality traits and education. In addition,

- Employers can listen to an employee’s telephone calls. When the call is purely personal, however, the employer must hang up.
- Employers can monitor or read an employee’s e-mail even if the e-mail is marked “private.”
- Employers can listen to an employee’s voice-mail.
- Employers can monitor what is on the screen of an employee’s computer and what remains on an employee’s hard-drive.
- Employers can install software that monitors the number of keystrokes an employee performs per hour, and measures the time an employee is away from that employee’s workstation.
- Employers can make an employee provide a urine sample to test for drugs as a “condition of employment.” The employer may have access to the results of the test, even if certain results are not job related. For instance, the employer would have access to the test results if the results revealed information involving the employee’s conditions connected to (1) use of birth control, (2) pregnancy, (3) epilepsy, (4) manic depression, (5) diabetes, (6) heart disease, or (7) schizophrenia. This list is non-exclusive. It is not incumbent on the employer to confirm the accuracy of the test results.
- Employers can, under certain circumstances (most often subject to employee consent), read an employee’s credit report, and locate an employee’s medical records.
- Employers cannot give an employee a polygraph test, but employers can probe an employee’s thoughts with psychological tests.
- Employers generally can share information about an employee with creditors and government agents.

**C: WAS THE SEARCH OR SEIZURE REASONABLE?**

Recall that the Fourth Amendment proscribes “unreasonable” searches or seizures. The test for reasonableness turns on a number of factors – including the requirement of probable cause.

**1: Did probable cause exist to obtain the warrant?**

Before a court may issue a search warrant, the Fourth Amendment requires that the warrant be based on probable cause provided by an affiant or by the person requesting the warrant.

To be based on probable cause, certain elements must be satisfied. In *Beck v. Ohio*, 379 U.S. 89 (1964), the Court laid out the following required elements:

- *facts and circumstances* are within the affiant’s knowledge;

- the affiant has *reasonably trustworthy information*; and
- this information is *sufficient to warrant a person of reasonable caution* in believing that
  - for arrest – the person to be arrested has committed a crime; or
  - for search and seizure – that certain items specified are fruits or instrumentalities of a crime and are to be located at a specific place.

**2: Was the search or seizure within the bounds of the warrant?**

An important thing to remember is that even if a warrant is legal, the police can only search and seize according to the warrant’s bounds.

An important exception to this general rule is the Plain View Doctrine. If the police are properly conducting a search, and come across items in *plain view* that are not listed in the warrant – but appear relevant to a crime – the police may seize the unlisted items.

**3: Exclusionary Rule**

In *Weeks v. United States*, 232 U.S. 383 (1914), the U.S. Supreme Court, determining that the best way to enforce the Fourth Amendment was through deterrence, created an exclusionary rule. The rule excludes at trial any evidence seized in violation of the Fourth Amendment.

*i: Application to State Government*

The obvious problem with the *Weeks* holding was that it only applied to the federal government. Therefore, the various states were allowed to create their own remedies for enforcing the Fourth Amendment in their respective state courts. *Wolf v. Colorado*, 338 U.S. 25 (1949).

This problem was remedied in *Mapp v. Ohio*, 367 U.S. 643 (1961). The *Mapp* Court held that because the exclusionary rule is tied to the Constitution, any evidence that violates the Constitution has to also *be inadmissible* in a state court.

*ii: Good Faith Exception*

Normally, if a search warrant is invalid, any search done pursuant to it would be unconstitutional and the evidence will be excluded at trial. If the police, however, *reasonably but erroneously believe* that a warrant is valid, the exclusionary rule will not apply.

The U.S. Supreme Court imposed this “good faith” exception for the government in *United States v. Leon*, 468 U.S. 897 (1984). The effect is that if the government can show that a warrant that was later invalidated was initially obtained upon an “objectively reasonable reliance,” the evidence is not excluded. Relying on a balance test between deterrence and exclusion, the *Leon* Court reasoned that because there was good faith on the part of the government actors, the “substantial costs of exclusion cannot be justified.”

Nevertheless, this is not an easy “out” for the police since there is no exception when the Fourth Amendment violation is substantial and deliberate. Some examples of a “substantial and deliberate violation” are:

- when an affidavit was based on knowingly or recklessly false information.
- when an issuing magistrate wholly abandons his judicial role.
- when an affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”
- when there is a facially defective warrant such as failing to specify the place to be searched or things to be seized.

**iii: Wong Sun Doctrine (“Fruit of the Poisonous Tree”)**

This doctrine, announced in *Wong Sun v. United States*, 371 U.S. 471 (1963), is essentially a corollary of the Exclusionary Rule. It applies to “derivative evidence” that police obtain from primary illegal conduct. In other words, the defendant can get “derivative evidence” excluded if he shows that it was (1) obtained from an exploitation of primary illegality or (2) tainted by primary illegality.

The government can overcome this evidentiary problem in three ways. It can show:

- the discovery of the evidence is sufficiently distant in casual connection from the illegal search so as to attenuate the connection between the two;
- an independent source for the derivative evidence; or
- that the evidence would inevitably have been discovered without the unlawful search.

*Nix v. Williams*, 467 U.S. 431 (1984).

