

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA

v.

DEMARIO JAMES ATWATER,

Defendant.

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08 CRS 840-4

08 CRS 51241

MEMORANDUM AND ORDER

This matter comes before this Court upon the State's Motion for a Protective Order. The Court heard arguments on December 20, 2009 and January 13, 2010 in Hillsborough, North Carolina, and with the consent of all sides, took the matter under advisement, for issuance of a ruling out of session.

Present in court were Jim Woodall, District Attorney for Orange and Chatham Counties; James Williams, Public Defender for Orange and Chatham Counties, and Jonathan Broun, both representing Defendant. With the consent of the Defendant and his attorneys, the Defendant was not present in court at either hearing. The Court has fully reviewed and considered the record proper in this case, including an *in camera* review of all documents presented by the District Attorney as the subject matter of the Motion, as well as arguments and submissions of counsel on behalf of the State and the Defendant.

Based on this consideration as noted above, the Court notes the following Findings of Fact, Relevant Law, and Conclusions of Law:

FINDINGS OF FACT

1. The Court has conducted an *in camera* review of all documents submitted under seal by the District Attorney. The Court notes that even though the

State's Motion purports to cover all submitted documents, the State was not in fact seeking non-disclosure of all documents.¹

2. The documents that are the subject matter of the Motion are the result of information received from the Crimestoppers "tip" line, and from Gang.net, which is a law enforcement gang database.
3. The District Attorney has previously made all documents available for review by attorneys for defendant. The attorneys were permitted to review all documents, but could not copy them, remove them from the District Attorney's office, or make notes about their contents. The attorneys were, however, permitted to keep track of which pages they might find relevant, useful, or otherwise noteworthy.
4. Some documents produced to the Court for review as part of this Motion have been previously released to the defendant as part of the discovery process, and are not the subject of this Order.²
5. Attorneys for defendant request disclosure of all documents, but have also attached to their Memorandum of Law regarding the Motion for Protective Order a list of specific page ranges they sought to have disclosed.
6. The Court discovered that a few pages specifically requested by one or both of the defendants were not turned over by the State to the Court as part of its submission for *ex parte* review; the Court requested those pages from the State, and they were submitted to the Court under seal, with the exception of the following:
 - a. Pages 181-8 were previously turned over in discovery, and so are not subject to this Motion
 - b. Due to a clerical/numbering error, page 887 does not exist.

¹ "[T]he State believes an *in camera* review with the possible redaction of certain identifying information as to some callers and informants is both a prudent step and in keeping with current ... law." State's Memorandum in Support of State's Motion for a Protective Order, p. 8.

² Pages marked 45-47, 124 and 181-188 have been previously turned over. None of these pages appear to be initial Crimestoppers tip sheets; some are also clearly not from Gang.net. Regardless of the source, these page ranges have been previously disclosed and are not subject to this Order. Page 191 wasn't listed by the District Attorney as a page that has been previously turned over, but it is a duplicate of page 183, which was disclosed.

7. The Crimestoppers tip line is a tool designed and advertised as a way for citizens to provide information in an anonymous fashion.
8. The Crimestoppers organization appears to be a privately run corporation or organization, not subject to the direct supervision of any law enforcement agency. It appears to be a national organization or federation of locally operated agencies.
9. However, the advertised tip line is routed directly to local law enforcement agencies. In this case, calls were routed to the UNC Police Department. Officers assigned to handle the calls are instructed to retain the substance of the information provided, but are trained not to retain information about the identity or contact information of the caller.
10. Officers receiving the tips were instructed not to record, write down, or otherwise retain names or contact information of the callers.
11. In this case, on occasion, a person calling the tip line provided their name as well as contact information, and the information was recorded, written down, or otherwise retained.
12. The Court is unable to determine if those who provided their name and/or contact information were told to not provide that information and insisted on doing so, or if they were told that they could provide their personal information because it would be kept confidential, or if they were not given any instructions or warnings at all.
13. The vast majority of the information obtained through Crimestoppers was submitted anonymously.
14. The substance of the Crimestoppers information falls into several broad categories:
 - a. The tipster's belief regarding the identity of a person or persons in photographs widely distributed in the media;
 - b. The tipster's belief regarding the then-current location of a subject;
 - c. The tipster's thoughts about what may have happened, with no apparent indication or allegation that the tipster was in any way involved;
 - d. The tipster's thoughts about what could be observed in the photographs;

