



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 55580-00	EFFECTIVE DATE: October 2, 2009	POLICY CODE: INC 1
SUBJECT: In-Custody Informer Witnesses		CROSS-REFERENCE: DIS 1 IMM 2 Practice Bulletin

POLICY

The purpose of this policy is to avoid miscarriages of justice in cases involving in-custody informer witnesses. A number of important Inquiries and Reports have found that in-custody informers have figured prominently in cases of wrongful conviction.

Crown Counsel should present the evidence of an in-custody informer witness only after a thorough investigation has satisfied an In-Custody Informer Witness Committee or the ADAG, as described below, that independent confirmatory evidence addresses the reliability concerns that arise with this category of witness. A written record of the reasons for the decision should be kept.

An In-Custody Informer Witness Committee (“the Committee”) consists of three Crown Counsel members of Branch Management Committee, including one designated by the Assistant Deputy Attorney General (ADAG) as a standing member and the Regional Crown Counsel from the region where the case is being tried.

In the event that the Committee is not unanimous that the evidence should be presented, the matter should be referred to the ADAG for decision.

The public interest requires that an in-custody informer witness should not be permitted to testify unless the matter is serious.

Before making a decision to present the evidence of an in-custody informer witness, Crown Counsel should consider the risks to the safety of the informer.

If there is any significant change of circumstances throughout the course of the prosecution, Crown Counsel should request Regional Crown Counsel to have the matter re-assessed by the Committee or the ADAG depending on who has made the decision.

Even after approval by the Committee or the ADAG, trial Crown Counsel may exercise discretion in deciding not to call the evidence of an in-custody informer witness.

When in-custody informer witnesses testify, Crown Counsel should disclose to defence counsel all information relevant to credibility (see the policy on Disclosure - DIS 1, particularly if informer privilege arises).

Whether or not a proposed in-custody informer witness does testify, Crown Counsel must forward the informer's identity and the case information to the Informer Witness Registry (see the Practice Bulletin entitled Informer Witness Registry), so that any information which may relate to the reliability of the witness in any future case will be kept on file.

See below for factors to consider when assessing the reliability of an in-custody informer witness.

DISCUSSION

While in custody and awaiting trial, accused persons sometimes confess to other inmates. Some inmates, referred to in this policy as "in-custody informer witnesses", will inform authorities of these confessions.

Unfortunately, some inmates falsely report confessions, particularly in high-profile cases. These inmates show remarkable skill at acquiring and presenting what appears to be compelling evidence from the accused. What motivates these inmates to fabricate evidence against others is not always easy to discern. For example, by becoming a witness, an inmate may engineer a transfer to a more desirable institution, or obtain a more lenient sentence by reason of the inmate's cooperation with authorities.

Inquiries, studies and reports have repeatedly found that in-custody informers have figured prominently in cases of wrongful conviction. (See [Kaufman: Sophonow Inquiry](#); [Heads of Prosecutions Report on the Prevention of Miscarriage of Justice](#); [The Innocence Project](#)).

Because of these risks, Crown Counsel should presume that the evidence of in-custody informer witnesses is unreliable unless other evidence confirms the evidence of the witness and clearly addresses concerns about reliability. Only an In-Custody Informer Witness Committee or the ADAG may permit Crown Counsel to present an in-custody informer's evidence to a court.

PROCEDURE

When Crown Counsel first learns of an offer of evidence from an in-custody informer witness, Crown Counsel should report the details of the file and the witness to the Informer Witness Registry, whether or not Crown Counsel intends to call the witness at trial (see Practice Bulletin entitled Informer Witness Registry).

In order to assess the reliability of an in-custody informer witness' evidence, Crown Counsel should request the police to conduct a thorough investigation of the witness and the evidence

offered. Crown Counsel should check the Informer Witness Registry for any history concerning the witness.

If Crown Counsel decides to interview the witness, an investigating police officer should attend.

If Crown Counsel is satisfied that the witness should testify, then all information should be forwarded to Regional Crown Counsel who will refer the information to an In-Custody Informer Witness Committee for decision. In the event that a decision by the ADAG is necessary, the standing member of the Committee should ensure that all information is provided to the ADAG along with a summary of the Committee's reasons.

Where a witness seeks consideration for testimony, see the policy on Immunity Agreements - IMM2.

Factors to Consider when Assessing the Reliability of an In-Custody Informer Witness

1. Motives of Informant

What motives does the informant have to present the information offered?

- what does the informant say motivated cooperation with authorities?
- what motives do the staff of the custodial institution(s) involved (if any) believe the informant has, and why?
- what tactical advantages can this informant make of cooperation with police now?
- exactly what consideration or remuneration does this informant expect?
- what benefits has this informant sought or received in the past or the present for information? From police? Corrections? Other sources?
- what benefits have been offered to this informant in the past or present?
- what safety measures have been requested/offered/received in connection with this testimony?

What pressure, if any, have the police placed on the informant to follow through in court with the evidence?

2. How the Informant Obtained the Information

What are the circumstances under which the informant obtained the information of interest?

- when, where and how it was made?
- how much detail?
- do Correctional records establish that these events could have occurred?

3. How the Informant Disclosed the Information to Authorities

Under what circumstances did the informant reveal the confession to authorities?

- which authorities?
- what records did they make?
- did police give a public mischief warning before taking any statement from the informant?
- did the police use any leading questions during any interview?
- did the informant ever give contradictory information?

What pressures, if any, have the authorities placed on the informant to follow through in court with the evidence?

4. Opportunity to Concoct / Collude

What access did the informant have to sources of information: media reports, accused's particulars; witnesses to the offence; any information investigators may have released?

What was the timing of the disclosures to the authorities, relative to news reports and disclosure of particulars?

5. Confirmation

What evidence is there that confirms the informant's evidence? "Confirmation" must be independent of the informant, and support the view that he is telling the truth about inculpatory aspects of the statement. It does not need to corroborate the key details. See R. v. Kehler [2004] 1 S.C.R. 328. However, one in-custody informant generally cannot confirm another.

Has the informant undergone a polygraph examination?

Does the informant have an alibi for this offence?

6. Corroboration

Did the informant's information lead to discovery of evidence known only to the perpetrator?

Does the alleged confession match information held back until after the informant provided it?

7. Character of Informant

What is the informant's character:

- re honesty: are there any convictions for false pretences, fraud, perjury etc.?
- generally: length of criminal record, or history of disreputable conduct, or good character evidence, reasons for current incarceration, or other background?
- what medical/psychiatric reports are available to Crown Counsel or police?
- are Correctional Services Canada records available?

This part of the assessment is not complete until all available databases have been checked: JUSTIN, CPIC, PIRS, Provincial or National Registries of Informants.

8. Previous Disclosures by the Informant

- has this informant previously claimed to have information useful to the authorities (police or Corrections)?
- what requests has the informant made for consideration for providing information, a statement or evidence?
- what consideration or advantage has the informant been offered or given in the past for information?
- how reliable was the information that the informant gave in the past?
- has the informant testified in court? What assessment of the evidence given is available and what comments, if any, did the judge make?

9. Agent of the State

Was the informant an agent of the state? If so, the evidence obtained may be excluded by virtue of s. 7. See R. v. Broyles, [1991] 3 S.C.R. 595.

- what relationship existed between informant and accused?
- what relationships existed between informant and authorities prior to offer of testimony?
- did police solicit information from this informant?
- did police approach the informant before the informant received the alleged confession/information?
- what arrangements led to the informant being with the accused? Did the authorities have anything to do with it?

10. Safety

What safety measures are appropriate, if the informant testifies?

Are they available?