**4: Detention Facilities**

A person entering a correctional facility, including jails, prisons, and other detention facilities, are subject to strip searches regardless of the nature or severity of the offense they have been arrested for. *Florence v. Board of Chosen Freeholders of County of Burlington*, 2012 WL 1069092, \*14 (U.S. Supreme Court 2012). The term strip search applies only to those searches where the arrestee is asked to take off their clothes for inspection, but is not touched by the correctional official. *Florence*, 2012 WL at 13. It would not be a “workable” system for correctional officials to have to base their decision on whether to search on the arrestee’s behavior, suspected offense, criminal history, or other factors. *Id.* at 13. Further, persons arrested for minor offenses pose the same security risks as those arrested for serious offenses. *Id.* In order to ensure the security of jails, prisons, and detention facilities, correctional officials need to check inmates for obvious signs of

wounds and other injuries, gang affiliations, and contraband. *Id.* The removal of clothing is necessary for the detection of these issues. *Id.*

In general, correctional officials are allowed to devise reasonable search policies to detect, as well as deter, the possession of contraband in their facilities. *Id.* at 7. The Court exercises substantial deference to the discretion of correctional officials in determining whether a search policy is reasonably related to legitimate security interests. *Florence*, 2012 WL at 7. Without substantial evidence in the record that indicates that correctional officials exaggerated their response of the security need, the Court will defer to the policy. *Id.* This is because, “[c]orrectional officials have a significant interest in conducting a thorough search as a standard part of the intake process.” *Id.* at 9.

## THE FIFTH AMENDMENT

### A: THE TEXT

The Fifth Amendment provides that no person “shall be compelled to be a witness against himself...”

### B: APPLICATION

This protection has been interpreted to mean that an individual cannot be forced to give self-incriminating *testimony*.

The Court used this interpretation as a basis for its decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). After *Miranda*, specific warnings and a waiver must be given to an individual who is placed by the police *in a custodial setting* in order for any confession to be admissible. Accordingly, before a person in custody is subject to interrogation, the person must be informed that:

- The person has the right to remain silent.
- Anything the person says can be used against the person in a court.
- The person has the right to an attorney.
- If the person cannot afford an attorney, an attorney will be provided.

This warning is required no matter how small the crime. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

### C: EXCEPTIONS AND EXCLUSIONS

No Miranda rights are required if the person is in a *non-custodial setting*. A *custodial setting* usually is limited to being *under arrest*. It may, however, also include situations in which the police suggest that a person cannot leave police presence.

#### 1: Waiver

A person may and frequently does waive his Miranda rights. This is done by speaking to police despite the warning.

#### 2: Non-Custodial Interrogations

If the police speak to a person before arresting that person, usually the interrogation is non-custodial. Therefore, no Miranda rights need be given. In the context of a requirement that a

suspect identify himself during a “stop and frisk” (Terry stop), the requirement does not violate the Fifth Amendment’s prohibition on self-incrimination unless such disclosure presented a reasonable danger of incrimination or would furnish a link in the chain of evidence needed to prosecute him. *Hibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177 (2004).

### **3: Private Papers/Diaries/Journals/Letters**

The U.S. Supreme Court has yet to decide squarely whether the Fifth Amendment protects against the forced surrender of personal papers. Lower courts are split on the issue. The leading lower court opinion on the subject involved the attempt by a Senate committee to enforce its subpoena of the diary of Senator Bob Packwood. The district court held that the Fifth Amendment did not protect Senator Packwood and ordered the diary to be turned over. *Senate Select Committee on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C. 1994).

The Fourth Amendment, it should be noted, also does not protect individuals from having their private papers searched or seized if the government has a reasonable justification for believing that it contains evidence of a crime. *Warden v. Hayden*, 387 U.S. 294 (1967).

When asked if she was keeping a diary, Hillary Clinton responded, “Heavens no! It would get subpoenaed. I can’t write anything down [Laughing].” *The NewsHour with Jim Lehrer*, May 29, 1996.

### **4: Exculpatory No**

Any false denial of wrongdoing during the course of an official government investigation can itself be punished as a false statement under 18 U.S.C. § 1001. The Fifth Amendment right against compulsory self-incrimination does not include the right to lie to investigators – even if the statement is a reflexive denial of guilt. *Brogan v. United States*, 522 U.S. 398 (1998); *LaChance v. Erickson*, 522 U.S. 262 (1998).

## THE SIXTH AMENDMENT

### A: THE TEXT

The Sixth Amendment provides in part that “In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.”

### B: APPLICATION

The right to counsel means the right to engage (hire) counsel. The U.S. Supreme Court made this right applicable to the states in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Also in *Gideon*, the Court held that the Sixth Amendment automatically entitles an *indigent* defendant to appointed counsel in felony cases. “Indigence” is defined as “lacking funds to hire a lawyer.” The courts have generally determined the existence of indigence on a case-by-case basis.

The U.S. Supreme Court, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extended the right to counsel to all indigent misdemeanor defendants faced with a potential jail sentence.

The U.S. Supreme Court has extended the right to appointed counsel to a juvenile delinquency proceeding in which institutional commitment was a possibility. *In re Gault*, 387 U.S. 1 (1967). The *Gault* holding likely applies to other proceedings that are comparable in seriousness to a felony prosecution – including, perhaps, civil commitment proceedings in which a significant deprivation of freedom is a possibility.

The right to counsel attaches only upon these events:

1. The suspect is to be questioned by the police in custody. *Gideon v. Wainwright*, 372 U.S. 335 (1963); or
2. The prosecutor has initiated formal proceedings against a suspect. *Moore v. Illinois*, 434 U.S. 220 (1977); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

Even if, however, *the suspect prior to police questioning has established an attorney-client relationship*, the suspect has no Sixth Amendment right to have the police respect that relationship. Thus, the police may decline to tell a suspect that the suspect’s family has retained a lawyer who is trying to contact the suspect, or may falsely tell the lawyer that the police will delay interrogating the suspect until the next day. *Moran v. Burbine*, 475 U.S. 412 (1986).

## **SPECIAL AREAS OF THE LAW**

### **A: CRIMINAL INVESTIGATIONS OF CORPORATIONS OR OTHER ENTITIES**

Although corporations and other legal entities do not enjoy the Fifth Amendment right against self-incrimination, *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S. 361 (1911), corporations and other legal entities do enjoy the Fourth Amendment protection against unreasonable searches and seizures, *see G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), as well as the attorney-client privilege, *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318 (1915), and the work product doctrine, *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

It is important to note, however, that a corporation's interest often is not identical to the interests of the corporation's officers, directors, or employees.