- e. The tipster's observations about some other incident that the tipster wanted to make sure law enforcement knew about;
- f. Second-hand information heard or overheard by the tipster – eg, "another person told me ..." or "I heard...";
- g. The tipster's observations about something the tipster believes to be related; or
- h. Information the tipster states was provided by someone alleged to have been involved.

15. The Crimestoppers information regarding the identity of the tipster falls into several broad categories:

- a. Some tips are completely anonymous, in that there is no name or contact information associated with the tip, and nothing about the substance of the tip would tend to reveal the identity of the tipster;
- b. Some tips record the name or other identifying information provided by the tipster; and
- c. Some tips, merely based on the nature of the information contained in the tip, would make the identity of the tipster apparent or likely to become apparent to someone involved in the case.

16. Of the specific pages of discovery requested by one or both of the defendants, the following are duplicates:

Page Number	Duplicate
107	816
108	818
110-11	179-80
113	814
116	118, 813
117	178, 815
120	810
121	811
122	812
176-7	119, 189-90
192-3	970

17. The following pages regard anonymous tips about:

- a. The tipster's belief regarding the identity of a person or persons in widely-distributed photographs: 106, 114, 122, 123, 176-7, 192-3, 817, 835, 837, 841, 853, 854, 855, 862, 863, 864, 865, 866, 867, 870, 871, 874, 875, 876, 877, 883, 885, 890, 892, 894, 897, 901, 902, 910, 911, 917, 921, 924, 928, 930, 932, 934, 935, 939, 940, 941, 943, 945, 947, 953, 954, 960, 962, 963, 973, 974, 978, 989, 995, 996, 1002, 1008, 1010, 1012, 1013, 1018, 1022, 1026, 1027, 1032, 1041, 1045, 1048, 1049, 1053, 1054, 1056.
- b. The tipster's belief regarding the then-current location of a subject or someone who knows the subject: 108, 116, 121, 888-9, 1025.
- c. The tipster's thoughts about what may have happened, with no apparent indication or allegation that the tipster was in any way involved: 116, 176-7.
- d. The tipster's thoughts about what could be observed in the photographs: 845, 847, 850, 936, 946, 949, 965, 1011, 1014, 1021.
- e. The tipster's observations about some other incident that the tipster wanted to make sure law enforcement knew about: 820, 822, 827, 829, 830-1, 833, 842-3, 848, 950, 952.
- f. Second-hand information heard or overheard by the tipster – eg, “another person told me ...” or “I heard...”: 879, 880, 985, 991.
- g. The tipster's observations about something the tipster believes to be related: 823, 826, 832, 918, 1037.

18. The following pages contain anonymous tips, but contain enough identifying information in the substance of the tip that the tipster could be identified:

- a. The tipster's belief regarding the identity of a person or persons in widely-distributed photographs: 107, 852, 872, 886, 891, 903, 975-6.
- b. The tipster's belief regarding the then-current location of a subject: 113, 115, 117, 120.
- c. The tipster's observations about some other incident that the tipster wanted to make sure law enforcement knew about: 821.

