

# **WAPA MODEL POLICY FOR USING SPECIAL INQUIRY JUDGE PROCEEDINGS<sup>1</sup>**

## **I. Introduction**

Washington's Special Inquiry Judge Proceeding was established by the legislature in 1971<sup>2</sup>, and has been in statewide use since that time. Akin to Grand Jury Proceedings, which have been in broad national use since this country was established, the Special Inquiry Judge Proceeding, or "SIJ Proceeding" enables a judge to issue subpoenas, order the production of records, or take other action as the court deems justified to allow a prosecutor to investigate suspected crime or corruption.

Like the Grand Jury, Special Inquiry Judge Proceedings are confidential and used only during investigations; they cannot be used after criminal charges have been filed. Also like Grand Jury Proceedings, SIJ proceedings gather evidence based upon a lower standard than probable cause, in this case, "reason to suspect" crime or corruption within the court's jurisdiction. This term is not defined in the statute or case law, but may be interpreted by our courts as roughly equivalent to a *Terry* stop standard (articulable suspicion). In a Special Inquiry Proceeding, the Special Inquiry Judge may, upon determining that the standard has been met, issue subpoenas for records and testimony to obtain evidence in furtherance of the investigation. While a prosecutor may seek to initiate an SIJ proceeding, the prosecutor must first convince the Special Inquiry Judge of the basis for it. The Special Inquiry Judge then presides over each step of the SIJ proceedings.

Both Special Inquiry and Grand Jury proceedings are intended to be confidential proceedings. Confidentiality is necessary, in some criminal investigations, to protect the safety interests of the public, and the integrity and effectiveness of the investigation. Many prospective investigative options would be foreclosed if the information related to and received by the Special Inquiry Judge were to be prematurely made public. Confidentiality is also frequently necessary to protect the safety of witnesses and/or victims, as well as to protect those who are wrongly suspected of crime or corruption and therefore never charged with any criminal activity.

Washington's SIJ Proceedings are less expensive and more flexible than Grand Jury Proceedings. The SIJ model created by our legislature has numerous advantages that are not generally found in Grand Jury Proceedings: First, an elected Superior Court Judge

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<sup>1</sup> THIS MODEL POLICY IS NOT INTENDED TO AND DOES NOT GIVE ANY RIGHTS BEYOND THOSE CONTAINED WITHIN THE STATUTE.

<sup>2</sup> This was part of the Criminal Investigatory Act of 1971, which also revised then existing law dealing with grand jury investigations. In passing this law, the legislature followed proposals of the Washington Judicial Council study (22 Judicial Council Reporter (1970)). The Judicial Council recognized that an alternative to the grand jury was needed. Their report recommended the creation of the SIJ proceeding to be modeled after the one person grand jury law of Michigan (Mich. Comp. Laws Ann. § 767.3 ff). Connecticut has a similar law. Conn. Gen. Stat. Annot. Sec. 54-47B. The new procedure, both as recommended and as enacted, is designed to supplement rather than substitute for the grand jury. A Grand Jury may be called in a Washington State county only by agreement of the majority of superior court judges who have determined that the public interest demands this action. This authority is rarely used.

(selected by his or her fellow judges<sup>3</sup>) participates in the proceeding. Second, SIJ subpoenas are issued by the elected SIJ Judge, who is familiar with the investigation for which the subpoenas are issued. Third, the SIJ Judge presides over the taking of witness testimony. Fourth, the SIJ proceeding avoids the public costs that would be inherent in convening a Grand Jury. These savings include savings of public taxpayer dollars, as well as savings to business, industry, and individuals, because citizens are not being compelled to miss work to participate as Grand Jurors. In contrast, as a general rule, no judge actively participates in Grand Jury proceedings, reviews Grand Jury subpoenas before they are issued, or presides over the taking of witness testimony. Fifth, a Special Inquiry Judge is trained and experienced in the law as well as in sitting as a neutral and detached magistrate, whereas any citizen can be called to sit as a Grand Juror. While a Special Inquiry Judge assures that the investigation is conducted fairly, the Judge does not issue indictments. A Grand Jury is empowered to call witnesses, issue grand jury reports, and issue indictments.

