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CHAPTER V – CHAPITRE V : Witnesses and Victims Témoins et victimes	Readers are referred to the list of Related Documents at the end of this Policy for additional information. Les lecteurs peuvent se référer à la liste des documents connexes notés à la fin de cette politique pour information supplémentaire.	

IN-CUSTODY INFORMANT EVIDENCE

1. Introduction

Evidence of an in-custody informant is admissible in court and can properly form part of the case for the Crown where, upon thorough review, there are sufficient indicia of reliability and a compelling public interest to adduce the evidence.

The evidence of some in-custody informants has been shown to be unreliable and has resulted in miscarriages of justice. The prevailing view is that the testimony of an in-custody informant is inherently suspicious, and that reliance on this type of evidence should be used only in exceptional circumstances.

2. Scope of the Policy

The purpose of this Policy is to avoid miscarriages of justice in cases involving in-custody informant evidence.

An “in-custody informant” is someone who

- (a) allegedly receives one or more statements from an accused,
- (b) while both are in custody, and
- (c) where the statements relate to offences that occurred outside of the custodial institution.

This Policy does not apply to an informant, whether in-custody or not, who has evidence independent of the alleged statements of an accused, or to an agent of the state who is placed in contact with an accused to obtain a statement as *per R. v. Broyles*¹.

3. Assessing In-custody Informant Evidence

Given the high propensity for harm in relying on in-custody informant evidence, a careful consideration must be given in the assessment of whether the evidence is sufficiently reliable and, if so, whether it is in the public interest to use it.

¹ [1991] 3 SCR 595.

3.1 Procedure

The Crown Prosecutor shall assess the reliability of the evidence according to the indicia below and determine whether use of the evidence is in the public interest.

Where, upon thorough review, the Crown Prosecutor believes that the in-custody informant's evidence is reliable and use of it is in the public interest, the Crown Prosecutor shall prepare and submit a report to the Regional Director or the Executive Director, as the case may be, for review.

The Crown Prosecutor's report should contain the following information:

- (a) a detailed synopsis of the allegations;
- (b) the proposed evidence of the in-custody informant;
- (c) all evidence considered by the Crown Prosecutor whether admissible or not;
- (d) the Crown Prosecutor's analysis of the reliability of the in-custody informant and the evidence;
- (e) information concerning requests for, offers of, and negotiations regarding consideration;
- (f) information about the in-custody informant, including his or her criminal history, court behavior, and police cooperation;
- (g) the Crown Prosecutor's opinion and recommendation;
- (h) any plans to ensure the in-custody informant's safety; and
- (i) the Crown Prosecutor's disclosure plan.

Where the Regional Director or the Executive Director, as the case may be, agrees that the in-custody informant's evidence is reliable and use of it is in the public interest, the Regional Director or the Executive Director, as the case may be, shall obtain approval from the Director of Public Prosecutions.

If there is any significant change of circumstances throughout the course of the prosecution, the Crown Prosecutor shall consult the Regional Director or the Executive Director, as the case may be, to discuss whether the matter should be reassessed.

Where the in-custody informant's evidence is to be used in exchange for a benefit or immunity, a written public interest agreement must be entered into as set out in Policy 34, Crown Immunity and Public Interest Agreements.

This procedure should be completed as soon as practicable. The Crown Prosecutor may exercise discretion in deciding not to call the evidence even though approval to do so has been obtained.

3.2 Factors to Consider in Assessing the Reliability of Evidence

In order to assess the reliability of an in-custody informant's evidence, the Crown Prosecutor should ask the police to conduct a thorough investigation of the potential witness and his or her evidence, and shall consider the following:

- (a) the motives of the in-custody informant, including
 - (i) what he or she claims motivated cooperation;
 - (ii) what others believe motivated cooperation and why they believe this;
 - (iii) any tactical advantages that could be derived from cooperation;

