

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**SB 654
Subpoena Duces Tecum**

**A BILL REFERRAL STUDY TO
THE SENATE COURTS COMMITTEE AND
THE GENERAL ASSEMBLY OF VIRGINIA**



**COMMONWEALTH OF VIRGINIA
RICHMOND
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I. Authority

The *Code of Virginia*, §30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters “including apprehension, trial and punishment of criminal offenders.” Section 30-158(3) provides the Commission the power to “conduct studies and gather information and data in order to accomplish its purposes as set forth in §30-156. . .and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, the staff conducted a study to determine whether to add a section to the *Code of Virginia* relating to subpoenas *duces tecum* for the purposes of allowing law enforcement agents to obtain financial institution records and credit card records.

II. Executive Summary

During the 2002 Session of the Virginia General Assembly, Senator William C. Mims introduced Senate Bill 654 (SB 654),¹ which would add a section to the *Code of Virginia* granting law enforcement the ability to obtain financial institution and credit card records through a subpoena *duces tecum*. This bill was referred to the Senate Courts of Justice Committee where it was continued until 2003 and referred by letter to the Virginia State Crime Commission for further study. As a result of this study effort, the following recommendation was made concerning SB 654.

Recommendation

The Crime Commission does not have any official recommendation concerning SB 654 at this time. During the 2001 Session of the Virginia General Assembly, the legislature expanded the powers of special grand juries to serve as investigative tools. Since these expanded powers may accomplish the same objectives as the subpoenas proposed by SB 654, the Crime Commission has decided to monitor the use of these grand juries, to determine if they are sufficient by themselves.

III. Methodology

The Virginia State Crime Commission utilized three research methodologies to examine SB 654. First, the *Code of Virginia* relating to subpoenas *duces tecum* and grand juries was reviewed. Second, the *United States Code* and federal laws relating to subpoenas *duces tecum* were analyzed for relevancy to the issues in SB 654. Third, a cursory review of other state statutes was conducted to determine if similar legislation had been enacted elsewhere.

¹ See Attachment 1.

IV. Background

A subpoena *duces tecum* is a subpoena that is issued for documents, records, or other pieces of physical evidence that are to be used or inspected.² They are available as one of the tools of discovery in civil cases;³ can be used to a more limited degree in criminal cases;⁴ and are used for investigative purposes by special and multijurisdiction grand juries⁵ and administrative agencies.⁶

Their role in the latter two contexts is well established. Special grand juries, whose role is to “investigate and make report thereon concerning any condition which involves or tends to promote criminal activity,”⁷ are specifically empowered to “subpoena persons to appear before it to testify and to produce specified records, papers and documents.”⁸ Multijurisdiction grand juries have a similar duty to “investigate any condition which involves or tends to promote criminal violations,” but their role is confined to violations of specific statutes.⁹ They too have the power to “subpoena persons to appear before it to testify or to produce evidence in the form of specified records, papers, documents or other tangible things.”¹⁰

Administrative agencies can also make use of subpoenas *duces tecum*, provided that they have been given the statutory authority to do so. Section 9-6.14:13 of the *Code of Virginia* specifically grants all administrative agencies¹¹ the power to “issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.”¹² The subpoena power of Virginia’s administrative agencies has been recognized and upheld by the Virginia Court of Appeals.¹³

However, while the power to issue subpoenas is a useful investigative technique that can be applied, in certain circumstances, by administrative agencies, a similarly broad power has never been granted to Virginia’s regular law enforcement officers. While this may reflect a policy decision not to allow law enforcement the ability to search through citizens’ financial and other records without obtaining search warrants, it is probably also due to the fact that law enforcement officials have always had this ability, provided that they were willing to work in concert with Commonwealth’s Attorneys and the special grand jury process.

² See, generally Black’s Law Dictionary 448 (5th ed. 1979).

³ See Va. Code § 16.1-89, 16.1-265; Rules of Va. Supreme Ct., Rule 7A:10, 7A:12.

⁴ See Va. Code § 16.1-131; Rules of Va. Supreme Ct., Rule 3A:12.

⁵ Va. Code §§ 19.2-208, 19.2-215.5.

⁶ Va. Code § 9-6.14:13; see, e.g. Va. Code § 4.1-103 (Virginia ABC Board has the authority to “hold and conduct hearings; issue subpoenas requiring...the production of records, memoranda, papers and other documents...”).

⁷ Va. Code §§ 19.2-191(2), cited in 19.2-206(A).

⁸ Va. Code § 19.2-208.

⁹ Va. Code § 19.2-215.1.

¹⁰ Va. Code § 19.2-215.5.

¹¹ That is, any agency of state government that is “empowered by the basic laws to make regulations or decide cases.” Va. Code § 9-6.14:4.

¹² Va. Code § 9-6.14:13.

¹³ State Health Dep’t Sewage Handling & Disposal v. Britton, 15 Va. App. 68 (1992).

