How Crime Stoppers Keeps Its Promise To An Informant That The Informant's Identity Will Remain Anonymous

A. <u>The Promise</u>

Crime stoppers has been the most successful crime solving and crime fighting program in the history of law enforcement because it has all of the necessary elements to induce people to give information to crime stoppers which can be used by law enforcement officers to solve crimes, make arrests, and obtain criminal convictions. The payment of a reward is inducement to some informants, while unnecessary for others. However, the promise that the crime stoppers informant can remain anonymous is a necessity to nearly all informants. It is also important to law enforcement. An informant whose identity is revealed may be subjected to threats and retaliation. The informant is of little future use to law enforcement officers if the criminals all know that the person is a crime stoppers informant and cannot be trusted with information about criminal activities. If an informant is "burned" or "upped" by law enforcement officers who disclose the informant's identity without the consent of the informant, then the law enforcement officer and agency cannot be trusted by informants. When the promise of anonymity is not kept, then the flow of information to police agencies is seriously reduced in the future until a new trust can be established.

Crime stoppers programs make the promise of anonymity in a variety of worded statements. Examples of the promise are:

1. "You will remain anonymous."
2. "You do not have to disclose your identity."
3. "You may remain anonymous."
4. "You can remain anonymous."

The promise of anonymity is a part of the contract that is formed by the offer of a reward and the informant's acceptance of and performance of the contract. If the promise is made, it should be kept. The only exception is when the contract is modified by mutual consent of the parties to the contract, i.e., when the informant agrees to allow the identity to be disclosed. Although there has not been a crime stopper case in which crime stoppers has been sued for not keeping the promise of anonymity, there is a case in the State of Oregon where an informant sued because her identity was revealed to the criminal defendant and his attorney. The informant's case was lost in the trial court, but is being appealed.[1]

B. <u>The Best Way To Preserve The Informant's Identity</u>

If you do not know the identity of the person who calls crime stoppers, then you cannot reveal what you do not know. For this reason, most crime stoppers programs tell the caller at the very beginning of the phone conversation: "Please

[1] <u>Keltner v. Washington County</u>, 100 Or.App 27, 784 P.2d 127 (Or.App.1989).

do **NOT** tell me who you are, so that you can remain anonymous." Occasionally, however, the caller will give his or her name or identifying information in spite of all efforts to dissuade the informant from doing so.

In the event that a crime stoppers caller blurts out the informant's identity, there are still some options available to protect the informant's identity from disclosure. The call-taker should not write down the informant's name or identifying information (other than the informant's code number, if one is given to the caller by crime stoppers) on the tip information sheet. Nor should there be a tape recording made of the informant's call. Generally, there is no duty whatsoever to write down, preserve, or ask for, the name of a caller. In at least two crime stoppers cases, defendants have attempted to strike down crime stoppers as being unconstitutional for its failure to ask for the identity of a caller; for its practice of telling the caller that the identity is not wanted; and for not making efforts to track down and identify a caller who might be an exculpatory witness.[2] In both cases, crime stoppers survived the challenge with flying colors.

C. Protecting The Name Of The Informant Or The Identifying Information If You Do Not Have Such

If there are written documents, computer records, or even knowledge contained in the memory of a crime stoppers call taker's mind, it must be protected in every way possible from being disclosed. If not adequately protected, an informant's identity can be disclosed in several ways. The information may be disclosed accidentally by negligence if it falls into the wrong hands, or, it could be ordered to be disclosed by a court of law. There is really no reason why this should happen, if the guidelines of crime stoppers are followed.

For the good of all crime stoppers programs everywhere, it is strongly urged that each and every effort to secure the disclosure of an informant's identity and/or crime stoppers records be met with the greatest resistance possible. Never, ever, voluntarily disclose the identity of a crime stoppers informant. Always fight requests for disclosure. If crime stoppers programs give up their records (even records that do **NOT** contain identifying information), then it will soon be routine and commonplace for such requests. The voluminous requests can become overwhelming, time consuming, and chilling to would-be informants. If such requests become standard, then it is possible that all criminal defense attorneys will feel compelled to seek the information for fear of being accused of providing incompetent legal counsel.