Government investigators or prosecutors often insist, even at the outset of a corporate investigation, that corporations turn over privileged communications, attorney work product, and incriminating statements from corporate employees as a condition of favorable treatment. The government often views a corporation's failure to disclose privileged information as an effort to conceal the truth. It is best to assume that a corporation will turn over privileged information including employee statements and records.

In the context of a corporation's internal investigation, corporate officers, directors, or employees should consider that the questions asked, answers received, and the advice given may soon be in the hands of a prosecutor, competitors, and civil litigants. Individuals in this situation should strongly consider engaging their own independent legal counsel – even if this means that the employer may stigmatize or fire them.

Officers, directors, or employees approached directly by the government likewise should strongly consider engaging their own independent legal counsel – even if this means that the employer may stigmatize or fire them.

From an individual's point of view, remaining silent or invoking the Fifth Amendment privilege against self-incrimination usually is more advantageous than making incriminating statements or falsely exculpatory statements.

*See Zornow and Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147 (2000).

### **B: TAX INVESTIGATIONS**

#### **1: Criminal**

Every criminal tax investigation is a potential criminal prosecution. Tax investigators have three general sources of information: (1) referrals from other tax agency functions, (2) information-gathering activities of investigating agents, and (3) information items provided by members of the public, other governmental agencies, and reports of currency transactions.

Information items can come from a number of sources. Investigating agents have administrative summons power to obtain testimony and records from third parties. 26 U.S.C. § 7602. These records can include accountant records (in federal investigations and in state investigations where no accountant-client privilege exists), bank records, brokerage records, private business records, and insurance records. Alternatively, in federal cases, investigations are frequently conducted through a grand jury of a local federal district court that uses the district court's subpoena power.

Informants (often a disgruntled spouse, employee, or relative) supply much of the information about individual taxpayers. Informants are sometimes motivated by the financial reward that the Internal Revenue Code provides (under limited circumstances) for such information. 26 U.S.C. § 7623. At some point during the investigation, often in an early stage, the investigating agent contacts the taxpayer or other suspect. The investigating agent is not required to give Miranda warnings to a taxpayer in a normal investigation because the taxpayer is not in custody. *Beckwith v. United States*, 425 U.S. 341 (1976). Federal agents, and many state agents, however, are instructed in unequivocal terms to identify themselves to the taxpayer and to state that one of their functions is to investigate the possibilities of criminal violations of the tax laws. In addition, under IRS procedures, the agent must advise the taxpayer of his constitutional rights not to speak and to be represented by a lawyer and must caution the person that if he chooses to speak, anything he says can be used against him. Internal Revenue Manual § 9.4.5.11.3.1 (05-15-2008).

Despite these warnings, taxpayers often make damaging admissions to investigating agents. This is why the IRS advises agents that “the confessions or admissions of alleged violations are major factors in resolving tax cases.” Internal Revenue Manual § 9.4.5.3 (05-15-2008).

Usually cooperation with an investigating agent is not viewed as a defense to a violation; rather, it may only serve to mitigate the penalty. Therefore, if doubt exists about the matter, the taxpayer probably should not cooperate by speaking to the agent or otherwise making a disclosure without the assistance of a lawyer.

Persons should be aware of the voluntary disclosure programs offered by the Internal Revenue Service and various state tax authorities. While these programs differ in specifics, the basic premise of each is that if, before being contacted by the agencies or being alerted to the likelihood or inevitability of an audit, a taxpayer comes forward voluntarily with information that would materially change and correct a filed return (or would indicate that a non-filed return will soon be filed), the tax authorities will give weight to the fact in deciding whether to investigate or charge the taxpayer criminally. The IRS voluntary disclosure program explicitly is not a guarantee of immunity from criminal prosecution and does not confer substantive or procedural rights. It is, rather, a means by which a taxpayer may win a no-prosecution recommendation. In practice, the IRS most often elects not to criminally investigate – or recommend charges against – a taxpayer for a tax offense if that person has come forward under the voluntary disclosure rules. I.R.S. News Release IR-2002-135 (12-11-2002); Internal Revenue Manual § 9.5.11.9 (12-02-2009). Legal source income is a further eligibility requirement for the voluntary disclosure program. *Id.*

A word of caution is appropriate here. If a taxpayer has reason to believe that the IRS may have already initiated an inquiry likely to lead the criminal investigators to the taxpayer, before doing

anything else the taxpayer should try to confirm the activity. Most taxpayers who are already under criminal investigation will not wish to participate in the voluntary disclosure program. Such taxpayers probably will be better served by preserving their constitutional rights.

## **2: Civil**

Civil tax investigations are not materially different than civil investigations by other government agencies. Federal civil tax investigators, and many state civil tax investigations, have summons power to compel the testimony of individuals or the production of documents.

*See generally* Saltzman, *IRS Practice and Procedure*, (Revised 2d ed., WGL 2005).

## **C: ENVIRONMENTAL INVESTIGATIONS**

The Environmental Protection Agency (EPA) is a federal agency whose mission is to protect human health and the environment. The EPA generally is authorized to enter facilities that are regulated under federal environmental statutes to assess statutory compliance with the statute. The Administrator of the EPA generally delegates this authority to various offices of the EPA or to outside representatives. The extent of EPA's inspection and sampling authority, as well as the rights of a regulated entity, depend upon the statute under which the EPA conducts the inspection. EPA's authority under each of the major federal programs is discussed below.