Washington prosecutors have found Special Inquiry Judge Proceedings especially useful when sophisticated criminal activity is suspected, such as offenses involving public corruption (bribery, bid fixing, misappropriation), organized crime (gambling, theft, fencing, arson, vice, prostitution), and fraud (theft from the elderly, securities, real estate, insurance, inventory theft, false billing, embezzlement, identity theft).

It is important to recognize that a Special Inquiry Judge Proceeding may *not* be used as a discovery tool against a defendant as to already charged crimes.<sup>4</sup> The purpose of the SIJ Proceeding is to investigate *suspected* crime, not charged crime. Use of SIJ Proceedings to investigate charged crimes would not only be a violation of the statutes, but may also constitute interference with a defendant's constitutional right to a fair trial.<sup>5</sup> Remedies for such violations include suppression of evidence and possibly dismissal of the charges.

It should also be recognized that certain witnesses may acquire transactional immunity as a result of testifying before a Special Inquiry Judge and that witnesses testifying about public corruption may receive immunity automatically (self-executing immunity).<sup>6</sup>

It is recommended that the prosecutor should request the initiation of SIJ Proceedings only where there is reason to believe that more traditional investigative techniques will not be effective, for example: When investigators lack the probable cause necessary to obtain a warrant for the sought evidence; where law enforcement is confronted with an uncooperative witness and needs to compel the witness to speak; or when investigating corruption or other crimes which require confidentiality while under investigation.

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<sup>3</sup> The Special Inquiry Judge is a superior court judge who must be designated by a majority of the judges in that county to hear and receive evidence concerning crime and corruption. RCW 10.27.050.

<sup>4</sup> See *State v. Manning*, 86 Wn.2d 272 (1976).

<sup>5</sup> See *State v. Burri*, 87 Wn.2d 175 (1976). There is an exception to this general rule when the proceedings pertain to contempt committed in connection with SIJ proceedings.

<sup>6</sup> RCW 10.27.120, .130.

With these considerations in mind, we set forth the below recommended model policy for initiation and use of Special Inquiry Judge Proceedings.

## **I. Special Inquiry Judge Proceedings**

### **A. Initiating the SIJ Proceeding and Obtaining Subpoenas**

The prosecutor should ask the Special Inquiry Judge to initiate SIJ proceedings only if the following circumstances are present:

1. The prosecutor has reason to suspect crime or corruption within the jurisdiction;<sup>7</sup>
2. There is reason to believe there are witnesses who may be able to give material testimony or provide material evidence concerning the suspected crime or corruption;<sup>8</sup>
3. The evidence to be gathered does not pertain to crimes that are already charged against the person being investigated;<sup>9</sup> and
4. There is reason to believe that traditional investigative techniques will not be effective.

The prosecutor may seek subpoenas or orders from the Special Inquiry judge that either require specific persons to testify, or require production of evidence.

#### *1. Statement of investigative facts*

Normally, law enforcement contacts the prosecutor's office when they believe crime or corruption has been or is being committed, but they are unable to proceed with a referral asking the prosecutor to file criminal charges, because they need more information to determine whether to request that charges be filed. The police investigator asking the prosecutor to initiate an SIJ proceeding will provide the assigned Deputy Prosecuting Attorney (DPA) with a summary of his or her investigation and a description of the evidence to be sought through an SIJ proceeding.

#### *2. Supervisor's approval required*

The DPA receiving such a request shall discuss the matter with a supervisor, and obtain the supervisor's approval prior to proceeding. After the DPA's supervisor has determined that an SIJ proceeding is appropriate, the DPA will prepare a State's Petition to Establish Special Inquiry Judge Proceeding, and provide that to his or her paralegal/legal assistant, who will prepare additional pleadings to be submitted to the county's designated Special Inquiry Judge. To maintain the statutorily mandated

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<sup>7</sup>RCW 10.27.170

<sup>8</sup>RCW 10.27.170

<sup>9</sup>RCW 10.27.180

confidentiality of SIJ proceedings, this and all other SIJ pleadings shall be provided to the Special Inquiry Judge in a sealed envelope.