D. Special Legislation That Protects Crime Stoppers Information

A few very fortunate states have special statutes which gives added protection to crime stoppers records and information. The first such statute was enacted in

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[2] People v. Brown, 502 N.E.2d 850 (Ill.App 2nd Dist. 1986); and, People v. Callen, 194 Cal.App.3d 558, 239 Cal.Rpt. 584 (Cal.App. 1987).

New Mexico in 1978.[3] The statute provides that the records, reports, and files of the New Mexico Crime Stoppers Commission shall not be subject to subpoena except by order of the Supreme Court of New Mexico. Additionally, there is a criminal penalty for the unlawful disclosure of confidential crime stoppers information. The State of Texas went even further to protect the crime stoppers information in 1981.[4] Texas statutes make it almost impossible to obtain the records not only of the Texas Crime Stoppers Advisory Council, but all crime stoppers programs operating within the State of Texas. Like New Mexico, Texas has a criminal penalty for unlawful disclosure. Another state having a special crime stoppers statute is the State of Louisiana.[5] Louisiana does not have a criminal penalty for disclosure, but makes it very difficult for a criminal defendant to find an exception to the "privileged" communication to crime stoppers organizations. Court decisions in all three of the above states have interpreted the respective statutes favorably to crime stoppers.[6]

State and Provincial legislatures should be encourage to enact similar legislation everywhere. However, there are other legal means of protecting crime stoppers records and information even if special legislation has not been passed for crime stoppers.

E. Application Of "Open Records" Laws

There are two methods which have been successful in opposing attempts to obtain crime stoppers records when persons seeking information use an "Open Records"-type statute. Most national, state and provincial governments have such statutes which allow citizens to purchase copies of governmental records.[7]

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[3] Chapter 29, Article 12, General Statutes of New Mexico.

[4] Chapter 414, Texas Government Code.

[5] Louisiana Revised Statutes, 15:477.1.

[6] In all criminal cases tried and appealed in three states, there has not been a challenge to the Crime Stoppers Statutes themselves. In Texas and Louisiana, the appellate courts have denied access to Crime Stoppers records, citing the statutes. In New Mexico, there has been no serious effort to obtain the records, just efforts to suppress evidence obtained in searches. See: State v. Gibson, 505 So.2d 237 (La.App.3d Cir. 1987); In re Joe Cecil Smith, Jr., No. C-1699 (Tex.Sup. December 15, 1982); Meitzen v. Fort Bend County Crime Stoppers, Inc., No. C-4580 (Tex. Sup. December 4, 1985); Thomas v. Kinkeade, No. C-6189 (Tex.Sup. February 23, 1987); and, Ex Parte: George Hendon, No. C-6624 (Tex. Sup. August 24, 1987).

[7] The United States has the Freedom of Information Act (5 U.S.C. Section 552). The State of Texas has an Open Records Act (Article 6252-17a). Ontario, Canada has the "Freedom of Information and Protection of Privacy Act, 1987", and the "Municipal Freedom of Information and Protection of Privacy Act, 1989."

One method is to take the position and argue that the tips are the property of the non-profit crime stoppers corporation, which is a private legal entity. In other words, the crime stoppers corporation is not a governmental agency and the "Open Records" laws are not applicable. The Board of Directors of the crime stoppers corporation raises funds, offers rewards, solicits information, and receives the tips which it may or may not pass on to a law enforcement agency. The public cannot obtain the records of a private corporation such as General Motors or Chrysler, and it cannot, under an "Open Records" statute, obtain the records of a private, non-profit, charitable corporation such as crime stoppers. Many crime stoppers programs use rubber stamps on their tip sheets and records to reflect that the documents and tips belong to the corporation and are not to be disclosed or disseminated.[8] The State of Arizona, enacted a statute to protect crime stoppers records from "Open Records" acts. The 1990 statute reads:

"A record of a communication between a person submitting a report of criminal activity to a silent witness or Crime Stopper program administered by a police department, sheriff's department, or county attorney's office and the person who accepted the report on behalf of the Silent Witness program is not a public record".[9]

Another way to oppose "Open Records" requests, if the above method is unsuccessful, or if crime stoppers tip information has been co-mingled or transferred to law enforcement records and is now considered to be a governmental record, is to raise the "law enforcement exception" to the "Open Records" Act.[10] This exception normally protects the investigative files of law enforcement agencies in pending cases. The exception may not, however, be available after a case has gone to the Court or has been closed.