- Clean Water Act (CWA) 33 U.S.C. § 1318(a)

The Clean Water Act establishes the structure for regulating discharges of pollutants into the waters of the United States. Generally, a permit is required for a person or company to discharge pollutants from a point source into navigable waters. Most often, inspections involve permit compliance matters. The EPA Administrator can delegate inspection authority to a contractor. An inspector is not required to provide advance notice of inspection. The inspection must occur at reasonable times. The inspector must present credentials. The facility must give the inspector access to records related to compliance and provide the inspector with an opportunity to copy those records. The inspector may conduct sampling of wastewater effluent. Samples may include quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged and which the facility is required to monitor. The EPA is not required to provide the facility with a portion of the effluent sample taken from the point source, a receipt for such sample, or a copy of the analytical results.

- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. §§ 136e and 136f

In general, the Federal Insecticide, Fungicide, and Rodenticide Act regulates the approval and usage of pesticides. The EPA has inspection authority for establishments or other places where pesticides or related devices are held for distribution or sale. The EPA Administrator is authorized to delegate inspection authority to a state or political subdivision. The inspector must provide to the owner, operator, or agent of the establishment to be inspected (whether the establishment itself or the records are to be inspected) a written statement of the reason for the investigation and whether a violation of the law is suspected. Further, the inspector is required to present credentials prior to

inspection. If no violation of the statute is suspected, the inspector is required to present an alternate and sufficient reason for the inspection.

The inspector may access and copy records with the exception of financial, sales, pricing, personnel and research data – unless the data relates to registered pesticides or pesticides for which an application for registration has been filed. The inspector can require access to all records showing the delivery, movement, or holding of pesticides or related devices, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee.

The inspector is authorized to sample pesticides and related materials. If the inspector takes a sample, the inspector is required to provide a receipt that describes the samples taken. If an owner, operator, or agent in charge requests, a portion of each sample equal in volume or weight to the portion taken must be given to the requesting person. The inspector is required to promptly provide copies of any analysis performed on the samples.

- Clean Air Act (CAA) 42 U.S.C. § 7414

The Clean Air Act regulates air pollutants. To that end, a representative designated by the EPA Administrator has a right to inspect regulated facilities upon the presentation of credentials. The statute permits the delegation of authority to regulate in this area to the various states under what is called a state implementation plan (SIP). A SIP is a collection of the regulations a state will use to clean up the state's air to ensure acceptable air quality. Even when a SIP is in place, however, EPA retains oversight authority.

A federal or state inspector, as the case may be, can sample the emissions and inspect the records of regulated facilities. Sample splits, receipt for agency's samples, or return of analytical results are not required under the statute. The statute does not require advance notice of inspection to the regulated facility. If a SIP is in place, the EPA may still do its own inspection provided that it notifies the state of the inspection activity.

- Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6927

The Resource Conservation and Recovery Act regulates hazards related to waste disposal. A waste may be considered hazardous if it burns readily, is corrosive, or explosive. Waste may also be considered hazardous if it contains certain amounts of specifically regulated toxic chemicals or if it is a specifically designated hazardous waste. The EPA Administrator may delegate inspection authority. The inspector is not required to provide notice or present credentials. The inspector may sample wastes and inspect the records of the establishment. If an owner, operator, or agent in charge requests, a portion of each sample equal in volume or weight to the portion taken must be given to the requesting person. The inspector is required to promptly provide copies of any analysis done on the samples.

- Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-4

The Safe Drinking Water Act sets standards for drinking water quality and oversees the states, localities, and water suppliers who implement those standards. The EPA Administrator designates a

representative to perform inspections. The inspector must provide written notice prior to an inspection. The inspector is required to present credentials before an inspection. A state may be delegated regulatory authority. The EPA, however, maintains oversight authority. If a state has regulatory authority, the EPA may nevertheless conduct an inspection but must notify the state and provide the state with the reasons for the inspection. An inspector may conduct sampling and inspect records. The statute does not require the inspector to provide sample splits, a receipt for samples, or the return of analytical results.

- Toxic Substances Control Act (TSCA) 15 U.S.C. § 2610

The Toxic Substances Control Act authorizes the EPA to track industrial chemicals produced in the United States or imported into the United States. The statute requires written notice of inspection and the presentation of the inspector's credentials. The EPA may issue subpoenas to require testimony of witnesses or the production of reports, documents, or other information. Inspection of records is permitted; provided, however, that the inspection of financial, sales, pricing, personnel, and research data is permitted only if the nature and extent of the data is described with particularity in the notice of inspection.

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. § 9604

The Comprehensive Environmental Response, Compensation and Liability Act, sometimes referred to as Superfund, grants the EPA authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. The President of the United States may designate any officer, employee, or representative to conduct inspections. The inspector is not required to present credentials. The inspector is not required to provide prior notice of inspection. The inspection, however, must occur at a reasonable time. The inspector must give reasonable prior notice for the inspection of records. The inspector is permitted to conduct sampling. If an owner, operator, or agent in charge requests, a portion of each sample equal in volume or weight to the portion taken must be given to the requesting person. The inspector is required to promptly provide copies of any analysis done on the samples.

## **D: FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT**

Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in 1966. FOIA provides that any person has the right to request access to executive federal agency records or information. It does not apply to state or local governments or private businesses or individuals. The right of access is enforceable in federal court.

FOIA contains nine categories of exempt information that agencies are permitted (but generally not required) to disclose. In addition, FOIA contains three categories of information excluded from its reach. (The exclusions allow agencies to avoid the acknowledgment of the existence of certain records related to certain law enforcement investigations, informants, or foreign intelligence, counterintelligence, or international terrorism matters.)