- d. The tipster's observations about something the tipster believes to be related: 881.
 - e. Information the tipster indicates was provided by someone alleged to have been involved: 109-11, 113.
19. The following pages contain tips from persons who left their name, phone number, or other identifying information: 907, 944, 1005, 1020, 1038, 1055.
20. Pages 109-11 (which are duplicated at pages 2272a-b) contain information from a tipster or tipsters that, according to statements made by the District Attorney in open court, continued to provide information to law enforcement, and the substance of this statement to Crimestoppers is located within police reports that have previously been disclosed to the defendant.
21. Pages 208-33 are "informant control sheets," that have attached to them additional criminal, civil, or other background records regarding two informants who originally provided information via Crimestoppers, and then continued to have contact with law enforcement.
22. The following pages were not specifically requested by either defendant after their review of the documents. As to these documents,
- a. the following pages contain anonymous tips about:
 - i. The tipster's belief regarding the identity of a person or persons in widely-distributed photographs: 834, 836, 840, 851, 856, 861, 868, 873, 896, 905, 906, 909, 920, 922, 923, 925, 926, 933, 937, 938, 942, 948, 951, 955, 956, 957, 958, 961, 984, 993, 994, 1004, 1006, 1007, 1015, 1017, 1019, 1024, 1029, 1030, 1031, 1033, 1035, 1040, 1050-1.
 - ii. The tipster's belief regarding the then-current location of a subject: 899, 908, 912, 915, 972, 977, 979, 981, 983, 997, 1000, 1023, 1043, 1044, 1046, 1047, 1052.
 - iii. The tipster's thoughts about what may have happened, with no apparent indication or allegation that the tipster was in any way involved: 927, 959, 967, 990, 992, 1001, 1039.

- iv. The tipster's thoughts about what could be observed in the photographs: 846, 849, 859, 878, 895, 914, 919, 929, 966, 971, 1009, 1034.
 - v. The tipster's observations about some other incident that the tipster wanted to make sure law enforcement knew about: 824, 825, 857, 858, 860, 893, 900, 964, 968, 986, 988, 1003.
 - vi. Second-hand information heard or overheard by the tipster – eg, "another person told me ..." or "I heard...": 931, 987.
 - vii. The tipster's observations about something the tipster believes to be related: 913, 969, 1016.
- b. the following pages contain anonymous tips, but contain enough identifying information in the substance of the tip that the tipster could be identified:
- i. The tipster's belief regarding the identity of a person or persons in widely-distributed photographs: 904, 1028, 1042.
 - ii. The tipster's thoughts about what may have happened, with no apparent indication or allegation that the tipster was in any way involved: 998-9.
 - iii. The tipster's thoughts about what could be observed in the photographs: 838-9.
 - iv. The tipster's observations about some other incident that the tipster wanted to make sure law enforcement knew about: 844

23. Pages 467-70, 472-508, 592-602 appear to be materials printed from Gang.net.

24. Gang.net is a law enforcement tool designed to provide information about subjects encountered by law enforcement, but may not be used to establish probable cause in a case. It appears to be the modern-day, online equivalent of a police officer patrol briefing, in which officers might have discussed individuals they had encountered on patrol and what they had observed during the encounter.

25. The following pages are simply cover pages or otherwise blank pages: 819, 828, 869, 882, 884, 916, 980, 1036.

RELEVANT LAW

26. There exists a privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that 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. *Rovario v. United States*, 353 U.S. 53, at 59; 77 S. Ct. 623, at 627; 1 L. Ed. 2d 639, at 644 (1957) [internal citations omitted].
27. The public interest lies in the prevention, detection, and prosecution of criminal acts. Privileged communications to tip lines like Crimestoppers must be encouraged if law enforcement officers are to be held to the task of solving and prosecuting crime. If the identity of such tipsters must be routinely disclosed, those sources of information would surely evaporate. *McLawhorn v. State of North Carolina*, 484 F. 2d 1 (1973) at 7,8.
28. The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. *Rovario* at 60.
29. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. *Id.*
30. A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way. *Id.*
31. A line of cases holds that where an informer is involved in a material way in the crime alleged, the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense. *Id.* at 61.

