

Access, Entry, and Warrants



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Today's Focus

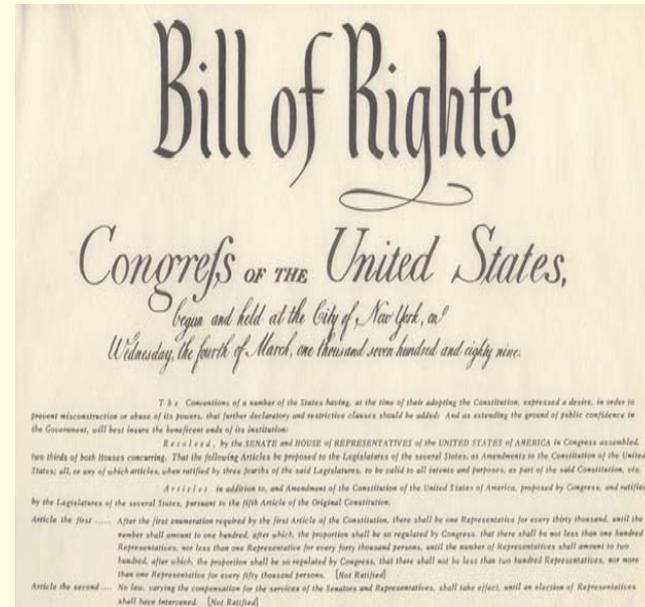
- To ensure that the information (evidence) you gather is admissible in any type of proceeding
- To respect the rights of the public
- To protect you and your agency from liability and litigation

But Remember--

- Just because you can doesn't mean you should
- Other considerations
 - Your agency's policies
 - Safety considerations

Legal Framework

- Both the US and the California constitutions prohibit “unreasonable” search and seizure by the government
- This restricts how you obtain information and conduct inspections



Some Definitions

- To look is a “Search”
- Taking documents, samples and other “stuff” is a “Seizure”
- Abatements may be a “seizure”



Consequences of “unreasonable” search or seizure

- Exclusionary rule;
 - Evidence collected or analyzed in violation of the defendant's constitutional rights is inadmissible in any criminal proceeding and in most civil and administrative proceedings
 - Fruit of the poisonous tree: evidence gathered with the aid of information obtained illegally is inadmissible
- Possible liability (personal and/or your agency) for intentional violations

How do you know what is “Reasonable”?

- Key concept is “reasonable expectation of privacy”
- Statutes/regulations are helpful but not controlling
- Constitutional issues are ultimately decided by courts
- The burden is always on the government to prove the search/seizure was reasonable

“Reasonable” searches as decided by the courts

- Entry into public areas
- Entry with consent
- Observation without entry
- Entry into open fields
- Search of abandoned things
- Entry in emergencies
- Entry with a warrant

What is not on the list?

- Entry per statutory/ordinance authority
 - Our statues either not tested in the courts and/or
 - Some have been found unconstitutional
- “Pervasively regulated” businesses
 - complicated case law
 - Calif cases have held it does not apply to worker safety or haz waste

Examples of Entry Statutes Held Unconstitutionally Broad

- Agric. C. § 5023 county agricultural commissioner may enter and make an inspection of any premises, plant or thing in his jurisdiction. *Vidaurri v. Superior Court of San Diego County* (1970)
- H&SC §25180 Hazardous waste and UST entry statute. *Peo. v. LA Chemical* (1990).
- County ordinance authorizing entry by health officer without warrant. *Tellis v. Municipal Court* (1970)

Significance of statutory authority

- Useful in obtaining consent
- Relevant when obtaining an inspection warrant
- Relevant to trespass analysis

What if inspection is a condition of their permit?

- It depends.....so have an attorney review the exact wording before relying on permit conditions to gain entry
- Even if you don't use it to enter, you can use the denial as cause for getting an inspection warrant or taking enforcement action

“Reasonable”

Areas to Which the Public is Invited

- Theory is implied consent
- Offices, driveways
- But if told to leave, you must leave



Reasonable: Entry with Consent

- Explain who you are and everything you might do (without using acronyms)
- Document who gave consent
 - Name and title
- Limitations on consent (ex: trade secrets, no pictures)
 - You must stay within the limitations they set
 - Can inform them you will need to get a warrant



Asking for Consent

- Be careful how you characterize the inspection
 - “routine”?
 - complaint response?
- Might be best not to characterize it at all, just explain what you need to do (inspect, sample, photo)
- Never mislead or say something that is not true
 - unless approved by supervisor and law enforcement ex: sting operation

Who Can Give Consent?

- Any person with actual or apparent authority
- Examples:
 - Person at the front desk
 - Person who answers the door.
 - Landlord for an absent tenant: No
 - Roommates / shared housing: Limitations
 - Housekeeper or caregiver: apparent authority?
 - Guest? Child? Ex-girlfriend?
- Best practice, ask to speak to the owner or manager

Consent: Just Ask For it!