- (iv) any consideration or remuneration expected;
 - (v) any benefits that have been requested, offered, or received in the past or at present for information or testimony;
 - (vi) any safety measures that have been requested, offered, or received in connection with this testimony; and
 - (vii) any pressure from authorities to follow through in court with the evidence;
- (b) how the in-custody informant obtained the information, including
- (i) when, where, and how the statement was made;
 - (ii) how much detail the statement contains;
 - (iii) whether a record was made of the statement; and
 - (iv) whether correctional records establish that such events could have occurred;
- (c) how the in-custody informant disclosed the information to the authorities, including
- (i) the circumstances under which the information was given;
 - (ii) the authorities to whom the information was given;
 - (iii) whether the authorities made any records of the information given;
 - (iv) whether the authorities gave a public mischief warning before taking the statement;
 - (v) whether the authorities used any leading questions during the interview;
 - (vi) whether any contradictory information was given; and
 - (vii) any pressure from authorities to follow through in court with the evidence;
- (d) whether the in-custody informant had any opportunity to concoct or collude evidence, including
- (i) his or her access to sources of information such as media reports, the accused person's particulars, witnesses to the offence, and any information investigators may have released; and
 - (ii) the timing of the disclosure to the authorities, relative to news reports, and the disclosure of particulars;
- (e) independent information that confirms the in-custody informant's evidence, including
- (i) whether he or she has undergone a polygraph examination; and
 - (ii) whether he or she has an alibi for this offence;
- (f) independent information that corroborates the in-custody informant's evidence, including
- (i) how his or her evidence relates to other available evidence whether admissible or not;
 - (ii) whether the information led to the discovery of evidence known only to the perpetrator; and
 - (iii) whether the alleged confession matches information held back until after the informant provided it;

- (g) the character of the in-custody informant, including
 - (i) anything known concerning his or her honesty, such as any convictions for false pretences, fraud, or perjury;
 - (ii) generally, the length of his or her criminal record, any history of disreputable conduct, any character evidence, the reasons for his or her current incarceration, and any other background information;
 - (iii) the results of any medical and psychiatric reports available; and
 - (iv) information obtained from New Brunswick's Justice Information System (JIS) and any national registries;
- (h) any previous disclosures by the in-custody informant, including
 - (i) whether he or she has previously claimed to have information useful to the authorities;
 - (ii) any requests for, or offers of, consideration for information given in the past;
 - (iii) how reliable any past information was; and
 - (iv) the court's assessment of any evidence and testimony previously given; and
- (i) the in-custody informant's safety, including
 - (i) a determination of any safety measures that will be required if he or she testifies; and
 - (ii) whether such measures are available.

Upon consideration of the factors listed above, where the Crown Prosecutor decides to interview the in-custody informant, an investigating police officer shall attend.

3.3 Factors to Consider Regarding the Public Interest

The determination of whether to use the evidence of an in-custody informant will depend upon whether doing so is in the public interest. Factors concerning the public interest are set out in Policy 11, Pre-charge Screening. In addition, the specific principles enumerated in subsections 4.3.1 and 4.3.2 below should also be considered.

3.3.1 Gravity of the Offence

The gravity of the offence is an important public interest consideration, but does not go to the reliability of evidence. The seriousness of the offence in itself cannot justify using an in-custody informant's evidence, yet the public interest requires that an in-custody informant's evidence is only used where the offence to which the evidence relates is serious.

3.3.2 Safety of the In-custody Informant

The safety of an in-custody informant is a paramount concern. As a result of providing information or evidence to the authorities, the personal safety of an in-custody informant, or his or her family, is potentially at great risk. The Crown Prosecutor must be satisfied that the in-custody informant has been warned of this risk.

4. Disclosure of In-custody Informant Evidence

Subject to safety concerns and the principles of informer privilege, the Crown Prosecutor should disclose the following:

- (a) the criminal record of the in-custody informant and a factual synopsis, where readily available;
- (b) information regarding any prior testimony of the in-custody informant, including, at a minimum, the date, location, and court, if known;
- (c) information concerning consideration requested, offered, or received; and
- (d) the circumstances in which the statement was obtained and given to authorities.

The timing of disclosure must correspond with, or follow, any measures taken to ensure the in-custody informant's safety.

5. Informer Privilege

Where an in-custody informant does not intend to testify or to make his or her identity known to the public, then his or her identity is protected by informer privilege and the Crown Prosecutor is not entitled to disclose any information that could expressly or impliedly reveal his or her identity.

Before disclosing an in-custody informant's information or accepting a waiver of informer privilege, the Crown Prosecutor shall ensure that the in-custody informant has been advised that he or she has informer privilege and is entitled to seek independent legal advice.

In many cases in-custody informants will have counsel to assist them in respect of charges they face or related matters. In such cases it is appropriate for the Crown Prosecutor and the police to deal with the in-custody informant through counsel (to the extent that this is consistent with the in-custody informant's wishes).

6. Prosecution of In-custody Informant for Giving False Statements

If it is necessary to investigate or prosecute an in-custody informant, it may be necessary and appropriate to refer the case to an outside police agency for investigation and an outside prosecutor for advice or prosecution.

7. Related Documents

Policy 11	Pre-charge Screening
Policy 22	Disclosure
Policy 34	Crown Immunity and Public Interest Agreements