### 3. *Outline of initial pleadings*

Initial SIJ pleadings should cover the following:

1. State's Petition to Establish Special Inquiry Judge Proceeding
2. State's Motion to Disclose Evidence to Investigating Officers
3. Order Establishing Special Inquiry Judge Proceeding (Proposed)
4. Order Authorizing Disclosure of Evidence to Investigating Officers (Proposed)

The Petition to Establish and Motion to Disclose can be included in a single pleading, as can the orders.

### 5. *Election of Special Inquiry Judge*

If the county does not have a currently designated Special Inquiry Judge, the DPA should contact the bailiff of the superior court Presiding Judge to request that the judges of the county designate, by majority decision, a superior court judge to serve as the Special Inquiry Judge. It should be noted that the Special Inquiry Judge is precluded from acting as a judge in any charging decisions (finding of probable cause to file an Information), and in any post-charging proceedings that arise out of the Special Inquiry Proceeding.<sup>10</sup>

### 6. *Special Inquiry Judge review, determinations, and issuance of orders/subpoenas*

The Special Inquiry Judge reviews the submitted pleadings; determines if a Special Inquiry Judge Proceeding is appropriate; and if so considers/issues the orders listed above, and issues subpoenas that the SIJ determines satisfy the legal requirements for SIJ proceedings.

The prosecutor must provide the SIJ with a factual basis for issuing any and all requested subpoenas or orders.<sup>11</sup> If the court concludes that the facts show reason to believe that the person to be subpoenaed may be able to give material testimony or provide material evidence concerning the suspected crime or corruption that is described in the pleadings, the judge will issue the requested subpoenas.<sup>12</sup>

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<sup>10</sup>RCW 10.27.180

<sup>11</sup>The factual basis may be included in the initial petition to establish the Special Inquiry Judge Proceeding, or in subsequently submitted pleadings.

<sup>12</sup>Note: SIJ subpoenas must be signed by the Special Inquiry Judge. See *State v. Miles*, 160 Wn.2d 236 (2007). SIJ subpoenas issued under a reasonable suspicion standard satisfy article I, section 7 of the Washington State Constitution. See *State v. Reeder*, No. 69226-7-I (2014).

Subpoenas to be considered by the Special Inquiry Judge shall be prepared in advance by the DPA and/or the DPA's paralegal/legal and may be submitted with the initial petition, or subsequently. The return date on the subpoena(s) shall be a hearing date established by the Special Inquiry Judge.

## **B. Handling SIJ Pleadings**

### *1. Filing Original Pleadings*

The County Prosecutor should work with the Special Inquiry Judge and the Clerk of the county's superior court to establish an ongoing policy for maintaining confidentiality of pleadings filed in SIJ proceedings.<sup>13</sup> It is recommended that the policy identify a designated clerk to receive SIJ proceeding pleadings from the prosecutor and, when necessary, from counsel for SIJ witnesses; establish a cause number or series of cause numbers for SIJ proceeding pleadings; and set forth procedures for clerk's office handling of these pleadings that ensures the pleadings are not made publicly available. These procedures should include a requirement that the prosecutor place the pleadings into a sealed envelope that is marked "Special Inquiry" on the exterior.

### *2. Prosecutor's Copy of SIJ Pleadings*

A copy of all SIJ pleadings should be placed in a file maintained within the prosecutor's office. This file should be marked "Special Inquiry" and bear the SIJ proceeding number that was assigned by the superior court clerk's office. See below for handling of evidence obtained through SIJ proceedings.

To assure that statutorily mandated confidentiality is maintained and that SIJ investigations can be located in the future, the prosecutor's office should establish a protocol for logging all SIJ proceedings separately from non-SIJ proceedings, cases, investigations and other matters. It is recommended that the prosecutor's office maintain a record identifying the location of the prosecutor's SIJ file

### *3. Pleadings filed in SIJ proceedings by persons other than the prosecutor.*

On occasion, an attorney for a witness who has received an SIJ subpoena will want to file pleadings pertaining to that subpoena. Because the SIJ proceeding is confidential, these pleadings should be filed directly with the Special Inquiry Judge's courtroom clerk. The SIJ clerk should handle these pleadings in compliance with a previously established policy for clerk's office handling of SIJ pleadings. This policy should include provision for providing the prosecutor with a copy of the witness's attorney's pleadings.