F. The Informant's Privilege

An "informant" is a person who voluntarily furnishes information regarding violations of law to officers charged with enforcement of the law. A general rule of law known as "The informer's privilege" has been created both by court decision and statutes. The United States
Supreme Court established the guidelines for applying and interpreting the informer's privilege in the landmark case of Rovario v. United States.[11] Many

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[8] In Texas, one rubber stamp often seen reads:
"Confidential: Property of Crime Stoppers of _____, Inc. Unauthorized copy, use, or dissemination is punishable by law. Texas Government Code, Sect. 414.099."

[9] Arizona Revised Statutes, Title 12, Chapter 13, Article 9.

[10] For example, see 5 U.S.C. Sect. 552 (b) (7) (D) for the United States federal exception.

[11] 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)

jurisdictions have codified the privilege in statutes dealing with criminal evidence and procedure.[12]
The general rule is that the prosecution in a criminal case has the privilege to withhold the identity of persons who have furnished law enforcement officials with information concerning violations of law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to

communicate their knowledge of the commission of crimes to law enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation.

There are three factors under Rovario that are relevant to a determination of the necessity for disclosure of the name of an informant. Those factors are where the informer:

1) participated in the offense
2) was present at the time of the offense or arrest, or
3) was otherwise shown to be a material witness to the transaction ar as to whether the defendant knowingly committed the act as charged.

It is well-settled law that an accused who seeks disclosure of the identity of an anonymous or confidential informer has the burden of showing that circumstances exist which justifies the invocation of an exception to the privilege of nondisclosure. In addition, to showing that the informant was a participant in or eyewitness to the criminal act with which the defendant is charged, that the nature of the crime is such that the informant's testimony will be useful in formulating defense, and that the defendant does not know the identity of the informant, the defendant may be required to provide specific, concrete reasons for his need to know the identity of the informant. The defendant may also be required to show that he intends to call the informant as a witness and that he has tried, and has been unable, to locate the informant.

Even where the defendant has met the preliminary burden of proof in establishing his need for the disclosure of the identity of an informant, the government can present compelling reasons for invoking the privilege of nondisclosure. While this may put the prosecutor in the position of having to drop the case, it might also result in simply balancing the factors in favor of the prosecution and against the defendant in his request for disclosure. The "balancing test" weighs the public interest in protecting the free flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous

[12] Examples: Texas Rule of Criminal Evidence 508(a); and, Montana Rules of Evidence 502.

must depend on the particular circumstances of the case, taking into consideration the crime charged, the possible defense[13], the possible significance of the informer's testimony, and other relevant factors. An excellent article, with examples of questions and evidence used in criminal cases dealing with the disclosure of an informer's identity can be found in the publication Proof of Facts in most law libraries.[14]

G. Crime Stoppers Cases Upholding Informer's Privilege

There have been several crime stoppers cases decided where appellate courts cited the informant's privilege as the legal authority for denying the defendant's motion to have the identity of the crime stoppers tipster disclosed.

The most significant case is the United States Court of Appeals decision in U.S. v. Zamora.[15] The Tenth Circuit upheld the defendant's federal conviction for manufacture of a controlled substance and possession of methamphetamine with intent to distribute. The Court ruled that the Albuquerque Crime Stoppers informer's identity need not be revealed

on the mere allegation by the defendant that the informant was more than a mere tipster as "there was no showing to identify how the informant was involved in the illegal activity."[16]

State appellate courts have also protected crime stoppers informants with the informer's privilege. In State v. Parker[17], the conviction of the defendant for shooting a sixth month old girl, solved by "88-Crime", was upheld. The defendant was unable to meet his burden of proving that the informant was likely to give evidence bearing on the merits of the case.