Information exempt from disclosure under FOIA includes:

- National defense or foreign policy secrets.
- Internal agency personnel rules and practices.
- Matters specifically exempted from disclosure by statute.
- Trade secrets and commercial or financial information if privileged or confidential.
- Inter-agency or intra-agency memoranda or letters not available to third parties by law.
- Personnel and medical files and similar files that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.
- With certain exceptions, records or information compiled for law enforcement purposes.
- Information connected to the examination, operation or condition of financial institutions generated by regulating or supervising agencies.
- Geographical and geophysical information and data (including maps) concerning wells.
- Information provided by non-federal parties to the Department of Homeland Security (or forwarded from the Department of Homeland Security to other federal agencies) that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism.

FOIA requests should be made in writing to an agency component's central FOIA office. There is no initial fee to file a request. By law, however, an agency is entitled to charge certain fees in connection with the request.

Under certain circumstances, a person may be entitled to receive more information under the *Privacy Act of 1974* than under FOIA. The Privacy Act permits citizens or aliens with permanent residency status to seek information about them that is in a system of records maintained under their names or other personal identifiers.

Eligible individuals can make a written Privacy Act request that a federal agency search its central files in Washington, D.C. as well as regional and local offices throughout the country. The FBI, however, will not honor requests for searches of its field offices. Requests must be directed to those field offices directly. Under the Privacy Act, agencies cannot charge for search time but can charge for copying costs.

*See generally*, Department of Justice Freedom of Information Act Reference Guide, [www.justice.gov/oip](http://www.justice.gov/oip) (Revised January 2010). *How to Use the Federal FOI Act*, Reporters Committee for Freedom of the Press, [www.rcfp.org](http://www.rcfp.org).

## **E: STATE OPEN RECORDS AND OPEN MEETINGS LAWS**

Each state has laws governing public access to state courtrooms, court and agency records, meetings of public bodies, and access to public facilities. Most of these laws, while differing on certain specifics and avenues for enforcement, favor open access to public records, meetings, and facilities. *See* Reporters Committee for Freedom of the Press, [www.rcfp.org](http://www.rcfp.org).

## **F: FOREIGN INTELLIGENCE SURVEILLANCE ACT/FISA COURTS/PATRIOT ACT/HOMELAND SECURITY ACT**

The Foreign Intelligence Surveillance Act (FISA) 50 U.S.C. § 1801, enacted by Congress in 1978 and amended a number of times, provides a statutory structure for foreign intelligence gathering purposes in connection with electronic surveillance, physical searches, pen registers, and trap and trace devices.

Under FISA, the Chief Justice of the United States Supreme Court designates eleven U.S. district court or court of appeal judges to serve on a rotating basis as a court that has jurisdiction over applications for and orders approving electronic surveillance anywhere in the United States. A special court of review populated by three judges similarly designated hears appeals of denials of an order under FISA.

FISA National Security Letters (NSL). The NSL authority is to intelligence investigations what the summons authority is to non-intelligence investigations. An NSL is a form of a summons. The NSL authority exists in three separate statutes: the Electronic Communications Privacy Act, 18 U.S.C. § 2709, for telephone and electronic communication records, the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414(a)(5)(A), for financial records, and the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681u, for credit records.

The NSL authority prohibits any disclosure at any time that the FBI has sought the subject information. This is in contrast to the procedures for court orders and warrants where, even under the Patriot Act, disclosure must occur eventually.

Interestingly, the Video Privacy Act of 1988, 18 U.S.C. § 2710 (the Bork Bill), was drafted to include a library privacy provision. When the FBI requested an NSL exemption to the provision to enable it to obtain library records, the library privacy provision was dropped. Thus, the law is unsettled whether NSL authority extends to library or bookstore records – although some evidence exists that the FBI has, after September 11, 2001, attempted to use NSL authority in this way.

FISA does not apply to electronic surveillance activity outside of the United States. Such surveillance is governed by Executive Order 12333 issued by President Ronald Reagan in 1982.

The Patriot Act of 2001 expanded the availability of FISA investigations. FISA applications are now permissible where a “significant” purpose of the investigation is foreign intelligence gathering rather than the sole or primary purpose. FISA authorized investigations can be used, and information exchanged, both for foreign intelligence investigation purposes and for criminal prosecution purposes – even though FISA “counterintelligence” warrants can be issued based on

less evidence of wrongdoing than criminal warrants require. United States Foreign Intelligence Surveillance Court of Review, *In re Sealed Case No. 02-001*, 310 F.3d 717 (2002).

The Patriot Act broadened the scope of applications for court orders for the production of business records (now more broadly defined). An application for a court order may now be directed to any entity and to any “tangible thing” with a showing only of “relevance” to an intelligence or terrorism investigation. This can include, it is believed, an order to a library or bookstore for a release of customer records. A secrecy provision allows a court to delay immediate notification of the execution of any order (sneak-and-peek) if it would have an adverse result as established by a specific government showing.

The Patriot Act modified the NSL authority to permit the FBI to issue an NSL based upon a bare certification of relevance to an intelligence or terrorism investigation.

The Patriot Act permits, upon written application to a court of competent jurisdiction, an order allowing access to educational records of students now protected by the Federal Educational Rights and Privacy Act (FERPA) for intelligence or terrorism investigations.

The Patriot Act amended FISA to permit applications for so-called multipoint or “roving” electronic surveillance. Pen registers and trap and trace techniques can now be authorized for e-mails (including routing information) as well as for telephone communications (including voice mail messages).

The Patriot Act prohibits FISA courts from granting orders based solely upon a United States person’s (U.S. citizen or permanent resident alien) exercise of First Amendment rights. The Act grants a private right of action against the United States for inappropriate disclosure or use (“willful violations”) of foreign intelligence or international terrorism investigation information by government personnel.

President Bush signed the Homeland Security Act of 2002 on November 25, 2002. The Act gives the Secretary of Homeland Security access to certain FISA-related investigatory information.