## **C. Taking Testimony in a Special Inquiry Judge Proceeding and Conducting an SIJ Hearing**

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<sup>13</sup> Note: Denying public access to special inquiry proceedings does not violate article I, section 10 of the Washington State Constitution, See *State v. Reeder* 69226-7-I (2014).

When the Special Inquiry Judge takes witness testimony, or otherwise holds an on-the-record hearing, the only persons permitted to be present are the prosecutor, witness, judge, court reporter, the witness's attorney (who's only role is to object based on privilege and for no other reason) and, if necessary, interpreter and jail guard.

Note that the case detective, judge's bailiff or law clerk, and court clerk are not among those permitted to be in the court room.

The Special Inquiry Judge shall swear each person present to confidentiality.

The witness must be advised of his or her privilege against self-incrimination. The witness has a right to be represented by an attorney and must be informed of that right. The role of the attorney is limited to advising the witness concerning the witness's rights, obligations, and duties before the Special Inquire Judge. The attorney may be present at all SIJ proceedings that are attended by his/her client, unless the witness has been granted immunity. If immunity is granted, the witness's attorney must leave the courtroom. However, even with immunity, the witness still has the right to leave the courtroom to confer with his/her attorney.

***Immunity — the prosecutor should be required to have prior approval from a supervisor before granting immunity to a witness.***

**D. Subpoenas *Duces Tecum* in a Special Inquiry Judge Proceeding**

Subpoenas *duces tecum* issued by a Special Inquiry Judge should contain notice regarding the confidentiality of the SIJ proceeding. For example:

**YOUR ATTENTION IS DIRECTED TO RCW 10.27.090(3) WHICH PROHIBITS WITNESSES OR OTHER PERSONS FROM DISCLOSING THE TESTIMONY OR EVIDENCE RECEIVED BY THE SPECIAL INQUIRY JUDGE.**

Once the Special Inquiry Judge has issued subpoenas *duces tecum*, the prosecutor will receive the originals and be responsible for ensuring that the subpoenas are served. This can be done by the case detective or by the prosecutor's paralegal/legal assistant.

It is possible that the subpoena recipient will wish to produce the subpoenaed records without a court appearance. This does not present a legal problem.

Where appropriate (typically when the subpoena is for production of documents, records, or other physical evidence), the DPA and/or the DPA's paralegal/legal shall also prepare an instruction memo or letter for the subpoena recipient(s) and a Certification or Declaration of Record Custodian that complies with RCW 10.96.

## **E. Obtaining Additional Subpoenas for Witness Testimony or Documents**

If, in the same investigation, the prosecutor needs to ask the Special Inquiry Judge to issue additional subpoenas *duces tecum*, or call additional persons to testify before the SIJ, the prosecutor can do so by submitting to the Special Inquiry Judge a supplemental factual statement showing the basis for these additional subpoenas. The requested supplemental subpoenas should be submitted at the same time. It is recommended that the number the Clerk's Office assigned to the original Petition to Establish a Special Inquiry Judge Proceeding also be used for these subsequent SIJ proceedings. A second order authorizing disclosure should not be necessary, because the disclosure authority the court granted when it established the SIJ proceeding is effective for the entire proceeding. See below if you wish to disclose SIJ evidence beyond the existing disclosure order.

## **F. Obtaining Authority to Disclose SIJ Evidence**

Any disclosure of SIJ evidence beyond the prosecutor requires prior court approval.<sup>14</sup> The court may allow disclosure if it is "in furtherance of justice." An example of when disclosure is in the furtherance of justice is when evidence developed through an SIJ proceeding needs to be disclosed to a police officer or investigator so s/he can develop additional evidence. The prosecutor desiring authority to disclose SIJ evidence shall prepare a motion and proposed order authorizing the disclosure and submit it to the Special Inquiry Judge. It is recommended that the motion explain the investigative necessity of disclosing SIJ evidence to the identified law enforcement agents, and that the order authorize disclosure to specified law enforcement officials "for their use in furtherance of the investigation."