In Faulkner v. State,[18] the appellate court held that the trial judge was correct in protecting the informant's identity and the contents of communications to Crime Solvers, after discussing the arguments for and against disclosure. No error was found because the trial court "determined that, since the confidential informants were not participants in or accessories to the crimes or intended witnesses,

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[13] Defenses weighing more heavily towards meriting disclosure include: entrapment, duress, alibi, self-defense, and mistaken identity.

[14] "Criminal Law: Need for Disclosure of Identity of Informant", 33POF2d 549 (1983).

[15] 784 F.2d 1025 (10th Cir. 1986).

[16] 784 F.2d 1025, at 1030.

[17] 128 Ariz. 107, 624 P.2d 304 (Ariz.App. 1980).

[18] 73 Md.App.511, 534 A.2d 1380 (Spec.App.Md. 1988).

disclosure was not required, absent additional evidence. Appellant did not show by a preponderance of the evidence that the information was necessary and relevant to a fair defense."

Perhaps the best written decision explaining why crime stoppers need not disclose the identity of an informer is the Kansas Supreme Court's State v. Pink.[19] The court said:

> "It has long been the rule of this court that it is incumbent upon the defendant to show that the identity of the informant is material to his defense. ...We are satisfied that the informant was a mere "tipster" whose information precipitated the investigation that led to the defendant's arrest, and fact alone is insufficient to compel disclosure of the information."

A similar decision was reached by the Supreme Court of Montana in State v. Babella. [20]The court found that the testimony by officer Wicks established that disclosure would result in substantial risk to the informants. The majority in this 4-2 decision said: "In this balancing test the burden is on the defendant to show the need for disclosure, and this need must be one which overrides the government's interest.
Mere speculation will not suffice." Quoting State v. Sykes, 663 P.2d 691, 695 (1983), the majority stated: "Allowing such a routine challenge as that presented by defendant would hamstring the effective operation of law enforcement agencies."

H. Use Of the Hearsay Objection

What may be the most surprising tactic that can possibly be used by a prosecuting attorney to keep out the contents of a crime stoppers informant's actual communication to the person who answers the crime stoppers telephone is the making of a hearsay objection during trial. For purposes of showing "probable cause", hearsay is always admissible. The hearsay is used in the affidavit presented to a judge when police are seeking a warrant, and may be gone into a pre-trial suppression hearing (except for the identity of the informant, generally). Hearsay is not admissible in the trial of a case if a proper objection is made and no exception shown. Thus, a prosecutor can have his cake and eat it, too! The prosecutor can use hearsay to secure a search warrant or an arrest warrant, but can object to the same as hearsay afterwards at trial.

Sometimes, a prosecutor will not object to a defendant's going into a discussion of the hearsay contents of a typical crime stoppers call. This is especially true if there is nothing to identify the informant; if the informant is already known to the defendant; and/or, if none of the hearsay is harmful to the government's case. In

[19] 236 Kan. 715, 696 P.2d 358 (Kan. 1985).

[20] 771 P.2d 875 (Mont. 1989).

State v. Garcia[21], the Arizona Supreme Court stated: "Here, defense counsel's conduct in extensively developing the subject information obtained from the "Silent Witness" caller opened the door for the caller's exact statement to come in . He thus waived objection to the admissibly of the statement. There was no error in admitting the alleged hearsay statement."

At other times, the prosecutor will find it advantageous to go into the hearsay contents of a crime stopper case himself during the trial, if the defense does not object.[22]

Cases of greatest importance are where the prosecutor objected to the defense going into the contents of a telephone tip during the trial (thus protecting the informant's identity and other information and records) because the contents are inadmissible hearsay. It is unfortunate that more prosecutors do not use this relatively simple technique which should be successful in nearly all cases.

In the Zamora case,[23] the U.S. Court of Appeals found no abuse of the trial court's discretion in not permitting a defense inquiry into a conversation between the confidential informant and Detective Caswell of the Albuquerque Police Department. The U. S. Attorney objected to the questions as calling for hearsay.

The basis of the hearsay objection in crime stoppers cases was best demonstrated in State v Esparza[24]:

> "In this case, the statements made during the calls were made by someone outside the business activity with no legal duty to report accurately. Therefore, the statements did not qualify for the Evidence Rule 803 (b) exception and no showing has been made that they qualify under any other hearsay exception."

