

Policy:

**In-Custody Informer Witnesses**

Policy Code:

**INC 1**

Effective Date:

March 1, 2018

Cross-references:

[DIS 1](#) [IMM 2](#)

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.

**In-Custody Informer Witness Committee**

In light of the risks associated with the evidence of in-custody informers, Crown Counsel should presume that this form of evidence is unreliable unless other evidence confirms the evidence of the witness and clearly addresses concerns about reliability. Only an In-Custody Informer Witness Committee (“the Committee”) or the Assistant Deputy Attorney General (ADAG) may permit Crown Counsel to present an in-custody informer’s evidence to a court.

Crown Counsel may only present the evidence of an in-custody informer witness after a thorough investigation has satisfied the 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.

The Committee consists of three Crown Counsel members of Branch Management Committee, including one designated by the ADAG as a standing member and the Regional Crown Counsel or Director from the jurisdiction 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.

As part of a decision whether 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 touching upon the credibility or safety of the in-custody informer witness throughout the course of the prosecution, Crown Counsel should request a Regional Crown Counsel, Director, or their respective deputy to have the matter re-assessed by the Committee or the ADAG, depending on who made the original decision.

## **Procedure**

When Crown Counsel first learns of an offer of evidence from an in-custody informer witness, Crown Counsel must report the details of the file and the witness to the Manager of the Informer Witness Registry, whether or not Crown Counsel intends to call the witness at trial. Crown Counsel should ascertain whether the registry contains any relevant history concerning the in-custody informer witness and, if so, consider that history before proceeding.

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.

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 about the offer of evidence should be forwarded to a Regional Crown Counsel, Director, or their respective deputy 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.

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 Crown Counsel decides that an in-custody informer witnesses should testify, Crown Counsel should inform the Registry and disclose to defence counsel all information relevant to credibility (*Disclosure (DIS 1)*), particularly if informer privilege arises.

If Crown Counsel decides that the witness should not testify, that decision should be conveyed to the Registry along with the reasons for the decision.

Where a witness seeks consideration for testimony, see the policy *Immunity from Prosecution – Witnesses and Informants (IMM 2)*.

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

### Motives of In-Custody Informer

- What motives does the in-custody informer have to present the information offered?
- What does the in-custody informer say motivated cooperation with authorities?
- What motives do the staff of the custodial institution(s) involved (if any) believe the in-custody informer has, and why?
- What tactical advantages can this in-custody informer make of cooperation with police now?
- Exactly what consideration or remuneration does this in-custody informer expect?
- What benefits has this in-custody informer sought or received in the past or the present for information? From police? Corrections? Other sources?
- What benefits have been offered to this in-custody informer 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 in-custody informer to follow through in court with the evidence?

### How the In-Custody Informer Obtained the Information

- What are the circumstances under which the in-custody informer obtained the information of interest?

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

#### How the In-Custody Informer Disclosed the Information to Authorities

- Under what circumstances did the in-custody informer reveal the confession to authorities?
- Was there any significant unexplained delay between the confession and when it was revealed to authorities?
- Which authorities?
- What records did they make?
- Did police give a public mischief warning before taking any statement from the in-custody informer?
- Did the police use any leading questions during any interview?
- Did the in-custody informer ever give contradictory information?
- What pressures, if any, have the authorities placed on the in-custody informer to follow through in court with the evidence?

#### Opportunity to Concoct / Collude

- What access did the in-custody informer 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?

#### Confirmation

- What evidence is there that confirms the in-custody informer's evidence?  
"Confirmation" must be independent of the in-custody informer, and support the view that they are telling the truth about inculpatory aspects of the statement. It does not need to corroborate the key details (*R v Kehler*, 2004 SCC 11.) However, one in-custody informer generally cannot confirm another.
- Has the in-custody informer undergone a polygraph examination?

- Does the in-custody informer have an alibi for this offence?

### Corroboration

- Did the in-custody informer's information lead to discovery of evidence known only to the perpetrator?
- Does the alleged confession match information held back until after the in-custody informer provided it?

### Character of In-Custody Informer

- 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, including: JUSTIN, CPIC, PIRS, Provincial or National Registries of In-Custody Informers.

### Previous Disclosures by the In-Custody Informer

- Has this in-custody informer previously claimed to have information useful to the authorities (police or Corrections)?
- Has Crown Counsel previously assessed the credibility or reliability of the in-custody informer's evidence on this or any other case?
- What requests has the in-custody informer made for consideration for providing information, a statement, or evidence?
- What consideration or advantage has the in-custody informer been offered or given in the past for information?
- How reliable was the information that the in-custody informer gave in the past?
- Has the in-custody informer testified in court? What assessment of the evidence given is available and what comments, if any, did the judge make?

### Agent of the State

- Was the in-custody informer an agent of the state? If so, the evidence obtained may be excluded by virtue of section 7 of the *Charter of Rights and Freedoms* (*R v Broyles*, [1991] 3 SCR 595.)
- What relationship existed between in-custody informer and accused?
- What relationships existed between in-custody informer and authorities prior to offer of testimony?
- Did police solicit information from this in-custody informer?
- Did police approach the in-custody informer before the in-custody informer received the alleged confession/information?
- What arrangements led to the in-custody informer being with the accused?  
Did the authorities have anything to do with it?

### Safety

- What safety measures are appropriate, if the in-custody informer testifies?
- Are they available?