## **PRIVILEGES**

A privilege is the right of a person not to disclose information about a particular communication or event. There are two policy reasons behind these privileges: (1) privacy and (2) society's desire to encourage the creation or protection of certain relationships.

With the exception of the privilege against self-incrimination, privileges are not constitutionally mandated. Therefore, both the federal court system (divided into various federal circuits) and each state have developed their own set of privileges.

The law of privileges in the federal circuits generally has arisen from common (judge-made) law. The Federal Rules of Evidence, as originally proposed, set out to codify the federal law of privileges into nine non-constitutional privileges: required reports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and certain other official information, and identity of informer. Proposed Fed. R. Evid. 502-510, 56 F.R.D. 234-56 (1973). Congress, however, rejected this package.

Instead, Congress enacted a revised Fed. R. Evid. 501 only. This rule sets up a two-part system of privilege law in federal courts.

In civil cases where state law supplies the rule of decision (so-called "diversity cases" in which the parties are from different states), the subject state law of privilege applies.

In criminal cases, and in civil "federal question" cases, the federal courts are free to use their own judgment subject to "the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." In making this federal common law, federal courts often look to the proposed Federal Rules of Evidence. With the limited exception of the privilege against self-incrimination (the Fifth Amendment to the U.S. Constitution here provides a legal baseline), each state has its own set of laws regarding privileges. Some are enacted by statute; others arise from common law.

All states recognize, in some form, the attorney-client, husband-wife, clergy-penitent, and government information privilege. All but ten recognize some form of the physician-patient privilege. State recognition of additional privileges drops off significantly after these instances.

### **A: ACCOUNTANT/CLIENT PRIVILEGE**

No accountant-client privilege historically was recognized in federal law. However, Congress created a new, special privilege for tax practitioners in the Internal Revenue Service Restructuring and Reform Act signed by President Clinton on July 22, 1998. Section 7525 of that law extends the traditional attorney-client privilege to confidential communications concerning tax advice between taxpayers and federally authorized tax practitioners. Tax practitioners can include certified public accountants or enrolled agents.

Congress limited the privilege to:

- *Non-criminal tax matters* before the Internal Revenue Service.
- *Non-criminal tax proceedings in federal court* by or against the United States.

Congress also stated that the privilege is inapplicable to:

- *Written communications* between a federally authorized tax practitioner and a corporation or its representatives in connection with *any tax shelter*.

The definition of a “tax shelter” turns out to be broader than common sense would suggest. Tax shelter is defined to include any plan or arrangement whose principal purpose is the avoidance of federal income tax. This, of course, could be just about anything.

About one-third of the states have granted a privilege for communication to accountants.

## **B: ATTORNEY/CLIENT PRIVILEGE**

Communications between the attorney and client made during the professional relationship are privileged. The communication also applies if the communication is between the client and the attorney’s representative.

The privilege belongs to the client. Accordingly, only the client can waive this privilege. The privilege generally survives the death of the client. *Swidler and Berlin v. United States*, 524 U.S. 399 (1998).

A corporation or other legal entity enjoys the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In practice, this means that employee communications “on behalf of the entity” with entity legal counsel in connection with seeking – or facilitating the giving of – legal advice for the entity are privileged.

Some important exceptions to the privilege exist. For instance, there is no privilege if the lawyer’s advice was sought to aid in the planning, commission, or cover-up of a crime (“crime-fraud” exception). There is also no privilege for a communication that is relevant to a dispute between the attorney and client, such as malpractice or failure to pay fees. Another exception involves contests concerning a person who receives a deceased client’s property. Still another exception involves communications with an attorney in connection with a tax return. (This is thought to be “accountant” work outside the attorney-client privilege.) *See United States v. KPMG LLP*, 316 F.Supp. 2d 30 (D.D.C. 2004). To be on more solid footing for privilege purposes, the communication must be limited to tax planning advice.

The fact that a client turns over to the attorney physical evidence or documents normally does not make those items in any way “privileged” or immune from disclosure.

A subset of the attorney-client privilege is the work product privilege. This privilege was first announced by the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine of work product immunity insulates a lawyer from being required to disclose certain information the lawyer obtains or creates while preparing for a lawsuit. The relevant rule is Rule 26(b)(3) of the Federal Rules of Civil Procedure. Most states follow this rule.

Under rule 26(b)(3), a party may obtain discovery of a document that was “prepared in anticipation of litigation or for trial” by the other party only “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” That is so-called “qualified” immunity. That is, the immunity is capable of being overridden.

Some materials, however, are so much the product of the lawyer’s own thinking that close to an absolute immunity may exist. The last sentence of Rule 26(b)(3) states that “in ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation.” This likely means that no showing of need will be sufficient to compel disclosure of such material.

The law is unsettled as to whether the work product privilege may be asserted by the attorney as well as by the client. Compare *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980) (work product privilege may be asserted either by the lawyer or by the client), with *In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S. 2d 985 (1997)(work product privilege belongs solely to the client).

## **C: DOCTOR/PATIENT PRIVILEGE**

This is a privilege that forbids a doctor from disclosing any information obtained while treating a patient, provided that the information was necessary to the treatment. The privilege is thus limited. For example, a doctor could be compelled to testify about a patient’s statement regarding family troubles if the doctor did not need that information to treat the patient’s broken foot.

As with the Attorney-Client privilege (the work product doctrine aside), only the patient holds this privilege and only the patient can waive it. *However, one must be careful because not all jurisdictions provide for this privilege and there are exceptions.* These exceptions include but are not limited to (1) a dispute between the doctor and patient, (2) to aid in wrongdoing, (3) situations in which an agreement to waive the privilege exists in connection with a life insurance policy.

