

CHAPTER I

LEGAL ISSUES

Should any programme be confronted with a legal issue which may impact beyond their area, they are requested to contact the President of the Ontario Association of Crime Stoppers for further consultation and advice.

CRIME STOPPERS AND THE LAW OF EVIDENCE

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Protection of Callers' Identities:

The principle: Crime Stoppers is a success because the program overcomes the two main reasons people are reluctant to provide the police with information: apathy and fear of reprisal. Apathy is addressed by offering modest rewards for information. Fear of reprisal is dealt with by going to every possible length to prevent the disclosure of the identity of informants. Carefully designed communications procedures are in place to ensure caller anonymity. The assurance of anonymity is widely publicized, so potential tipsters will be encouraged to call in with their information.

Legally, Crime Stoppers can confidently offer anonymity to its callers because of the application of the principle of **police informer privilege**. This is an ancient rule of evidence which says that the police do not have to reveal information which may identify an informant, if to do so may jeopardize the safety of that informant.

The application of the principle to Crime Stoppers in Canada: In February of 1997, the Supreme Court of Canada unanimously decided that callers to Crime Stoppers programs were entitled to the protection of the police informer privilege (*R. v. Leipert*). The Court said that

“informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.”

The Court recognized that in most cases of police informers, the identity of the informer is known to the police. The police are in a position to ascertain if the informer is in jeopardy, and to learn what, if any, of the information received from the confidential source may tend to identify him in the mind of an accused person.

However, in a typical case which started from a Crime Stoppers tip, the identity of the informer is unknown to everyone, even the Crime Stoppers coordinator who took the call. The Court said

“The fact that the privilege also belongs to the informer raises special concerns in the case of anonymous informants, like those who provide telephone tips to Crime Stoppers. Since the informer whom the privilege is designed to protect and his or her circumstances are unknown, it is often difficult to predict with certainty what information might allow the accused to identify the informer. A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them.”

The Supreme Court went on to confirm that the privilege is broad in scope. It applies in both criminal and civil proceedings, and applies to witnesses on the stand (who may not be asked if they are the informer) as well as to undisclosed or anonymous informants. It prevents disclosure not only of the name of the informer, but also of any information which might implicitly reveal his or her identity.

The exception to informer privilege: There is only one exception to police informer privilege, and that arises where the innocence of the accused person is said to be at stake. In order to raise this exception, there must be a basis on the evidence to conclude that disclosure of the informer’s information is necessary to demonstrate the innocence of the accused. Mere speculation that the information may prove useful to the defence is not enough. On the other hand, if the evidence before the court suggests that the informer is a material witness to the crime, or even an *agent provocateur*, “the privilege must yield to the principle that a person is not to be condemned when his or her innocence can be proved”.

The “innocence at stake” exception applies also to challenges to search warrants, for example where the evidence suggests that the items seized under the warrant had been planted. To establish that the informer had planted the goods, or had information which could show who did, an accused may be able to argue successfully that the identity of the tipster should be disclosed. But if no such basis on the evidence can be established, the tip information remains privileged.

May the tip sheet be edited? There is a temptation to edit a tip sheet to remove information which would obviously reveal the identity of the caller, and then produce the edited version to the defence. The Supreme Court has discouraged this practice, again on the basis that no reliable measure can be made of what information may tend to identify the tipster. An accused may know that only one or two persons knew a fact which on its surface appears innocuous.

Procedure:

Tip Sheets: All information circulated out of a Crime Stoppers office to an investigative agency should contain cautions as to the existence of the privilege, and the limitations on the use to which the information can be put. The following wording is suggested:

THIS INFORMATION IS LEGALLY PRIVILEGED. IT IS THE PROPERTY OF CRIME STOPPERS, AND MUST BE RETURNED AFTER VIEWING OR UPON REQUEST. DO NOT USE OR RELY ON FOR OBTAINING ANY JUDICIAL AUTHORIZATION WITHOUT TAKING STEPS TO PRESERVE POLICE INFORMER PRIVILEGE. THIS INFORMATION SHOULD BE INDEPENDENTLY CONFIRMED, AND MUST NOT BE INCLUDED IN ANY REGUAR POLICE REPORTS.