I. Purging Of Crime Stoppers Records

An informant's identity and identifying information can also be protected from possible subsequent discovery by periodically purging crime stoppers records and destroying unnecessary documents and materials (this includes any tape recordings or answering machine tapes). Tip sheets from cases that have been closed or already tried in court should be destroyed. A review of all materials to

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[21] 133 Ariz. 522, 652 P.2d 1045 (Ariz. 1982).

[22] See: State v. Cain, 717 P.2d 15 (Mont. 1986); but the Court in Cain predicted "it is highly unlikely that in future cases defense counsel will fail to object to such testimony."

[23] 784 F.2d 1024, at 1030-31.

[24] Court of Appeals of Ohio, Sixth Appellate District, Lucas County, Slip Opinion, August 26, 1986.

ascertain what can and should be destroyed should be conducted annually. The only records that should be kept for long periods of time are any records required to be maintained by applicable tax laws and corporate law. Minutes of the crime stoppers corporate board meetings should not contain informant identifying information (other than a code number and a reference to the case for which a reward was offered/paid). Many wise boards go so far as to take up and destroy all copies (not the original) of the minutes and any figures sheets used to determine the amount of reward if such a scale or point system is used, immediately at the close of each meeting. This prevents information from falling into the wrong hands if stolen or misplaced. Furthermore, the fewer documents that exist and the more centrally controlled, the less likelihood of them being targeted by a subpoena.

J. What To Do If All Else Fails

Every now and then, a blind hog finds an acorn. Even rarer, a criminal defendant will be successful in obtaining a court ruling which orders crime stoppers or law enforcement to disclose records and/or the identity of an informant. There are several things that crime stoppers can do when this happens. One of them, however, should never be the choice.

If faced with a court order to disclose the name of a crime stoppers informant or to produce records which would reveal the identity of the tipster, you "could" comply with the court order. You could also kill your crime stoppers Program; get the informant killed; lose your self-respect; or even be sued for breach of the contract where you promised that the informant would remain anonymous, as a result of complying.

K. Other More Intelligent Courses Of Action Would Include:

1. In the past some individuals have respectively declined ("decline" sounds better than "refuse") to comply. Be prepared to be incarcerated and/or fined for contempt of court. The judge may reconsider the decision or your attorney may find another way to protect you and the informant's identity in the meantime. An interlocutory appeal or an application of Writ of Habeas Corpus is also possible, to have you freed by a higher court.
2. If your failure to comply with the court order is based upon "principle" and your records actually reflect nothing that would reveal the informant's identity, you should consider a "compromise". Perhaps the judge would modify the order to provide for an "in camera" (in the judges chamber) examination of the records by the judge to determine whether the records should be disclosed. The in camera procedures may vary among jurisdictions. The judge could deny disclosure or allow the defense to examine the records. A judge could also order a disclosure "vel non", which means that the matter is discoverable but will not necessarily be admitted into evidence.
3. If the informant's identity is known to you (i.e., the informant is technically "confidential", not actually "anonymous"), you may

consider asking the informant for his or her consent to disclose the identity. Great caution must be exercised. In no event should a crime stoppers Informant's identity be disclosed unless the informant's "consent" is in writing and under oath. The consent form should include language which clearly indicates: The consent was made intelligently; the consent was given voluntarily; that there is no guarantee of the informant's safety after disclosure; and that any reward the informant received was for information, not for any testimony or dependent upon the quality or result of any testimony.

4. The ultimate choice is the one that hurts the most, but may be necessary. If all else fails, the prosecutor can file a motion to have the case dismissed rather than to proceed with a disclosure or a contempt of court punishment. As painful as it may be to do so, it is more important that crime stoppers survives to assist in the solution of thousands of other cases, than to avoid the loss of one single case and break the promise of anonymity.[25]

[25] On January 25, 1989, Hunt County, Texas District Attorney Duncan Thomas refused to make a court-ordered disclosure of a Crime Stoppers informant. The hit-and -run homicide case against Elton Roger Brookshire, a Commerce, Texas Fire Department Captain, was then dismissed by the 196th District Court Judge E. Paul Banner.