Nearly all states, and the federal courts, now recognize a *psychotherapist-patient privilege*. See *Jaffee v. Redmond*, 518 U.S. 1 (1996). Usually this privilege extends to medical doctors and psychologists (including qualified social workers). This is a qualified privilege. It may be overridden. Usually the exception is in the context of a criminal defendant’s Sixth Amendment right of confrontation of a witness whose mental or emotional condition may cast doubt on that witness’ credibility. Also, if a therapist reasonably believes a patient may be dangerous to others, many jurisdictions permit or even require that the therapist give authorities or the intended victim reasonable warning.

## **D: GOVERNMENT INFORMATION PRIVILEGE**

### **1: Military and State Secrets**

For this information, an absolute privilege exists.

### **2: Internal deliberations (including law enforcement investigative files) and policymaking**

A qualified privilege exists here. The privilege will apply only if the damage to the public welfare from disclosure outweighs the litigant's need for information. A criminal defendant, however, does have the right to certain information, including witness statements or the results of certain tests.

When information is held by the federal government, the Freedom of Information Act (FOIA) may become involved. FOIA makes many kinds of governmental information available to any citizen (even non-litigants) upon request. FOIA, however, has special exemptions that match most of the government information privileges.

The privilege between the President and his advisors is protected by a qualified privilege based on the separation of powers principle from the U.S. Constitution. *United States v. Nixon*, 418 U.S. 683 (1974).

The government has a special qualified privilege to decline to disclose the identity of informants who give information about crimes. If an informant is a participant in the alleged wrongdoing, a criminal defendant usually is entitled to the informant's identity.

Required reports or returns (like tax returns) are not privileged per se. If, however, a statute that imposes the duty to report also includes a provision prohibiting the government from disclosing the information (e.g., 26 U.S.C. § 6103 in the case of federal tax return information), then courts generally will honor the statutory prohibition and treat it as a privilege.

## **E: JOURNALIST'S PRIVILEGE**

In recent years, courts have recognized a qualified privilege for journalists. This privilege permits journalists to decline to divulge the identities of their confidential news sources.

The constitutional status of the privilege is uncertain. The U.S. Supreme Court, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), narrowly rejected such a constitutionally based privilege. Post *Branzburg* lower courts, however, have occasionally tried to reconstruct (or declined to reconstruct) the privilege on constitutional or common law grounds. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005)(collecting cases).

The journalist-source privilege has evolved mostly by the enactment of state statutes. A little over half the states have enacted "shield laws" that give journalists various degrees of protection against being forced by legal process to testify about their confidential sources. Some statutes give journalists protection against forced disclosure of notes and records connected to the source.

If the privilege conflicts with a criminal defendant's Sixth Amendment right to compulsory process and to confront a witness against the defendant, then the privilege likely will give way to the defendant's Sixth Amendment rights. *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978).

#### **F: MARITAL COMMUNICATIONS/SPOUSAL IMMUNITY**

The privilege for *confidential marital communications* prevents disclosure of *confidential communications* (oral, written, or gesture) made by one spouse to the other *during marriage*. The privilege may be asserted even if the marriage has ended. Federal law recognizes the privilege as belonging to the spouse who made the communication only. The states are split on this issue. The presence of a third person during the communication, even a child old enough to understand the communication, may destroy the confidentiality element. The privilege is available in both civil and criminal cases. A non-party witness may assert the privilege.

Exceptions to the privilege include the prosecution for a crime committed by one spouse against another, suits between spouses, and communications for purposes of planning, committing, or facilitating a crime.

The *adverse testimony privilege* (sometimes called "spousal immunity") gives a spouse complete protection from *adverse testimony in criminal cases* by the other spouse. The privilege usually applies even if the subject of the testimony arose before the marriage occurred. The privilege usually extends to out-of-court statements.

The adverse testimony privilege is recognized as a matter of federal common law. Only a slight majority of the states, however, recognize the privilege.

Courts and statutes are not in agreement as to who holds the privilege. Federal law holds that the privilege belongs to the *testifying spouse, rather than the party spouse*. *Trammel v. United States*, 445 U.S. 40 (1980). The states are split on this issue.

Federal law and some states hold that the privilege may be asserted in grand jury proceedings.

The witness and the defendant must be married at the time the privilege is asserted. Thus, the defendant has no privilege to keep his ex-spouse from testifying.

The privilege does not apply when one spouse is charged with a crime or tort against the other spouse, or against a minor child of either.

#### **G: CLERGY/PENITENT PRIVILEGE**

Each state has some form of the clergy-penitent privilege. The penitent, as holder of the privilege, can assert the privilege in order to prevent the clergy member from disclosing a confidential communication related to spiritual guidance or advice.

Usually, a clergy member would include a priest, minister, rabbi, or other person who holds a similar function within the religious organization. Self-designated ministers or ministers of fringe cults probably would not be regarded as clergy for purposes of the privilege.

Generally, the presence of a third party would make the communication non-confidential. If, however, a third party is present but nevertheless a reasonable expectation of confidentiality exists, or if the presence of the third party is necessary for the furtherance of the communication, a court may recognize the privilege. *See In re Grand Jury Investigation*, 918 F.2d 374, 386 (3rd Cir. 1990).

Importantly, some jurisdictions do not recognize the clergy-penitent privilege if the confidential communication pertained to child abuse.

In light of proposed Federal Rule of Evidence 506, it is likely that a federal court in a federal question case would recognize this privilege.

## INVESTIGATIVE ETIQUETTE – SITUATIONAL

*Information in this section is not intended to stop you from cooperating with proper law enforcement investigations.*

*It is never a good idea to speak inappropriately to or physically touch a police officer, run away, or complain. Be respectful. Lying to the police is a crime.*

*Remember, anything you say or do can be used against you.*

*One final note. Exercising your rights may subject you to short-term inconvenience. Be aware, however, that the most basic premise of our constitutional rights is to protect innocent people from being ensnarled in ambiguous situations.*

Constitutional Rights:

- The right to remain silent and the right to talk to a lawyer.
- The right to be free from “unreasonable searches and seizures.”
- The right to advocate for change. Note: immigration authorities can target non-citizens for reasons otherwise protected by the First Amendment as long as the person can be deported for other reasons.