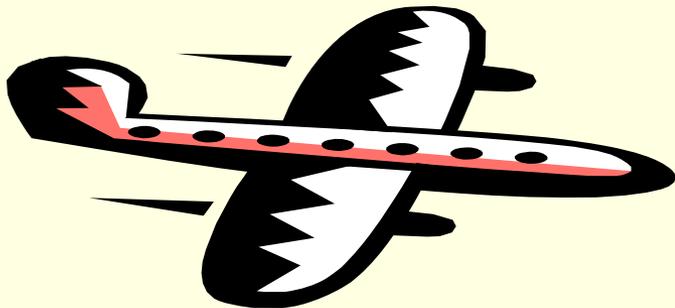
- Either during the inspection or after, ask the business to make you a copy of a document.
- Or as follow up, call or write and ask that a document be sent to you

Now You Are in—Now What?

- Changes/withdrawals of consent
 - Note the time consent is withdrawn
 - Search is OK up the time consent is withdrawn
 - You can inform them that if consent is withdrawn you will return with a warrant

Reasonable: Observations w/o Entry Onto Defendant's Property

- Views from adjacent property
- Use of cameras or binoculars from off site
- Use of aerial surveillance/photos



Looking Over & Through Fences?

Reasonable unless it's close to a house



View from Neighboring Property

- What is the reasonable expectation of privacy?
 - climbing a tree probably not if you are looking into a house; but view from balcony probably OK;

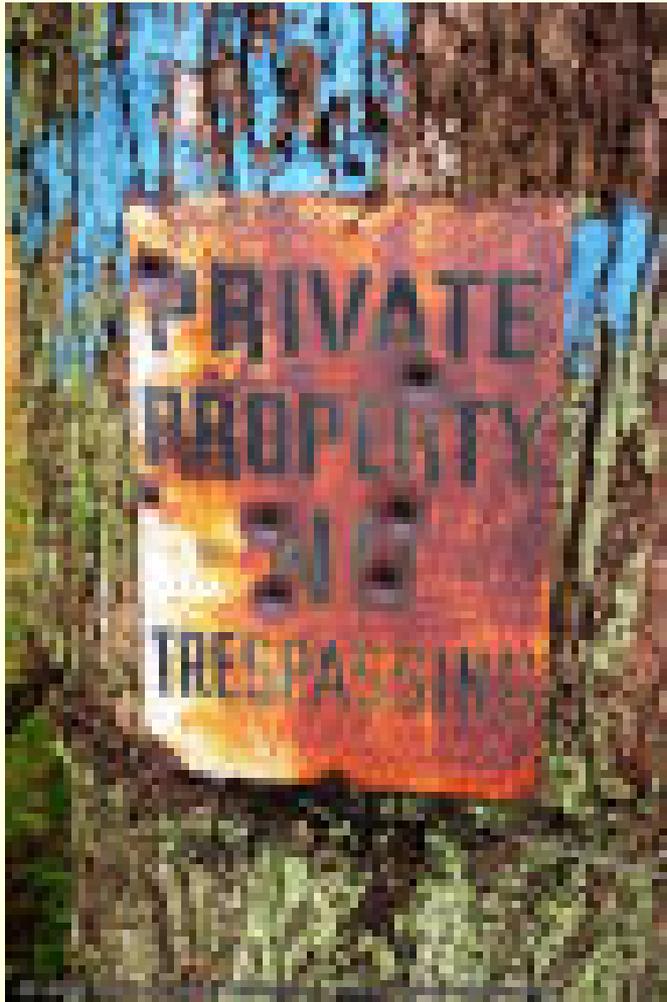


Reasonable: Open Fields

- Even if fenced & posted “no trespassing”
- Why? “No reasonable expectation” of privacy
- Might need a warrant to “seize”



What About Posted Areas?



Visit <http://www.fantfanzpages.com>

Trespass

- You have legal authority to inspect, so walking by a “no trespassing” sign is not trespass
- The open fields doctrine regards technical trespasses as immaterial and “reasonable”
- Remember safety issues

Reasonable: Search of Abandoned Items

- OK--“No reasonable expectation” of privacy



Reasonable: Exigent Circumstances

- Only if there was not enough time to get a warrant (& they can be obtained by phone)
- Only works during the emergency (hours not days)



Exigent Circumstances

- Substantial threat to life, health or property
- Risk from delay must be to life, health, property—not to evidence you want
 - Seizure of unwholesome food
 - Health quarantines
 - Destruction of diseased animals
 - Firefighting
 - Drug lab chemical hazards

But what if I go in with another agency?

- Other agencies such as CHP & DFG have authority to enter certain areas without consent or a warrant
- You cannot “tag along” on their authority. Each person making entry or conducting a search must have their own “reasonable” basis for their activity.

Summary

To enter a house or a business facility, absent an emergency, you need either:

- Consent, OR
- Warrant

*** Always document your basis for entry

What if I can't get consent?