Information to obtain a judicial authorization: The first defence against disclosure of the identity of an informant is to avoid making unnecessary reference to the caller or to the information obtained. Usually, a simple reference to Crime Stoppers will put the Crown, and eventually the Court, on notice that issues of police informer privilege exist, and that steps must be taken to protect the identity of an anonymous informant. Where a tip is not evidence, but merely uncorroborated information whose reliability is untested, it should be possible to exclude detailed reference to the tip in an information to obtain (search warrant or wiretap) or in evidence at trial. Paragraph 1 of the information to obtain may simply read

“1. After receiving information from Crime Stoppers, believed to have originated from an unknown and anonymous source, of unknown reliability, Constable Benton Fraser attended at ...”

In other cases, information in the tip may be known to be reliable, and therefore amount to evidence in support of a search warrant or wiretap authorization. In such cases, care must be taken to seal the information to obtain to prevent disclosure of the privileged information to the accused. For example:

“1. Information was received by Vancouver Police Department from Crime Stoppers, believed to have originated from an unknown and anonymous source which was initially thought to be of unknown reliability.

“2. Subsequent investigation has verified the accuracy of the information in a number of respects.

“3. A Narrative of the information received is attached as Exhibit “A”. The contents of Exhibit “A” are subject to police informer privilege. Application is hereby made under s. 487.3 of the *Criminal Code* to seal Exhibit “A” so as not to compromise the identity of a confidential, anonymous informant.”

Exhibit "A" should not be the tip sheet itself, but a paraphrase of the pertinent material, leaving out all extraneous matter.

When a challenge is made to a search warrant or wiretap, the sealed information may be reviewed by the Court, and an edited version omitting those portions subject to police informer privilege provided to the accused. In such cases, there must be sufficient evidence remaining in the information after editing to support the issuance of the warrant: *R. v. Garofoli*. It follows that when investigating a Crime Stoppers tip it is vital to conduct a sufficient follow-up investigation to include further evidence, not subject to privilege, which may be relied on at trial in support of the judicial authorization.

Warrentless search or arrest: The same principles apply as for search warrants and wiretaps. The decision to search or arrest must be based on reasonable grounds, which can be disclosed to the accused at his trial without breaching police informer privilege. To support the action taken, the initial Crime Stoppers tip must be followed up with further investigation, the results of which will be disclosed in the Report to Crown Counsel, and in testimony at trial.

At trial: From time to time accused persons or their lawyers will apply to trial judges for disclosure of all or part of the contents of a Crime Stoppers tip file. **All such applications are to be resisted.** Steps should be taken to ensure that Crown Counsel prosecuting charges arising from Crime Stoppers tips are aware of the protection afforded such information through police informer privilege. It is almost always possible to obtain an adjournment when such an application is made, during which Crown may consult with others if necessary. On occasion, Crime Stoppers programs have successfully had their own counsel appear in the course of a trial to argue the informer privilege issue.

In the context of search warrants, the Supreme Court of Canada has laid down the following procedure for responding to an application during a trial or *voir dire* for production of Crime Stoppers information:

- 1) The accused must show a basis on the evidence for concluding that without disclosure his ability to establish his innocence is at stake.
- 2) If such a basis is shown, the presiding judge should review the information in confidence, to determine whether, in fact, disclosure is necessary to establish innocence.
- 3) If the court concludes that disclosure is necessary, the court should reveal only that information which is essential to establish innocence.
- 4) Before disclosing any such information, the court should give the Crown the option of staying the charge, rather than jeopardize the anonymity of the caller.

In virtually all cases, if the matter proceeds to (3) and (4), the Crown should, in fact,

direct a stay. Better to allow an acquittal rather than put at risk the safety of an anonymous caller and the credibility of Crime Stoppers programs everywhere.