### *1. Confidentiality remains effective*

A court's authorization to disclose SIJ evidence to specified persons does not alleviate the confidentiality requirements for handling that evidence. The prosecutor disclosing SIJ evidence pursuant to court authorization should inform the recipient that the evidence was produced in SIJ proceedings and is therefore subject to the confidentiality provisions of SIJ proceedings. It is recommended that the prosecutor state in the motion to disclose that investigators have been advised of the SIJ confidentiality provisions, and that the prosecutor prepare a record showing that this action was taken.

### *2. Disclosure to Comply with CrR 4.7 (Discovery in a Criminal Case)*

The statutes do not explicitly permit a prosecutor do disclose SIJ evidence in as discovery in a pending criminal case. It is recommended that, at the time of initiating the SIJ proceeding, you ask the court to authorize the prosecutor to disclose all evidence obtained during the course of the SIJ proceeding, as required to allow the State to abide by court rules and case law requirements pertaining to discovery in any criminal case resulting from the investigation.

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<sup>14</sup>RCW 10.27.090 (Prosecutor shall have access to SIJ evidence and may introduce it at trial.)

### 3. *Expanding Your Authority To Disclose SIJ Evidence*

At times, the investigative team may expand, either beyond the detective who started the investigation, or beyond the law enforcement agency that started the investigation. If the prosecutor perceives a need to disclose SIJ evidence to investigators either in the same or in different law enforcement agency who are *not already authorized to possess and use SIJ evidence*, the prosecutor shall prepare and file with the Special Inquiry Judge a request for additional disclosure authority, and a proposed order authorizing that additional authority. The request should include a brief explanation of the investigative reasons that make the additional disclosure “in furtherance of justice,” and a statement that the additional investigators have been advised of the SIJ confidentiality provisions (so they will handle the SIJ evidence appropriately).

#### **G. Handling evidence and/or transcripts obtained via SIJ proceedings.**

##### 1. *Prosecutors*

Access to SIJ proceedings evidence (including transcripts) is limited by statute. It is available to the prosecutor, who can introduce it before any grand jury or trial in which it is relevant. Upon receipt of evidence produced in an SIJ proceeding, the prosecutor will review the evidence and ensure that the only evidence received is that which the Special Inquiry Judge subpoenaed or ordered be produced. Any information beyond that should be promptly returned to the person who produced the evidence. It is recommended that the prosecutor prepare a certification or declaration stating that this review was done.

Records obtained and transcripts of testimony taken in SIJ proceedings should be placed into the prosecutor’s “Special Inquiry” file. This file should be maintained in a secure location such as a locked file cabinet or secured evidence room.

##### 2. *Police*

Law enforcement officials to whom the court has authorized disclosure of SIJ evidence must be advised that the disclosed items were obtained through SIJ Proceedings and that they must be handled accordingly. As is noted above, a Special Inquiry Judge’s authority to disclose SIJ evidence to certain persons does not alleviate the confidentiality requirements for handling this evidence. The prosecutor must advise police who are authorized for disclosure of SIJ evidence that it is confidential and must be handled accordingly. The prosecutor should document that this advice was given.

##### 3. *Defendants*

While the statute permits the prosecutor to introduce SIJ evidence in any proceeding in which it is relevant, it does not explicitly permit the provision of SIJ evidence in discovery. It is recommended that the prosecutor obtain an order from the Special Inquiry Judge authorizing disclosure as required by the prosecutor’s discovery obligations in the event the investigation results in the filing of criminal charges. This motion can be brought at the initiation of an SIJ proceeding, or subsequently, but should in any event be brought *before* charges have been filed. The Special Inquiry Judge cannot act after

charges are filed. (If no order has been issued prior to charging, the prosecutor should seek the order from the criminal presiding judge of the superior court.)

4. *Others*

If the court allows, *and the participating prosecutor concurs*, an outside prosecutor, attorney general, city attorney, or corporation counsel can have access to evidence upon proper application showing good cause.

5. *After conclusion of the investigation or prosecution*

Unless evidence obtained in an SIJ proceeding was introduced into evidence in a criminal trial, it remains subject to the SIJ confidentiality provisions. The evidence should be placed into a sealed envelope or box that is labeled to inform anyone seeing or handling the item that its contents are confidential and may not be viewed absent court order.

Similarly, police to whom the SIJ has authorized disclosure of SIJ evidence should be instructed in the handling and storage of SIJ evidence in a manner that maintains its confidentiality.