- Not an open field
- Not abandoned
- Not an emergency
- Owner refuses
- Owner/occupant can't be found

Warrants: Two Types

Administrative
Inspection
Warrants

Criminal
Search
Warrants



Administrative Inspection Warrants

- Issued on “cause” to believe a condition of violation exists
- Inspection Warrant allows you to:
 - look, photo, sample
 - cannot take documents (unless by other means such as consent or photo them)
- Signed by judge
- Code of Civil Procedure Sec. 1822.50

Documents needed

- An affidavit/declaration
- The warrant
- Application for warrant
(optional)
- Legal points & authorities
(optional)

Inspection Warrant Affidavit/Declaration

- A sworn statement that describes
 - the place to be inspected,
 - the purpose of the inspection, *and*
 - why there is reason to believe a violation exists.
- Must contain a statement that either
 - Consent to inspect was refused *or* ...
 - reasonable circumstances justifying failure to seek consent.

The Inspection Warrant

- Document signed by the judge that orders the inspection be made
- Effective for 14 days unless extended by judge
- Must cite specific inspection authority:
 - Tires PRC §40500.01
 - Air Pollution: H&S Code § 41510
 - UST & Hazardous Waste: H&S Code § 25185
 - HMMP: H&S Code § 25508
 - RWQCB: Water Code § 13265

Waivers/Endorsements

Special endorsements can authorize:

- Night-time service
- Service without 24-hour notice
- Service without requesting prior consent
- Service in the absence of the owner
- Authorization for use of force to gain entry
- Other special orders

Getting the Warrant

- Attorney review and approval is not required (but is a good idea)
- Any judge in the county where the inspection will take place can sign the warrant
- It is an “ex parte” proceeding, no requirement to give notice, no right for “defendant” or his/her lawyer to be there.
- Get the judges card to ensure correct spelling of his/her name in your reports

Service of the Inspection Warrant

- Show the original warrant (not the declaration), give a copy to the owner/operator if present
- If no one present, leave a copy
- Other agencies may assist in the execution of the warrant
- Agencies assisting should be listed as authorized in the warrant

Service of the Inspection Warrant

- Interference with the inspection warrant is a misdemeanor
- Always have peace officers assist
- Once you leave, the warrant expires

After the Inspection

- File a “Return” with court (short statement that inspection was conducted)
- Not required by statute but a good idea
- The warrant and affidavit will be public records unless you get an order that they be sealed

Criminal Search Warrants

An order signed by a judge, commanding a peace officer to search for a person or property, seize said items and bring them to the judge. Penal Code §1523.

THE PEOPLE OF THE STATE OF CALIFORNIA, TO ANY PEACE OFFICER IN SAN JOAQUIN COUNTY;

Proof by affidavit, having been made before me on this date by _[_____]_, that there is probable cause for the issuance of the search warrant, as set forth in the affidavit attached hereto;

YOU ARE THEREFORE ORDERED to make search on the premises, structures, and rooms, situated at:

Basis: “Probable Cause”

Search warrants are issued upon a showing (by affidavit) that :

- 1) Probable cause exists to believe that a felony has been committed and
- 2) Evidence regarding the felony is currently located at a certain place.

Finding Felonies

- Illegal hazardous waste transport, storage, treatment, disposal H&SC §25189.5
- Certain water violations Water C § 13387
- Air H&SC §4200; Pesticides F&AC 12996 (b)
- Traditional crimes--perjury, conspiracy, theft, tax evasion, fraud
- Penal Code §115 false documents filed with the government

Search Warrant Affidavit

Not necessary to show in the affidavit that you know who committed the crime -- only that evidence related to the crime exists in the place to be searched (and that it is still there).

What May Be Taken

- Whatever is listed in the warrant
- Original documents
- Photos, samples
- Any evidence or tools of a crime; e.g., clothes, machinery
- Computers (usually a copy of the hard drive is made)

Search Warrants

- Get assistance from a prosecutor (DA or US Attorney) to prepare and draft a warrant
- Search warrants good for 10 days (and one entry only)
- Return must be filed
- Special waivers or endorsements may be authorized by the judge

Serving the Search Warrant

- Lead person must be a peace officer
- Other agencies may assist in the execution of the warrant
- Agencies assisting should be listed as authorized in the warrant
- What you may search or seize is limited to the terms of the warrant
- Once the team leaves, cannot reenter

Information Available

- Model inspection and search warrants are available from DAs, Cal/EPA and its Boards & Departments
- Check with other local agencies like code enforcement and animal control

Related Issues: Interference with Inspectors

- Threats, shoved, hit?
- If physical movement is restrained in any way (locked in a room, behind a gate, within a compound)
- Make a police report as soon as possible
- Write down who, when, where and names of witnesses
- Note (quote) exactly what was said, including obscenities and threats

Interference with Inspectors

Possible Crimes include:

- Threats may be assault- Penal Code §240
- Physical contact may be battery PC §242
- Interference with Public Officer PC §71
- False Imprisonment PC §236
- Permit violation may be a misdemeanor

Last Points

- If in doubt, check with your supervisor
- Consider talking to your legal counsel or public prosecutor
- If you “hit the wall” don’t stop! Get help!
- Task Force information:

www.calepa.ca.gov/Enforcement/TaskForce/