### **A: TRAFFIC STOP**

Upon request, you must show the police your driver’s license, registration, and proof of insurance. You – or part or all – of the vehicle can be searched without a warrant if probable cause exists. You do not have to consent to a search of your person or the vehicle. If you are suspected of drunk driving and refuse to take a blood, urine, or breath test, or a field sobriety test, your license may be suspended.

*Possible Response:*

“Officer, I wish to remain silent. I wish to invoke my right to speak with my attorney. I do not consent to the search of my vehicle or of my person. Do you understand? May I have your name and badge number please?”

### **B: SEARCH OF RESIDENCE OR WORKPLACE**

In a non-emergency situation, if the police approach your home and ask to enter, you do not have to admit them unless they have a search warrant. If the police say they have a warrant, you can ask to see it. You do not have to speak with the police. If you are arrested, the police can search you and the area close by. This usually means the room you are in.

*Possible Response:*

“Officer, do you have a search warrant? May I see it? I wish to remain silent. [My children wish to remain silent.] I wish to invoke my right to speak with my attorney. I do not consent to a search of the premises or of my person [or of my children’s person]. Do you understand? May I have your name and badge number please?”

**C: QUESTIONING BY POLICE**

It is not a crime to refuse to answer questions. Knowing about a crime is generally not a crime. In certain jurisdictions, however, you can be arrested for refusing to identify yourself on the street. Police may “pat down” your clothing if they suspect you are carrying a concealed weapon. You do not have to consent to a further search, however. If you are arrested, you have a right to know why. You do not have to say anything without a lawyer.

*Possible Response:*

“I wish to remain silent. I [and my children] wish to invoke my right to speak with my attorney. I and my spouse [and my children] do not consent to a search of any kind. Do you understand? May I have your name and badge number please?”

**D: QUESTIONING BY NON-LAW ENFORCEMENT INDIVIDUALS**

*Note: for students, this category includes school educators, administrators, or officials.*

It is not a crime to refuse to answer questions by a person who is not connected to the police. This may include, for example, private investigators, your employer, your teacher, your high school assistant principal, or the dean of students.

*Possible Response:*

“I do not wish to speak with you. Do you understand? May I have your name and telephone number please? If you must, please speak with my attorney. [Or in the case of a minor or student, ‘Please speak to my parent.’] Here is my parent’s card. Here is my attorney’s name, phone number, and card.”

**E: QUESTIONING OF NON-CITIZENS BY THE IMMIGRATION AND NATURALIZATION SERVICE (INS)**

You may demand your rights and ask to speak with a lawyer. If you do not demand your rights or if you sign papers waiving your rights, the INS may deport you before you see a lawyer or appear before an immigration judge.

*Possible Response:*

“I wish to invoke my rights. I wish to remain silent. I [and my spouse or children] wish to speak with my attorney. I [and my spouse or children] do not consent to a search of any kind. Do you understand? May I have your name and badge number please?”

## **SUMMARY**

Our understanding and adherence to the laws and animating principles ground by the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution is essential to the preservation of the special nature of our great country. It is the same with the laws of privacy – the flip side of the same coin. The right to be left alone – and all that goes with that idea – is the foundation of our essential freedoms. This right, however, must always be weighed against the legitimate needs of government for information that is considered to be private.

The balancing of rights and obligations in our society is a dynamic enterprise. As circumstances change, so does the law or the application of the law.

The great republican experiment called the United States of America requires our participation – both to educate ourselves about our rights and responsibilities and to protect ourselves from the diminishment of those rights absent our knowledge and consent.

## OTHER SOURCES OF INTEREST

American Civil Liberties Union, [www.aclu.org](http://www.aclu.org).

Electronic Privacy Information Center, [www.epic.org](http://www.epic.org).

Findlaw, [www.findlaw.com](http://www.findlaw.com).

Fried, *Privacy*, 77 Yale L.J. 475 (1968).

Internal Revenue Service, [www.irs.gov](http://www.irs.gov).

Privacilla.Org., [www.privacilla.org](http://www.privacilla.org).

Privacy Foundation, [www.privacyfoundation.org](http://www.privacyfoundation.org).

Privacy Rights Clearinghouse, [www.privacyrights.org](http://www.privacyrights.org).

Reporter's Committee for Freedom of the Press, [www.rcfp.org](http://www.rcfp.org).

Rosen, *Is Nothing Private?* New Yorker (June 1, 1998), at pages 36-41.

Rosen, *The Unwanted Gaze: The Destruction of Privacy in America*, (Turtleback Books 2001).

Rotenberg, *The Privacy Law Sourcebook 2003*, (EPIC 2003).

Stein, *Kafkaesque*, Washington Lawyer (Jan. 2001) (“*Joseph K. knows he is guilty of something. Isn't everybody? Don't prosecutors say that the federal criminal code is so comprehensive that even a denial of guilt is prosecutable as a false statement felony under 18 U.S.C. Section 1001?*”).

Sykes, *The End of Privacy*, (St. Martin's Press 1999).

Workplace Fairness, [www.workplacefairness.org](http://www.workplacefairness.org).

## **DISCLAIMER AND CAUTION**

This publication is intended to provide general information in connection with the laws involving investigations and privacy rights. The contents of this publication have general application but should not be construed as legal or professional advice on the specific matters, facts, situations, or issues. Additional facts and information or future developments in the law may affect the subjects addressed in this publication. Whenever possible, you should consult with a lawyer about your particular circumstances.

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