Ownership of Crime Stoppers Records:

The *Freedom of Information and Protection of Privacy Act* sets out the right of any person to request access to records “in the custody or under the control of a public body”. Access to those records must normally be provided, unless the information requested comes under one of a number of exceptions. Although exceptions to disclosure exist under the *Act* where disclosure can be demonstrated to be harmful to law enforcement, Crime Stoppers organizations have argued for some time that they have an absolute immunity from disclosure, as the records are privately owned by non-governmental agencies. By being excluded from the *Act*, Crime Stoppers is spared having to go through the exercise of invoking the “harmful to law enforcement” exception in order to resist disclosure.

The Information and Privacy Commissioner for the Province of British Columbia has ruled that Crime Stoppers is not a “public body” within the meaning of the *Act*. This means that Crime Stoppers records are not subject to disclosure under Freedom of Information laws.

In a letter to the Victoria, B.C. Police Department dated March 10, 1998, the Commissioner referred to a number of factors in deciding that Crime Stoppers were not a public body. Most importantly, the organization is set up as a private society, with membership drawn from the general public. It is privately funded. Police officers seconded to Crime Stoppers are uninvolved with regular policing duties, and exercise independent discretion in deciding whether to forward tip information to a police agency.

When tip information is passed on to police agencies, Crime Stoppers coordinators may choose to hold back information which may tend to identify a caller. The Tip Sheet remains the property of Crime Stoppers, and must be returned, with a response record, in the shortest time possible. Although the Tip Sheet comes into the possession of the police, it is not intended to be the document which leads to a decision to charge an individual; rather, it is used merely to suggest a course of investigation which in turn is expected to lead to the gathering of evidence to support a search warrant or arrest warrant. As a result, the Tip Sheet when in the possession of the police does not come within the class of information which public bodies are required to retain (for possible disclosure) under the *Act*.

Records Retention Policy

In the course of his ruling, the Information and Privacy Commissioner acknowledged “the strict confidentiality with which Crime Stoppers manages their records, and maintains the privacy of individuals providing tips and the people who are the subject of tips by providing a narrow response to the tipster and limiting

information sharing in the organization". He referred with approval also to the "records retention practices which recognize the finality principle of fair information practices". Specifically, the Victoria Crime Stoppers organization, whose practices formed the basis for the ruling, has a policy of retaining records for at least two years where there is an investigation but no charges. For records relating to charges, retention continues until all possible appeals have been dealt with.

It is recommended that all Crime Stoppers programs adopt a similar records retention policy. In particular, **programs must resist the temptation to destroy records before the final conclusion of criminal proceedings**. Where an accused successfully demonstrates that his "innocence" may be at stake, if the records are unavailable the Court cannot embark on the 4-step procedure set out by the Supreme Court of Canada in the *Leipert* case (described above). Without the confidential review of the records by the trial judge, a stay of proceedings under the *Charter of Rights and Freedoms* will almost certainly result (see *R. v. Carosella*). In cases where the review would have shown the "innocence at stake" claim to have been unfounded, the result will be the loss of a prosecution which otherwise would probably have been successful.

Further Reading and References:

R. v. Leipert (1997), 143 D.L.R. (4th) 38, 207 N.R. 145, 112 C.C.C. (3d) 385, 4 C.R. (5th) 259, [1997] 3 W.W.R. 457, 41 C.R.R. (2d) 266, 85 B.C.A.C. 162, 138 W.A.C. 162, 4 C.R. (5th) 259, [1997] 1 S.C.R. 281

R. v. Garofoli (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421, 116 N.R. 241, 43 O.A.C. 1, 36 Q.A.C. 161, 80 C.R. (3d) 317, 50 C.R.R. 206

R. v. Carosella (1997), 112 C.C.C. (3d) 289, 98 O.A.C. 81, 4 C.R. (5th) 139, [1997] 1 S.C.R. 80, 142 D.L.R. (4th) 595, 207 N.R. 321, 41 C.R.R. (2d) 189 (S.C.C.)

Carter, Richard W., 1997, *How Crime Stoppers Keeps its Promise to an Informant that the Informant's Identity will not be Disclosed*, Crime Stoppers International Inc., P.O. Box 30413, Albuquerque, NM 87190-0413

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