Although Fourth Amendment concerns are raised by “searches” undertaken via the mechanism of subpoenaed records, these “constructive searches” have usually been held to be constitutional, provided that the investigation was legitimate and was not for purposes of harassment, the subpoena was not unnecessarily broad, and the information sought was relevant to the investigation.¹⁴ It should be noted that most federal jurisprudence on this issue has dealt with true administrative subpoenas, not subpoenas issued by general law enforcement agencies for purposes of criminal investigations.

V. Analysis of Senate Bill 654

Senate Bill 654¹⁵ creates an unusual amalgamation of an administrative subpoena/grand jury subpoena request, with the trappings of a search warrant. It clearly creates the authority for regular, local law enforcement personnel to issue subpoena requests, as the financial information is to be disclosed only to them, and no other entity, such as a prosecutor’s office. However, SB 654 then specifies that any such subpoena request can only proceed if it has been reviewed by the local Commonwealth’s Attorney, who is to prepare a draft Order and then have the request approved by the local circuit court.

True administrative subpoenas are not issued by a court, but proceed directly from the agency.¹⁶ True grand jury subpoenas, while used to investigate criminal activity, are issued by a special or multijurisdiction grand jury, not by a prosecutor or law enforcement. And, the requirement of SB 654 that the subpoena request be reviewed and endorsed as an official Order of a circuit court is reminiscent of a search warrant,¹⁷ but here there is no determination of “probable cause” being made. Instead, the judge is to endorse the subpoena *duces tecum* Order if he determines it is “relevant to a legitimate law-enforcement interest,” a much lower standard, and one that is normally used for administrative subpoenas.

It is difficult to see what investigative powers SB 654 would provide law enforcement officers that they do not currently have to a large degree. By forcing them to proceed through a Commonwealth’s Attorney for their subpoena request, the method of investigation proposed by SB 654 is strikingly similar to that for which special grand juries are used. Yet the final requirement of judicial approval is arguably more of a burden, in a practical sense. On the other hand, if a police officer does not wish, for whatever reason, to bring his suspicions of wrongdoing to the attention of a special grand

¹⁴ Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). *See also* Marshall v. Barlow’s Inc., 436 U.S. 307 (1978) (upholding certain administrative searches).

¹⁵ Senate Bill 654, 2002 General Assembly, Reg. Sess., (Va. 2002).

¹⁶ The courts become involved only if the recipient files a motion to quash, or refuses to comply. *See* Va. Code § 9-6.14:13, which mentions both possibilities.

¹⁷ Va. Code § 19.2-52, *et seq.*

jury, then under current law he can always proceed to obtain a search warrant, provided there is probable cause.

VI. Conclusion

The special subpoenas *duces tecum* that Senate Bill 654 would create do not seem to be an essential addition to the arsenal of investigatory tools available for law enforcement. Instead, they seem to be rather duplicative of available methods for obtaining financial records. To this extent, SB 654 would disrupt established policy when it comes to police investigations. The General Assembly has statutorily created both special grand juries and multijurisdiction grand juries for the purposes of investigating possible criminal conduct. Both entities have the power to issue subpoenas for relevant documents. Just last year, in response to requests from both law enforcement and Commonwealth's Attorneys, the legislature expanded the abilities of prosecutors when it comes to their use of special grand juries.¹⁸ Prosecutors are now entitled to convene special grand juries on their own motion,¹⁹ can examine witnesses called before the grand jury;²⁰ and are permitted to review and copy any evidence "deem[ed] necessary for use in a criminal investigation or proceeding."²¹

Allowing law enforcement officials to obtain subpoenas *duces tecum* with the help of prosecutors outside the confines of a special or multijurisdiction grand jury would subvert, in a sense, the grand jury process, by making it superfluous as an investigative mechanism. It would also create a significant expansion of police powers in the Commonwealth. Currently, if law enforcement wishes to examine a person's financial records, they must either obtain a search warrant, or use the grand jury process. Senate Bill 654 would allow them to "cut a middle path," obtaining bank records without "probable cause," and without any grand jury oversight. It would also represent the first time that an "administrative subpoena" power was granted, not to an agency with a carefully defined role and purpose, but to general law enforcement, for use in all police inquiries.

Finally, the process as described by SB 654 would muddle the usual inquiry made by judges when it comes to requests from the police for searches. Judicial officers are well used to employing a standard of "probable cause" when faced with search requests from law enforcement and using this standard to winnow out unreasonable or speculative searches. Senate Bill 654 would, for the first time, have judges in Virginia endorse a law enforcement request for a search based on a much lower standard.

¹⁸ Senate Bill 694, 2001 General Assembly, Reg. Sess., (Va. 2001); approved February 13, 2001.

¹⁹ Va. Code § 19.2-206.

²⁰ Va. Code § 19.2-210.

²¹ Va. Code § 19.2-212(B).