

# State Supreme Court to consider warrantless searches

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SEATTLE — Washington’s Supreme Court has agreed to review a decades-old law that investigators have used to secretly obtain private bank, phone, email and other records without showing probable cause — the standard that would normally be required to get a warrant for the information.

At issue are little-known “special inquiry judge” proceedings — confidential hearings in which a specially designated judge can review evidence or listen to witness testimony as prosecutors work toward filing charges in a criminal investigation. The procedure, created by the Legislature in 1971, allows the judge to issue subpoenas for evidence, such as bank or phone records, at the request of a prosecutor who has “reason to suspect” crime.

That’s a lesser standard than probable cause, and defense attorneys say that’s part of the problem. Other concerns are that the law doesn’t require any representations to the judge to be made under oath, and — unlike with a traditional search warrant — information about the search doesn’t necessarily become public.

“Where you are going into an area of privacy protected under Washington law, that subpoena must meet the standard of a warrant: probable cause, supported by oath or affidavit,” said David Donnan, a lawyer challenging the use of special inquiry judge proceedings in a King County case. “When you’re delving into financial documents, it does expose so much traditionally private information. It’s the sort of intrusion we try to protect against here in Washington.”

Under Washington’s Constitution, people can’t be disturbed in their private affairs without “authority of law.” Typically that is satisfied when investigators obtain a warrant.

The high court has never ruled on whether a special inquiry judge subpoena counts as “authority of law” — a question the justices are expected to address in an appeal brought by Donnan’s client, Michael Reeder, who was convicted of swindling an octogenarian out of \$1.7 million. Prosecutors used special inquiry subpoenas to obtain boxes full of his bank records without a warrant, Donnan said.

Prosecutors call the special inquiries an efficient way to tackle complex investigations, such as fraud cases, without alerting suspects. They can also be useful in compelling the testimony of uncooperative witnesses.

If no charges are filed, no one aside from those involved ever learns the proceedings occurred. Even the police involved in the case are barred from attending, though the evidence can be turned over to them. The special inquiry judge is disqualified from handling the case once charges are filed.

Tom McBride, executive secretary of the Washington Association of Prosecuting Attorneys, said special inquiries are a rarely used investigative tool and said the safety valve protecting the suspect’s privacy is that the subpoena is issued by a judge. He said his organization would welcome a ruling from the justices on whether the practice is constitutional.

“These are the cases where you don’t have probable cause, where you can’t get a warrant,” McBride said. “I can see why the court wants to take a look at this.”

Reeder is also challenging whether prosecutors strictly followed the special inquiry law. The law authorizes the prosecutor of a county “in which a grand jury or special grand jury is impaneled” to request special inquiry proceedings.

Although grand juries are allowed under Washington law, they are exceptionally rare, and there is no evidence one was impaneled in King County when the special inquiry judge proceeding took place. The Legislature created the special inquiries as a less cumbersome alternative to grand juries.

Briefings in Reeder's case are due Dec. 19, and arguments are set for February.

An Associated Press story in 2012 detailed how prosecutors had used special inquiry judge subpoenas as substitutes for warrants, especially in Benton County, where Seattle attorney Lenell Nussbaum and Pasco lawyer Robert Thompson challenged the practice. Through public records requests, Nussbaum and Thompson documented how detectives routinely obtained bank, mortgage, email and phone records without warrants,.

Their challenge ended when their client took a plea deal.

Following the AP's story, the prosecutors association acknowledged the special inquiries had been overused and adopted model rules for the procedure. The guidelines say prosecutors should use them only when traditional investigative techniques won't work, including "when investigators lack the probable cause necessary to obtain a warrant."

Washington's Constitution is considered to be more protective of privacy than the U.S. Constitution. The U.S. Supreme Court has never found citizens to have privacy rights in bank or phone records maintained by third parties, and there would be no issue with a federal grand jury issuing a subpoena directing a company to supply such information.

In Washington, however, the state Supreme Court has found that people do have a constitutionally protected right to privacy in such records.

In 2007, the justices held that to obtain bank records, investigators needed “a judicially issued warrant or subpoena,” but the opinion suggested the subpoena had to be served on the target of the investigation, giving the person a chance to challenge it. In 2010, the court held that a court order could function as a warrant if it met the constitutional requirements of a warrant.

“Certainly, they have come close to saying a warrant is required, but they haven’t quite said it,” said Doug Klunder, privacy counsel for the American Civil Liberties Union of Washington, which is not involved in Reeder’s case.