32. Ultimately, the issue is one that calls for balancing the public's interest in protecting the flow of information against the individual's right to prepare a defense, taking into account all relevant factors, including, but not limited to, consideration of the crime charged, the possible defenses, and the possible significance of the informer's testimony. *Id.*
33. North Carolina law prior to significant changes to the discovery statutes (discussed below) has held that even prior to the balancing test set forth in Rovario, the defendant is required to make a sufficient showing that the particular circumstances of his case mandate the disclosure of the identity of the informant. State v. Jackson, 103 N.C. App. 239, 405 S.E. 2d 354 (1991) at 241.
34. A series of cases in North Carolina and elsewhere stand for the proposition that it is especially helpful in making the determination regarding disclosure to determine whether the informer was an actual participant in the crime, as compared to a mere tipster or informant. The privilege of nondisclosure ordinarily holds where the informant is neither a participant, nor assists in setting up the commission of the crime (as in a drug case in which the informant introduces the seller to the undercover law enforcement agent), but is simply or merely a tipster who provides a lead to law enforcement offices. *See, e.g., Jackson and McLawhorn.*
35. The balancing, when analyzed in the "tipster-participant" framework, generally protects and preserves the flow of information to law enforcement, while at the same time protecting and preserving the rights of the accused in the preparation of a defense.
36. Other jurisdictions, including the 5th Circuit, have adopted a three-part test: first, an evaluation of the level of involvement of the informant in the alleged criminal activity; second, the helpfulness of the disclosure to any asserted defense (requiring the defendant to make a sufficient showing of the aid of such disclosure); and third, the governmental interest in non-disclosure (safety of the informant, preservation of the future use of the informant, etc.). United States v. De Los Santos, 810 F.2d 1326, at 1331 (1987).
37. N.C.G.S. Sect. 15A-903 provides, in relevant part, that the Court must, upon motion of the defendant, order the state to "make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the

defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence *obtained during the investigation of the offenses alleged to have been committed by the defendant*. The term "prosecutorial agency" includes any public or *private entity that obtains information on behalf of a law enforcement agency* or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant” (*emphasis added*.)

38. N.C.G.S. Sect. 15A-904(a1) provides that the “State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.”

39. N.C.G.S. Sect. 15A-908 reads:

(a) Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders. A party may apply ex parte for a protective order and, if an ex parte order is granted, the opposing party shall receive notice that the order was entered, but without disclosure of the subject matter of the order.

(b) The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a), the material submitted in camera must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

CONCLUSIONS OF LAW

40. The Court has the requisite jurisdiction to address the matters presented.

41. The issues presented in the State’s Motion do not affect a substantial right of the Defendant, and therefore the Defendant’s waiver of his appearance at these hearings, with the consent of his attorneys, is proper.

42. Fairly recent changes to the discovery statutes make North Carolina an “open-file” state, in which the State is required to make its entire file available to the defendant. Therefore, the Jackson standard requiring the defendant to make a sufficient showing prior to engaging in the Rovario balancing test is no longer required.
43. N.C.G.S. Sect. 15A-904(a1), when read in conjunction with the rest of the discovery statutes, permits non-disclosure of the identity of confidential informants for reasons such as those set forth in N.C.G.S. Sect. 15A-908.
44. North Carolina discovery statutes on this issue are essentially a codification of the Rovario balancing test.
45. The Court has considered alternatives to either granting in whole or denying in whole the State’s Motion for a Protective Order.
46. No evidence exists at this time to suggest that any of the Crimestoppers tips have come from participants in the alleged crimes.
47. The vast majority of the information contained in the tips is neither relevant nor helpful to the defendant.
48. The disclosure of the contents of a tip tends to be likely to reveal the identity of the tipster in some, but not all, cases.
49. At this point, the identity of any of the tipsters has not been formally disclosed to those who would have cause to resent the communication, so at this point, the privilege is not waived on these grounds.
50. There are tips for which the disclosure would not reveal the identity of the tipster, and therefore the privilege does not apply.
51. Some anonymous tips provided information about a person the tipster believed looked like a person in the photographs distributed by law enforcement.
52. Other anonymous tips can only be described as more speculative and have no apparent indicia of reliability or relevance.
53. There is a substantial risk to any known or possibly identifiable tipster of physical harm, intimidation, bribery, or unnecessary annoyance or embarrassment.

54. The State shall not be required to disclose the identity of any tipster or informant who shared information via Crimestoppers.
55. Because the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the substance of the tips described in paragraphs 17(a), 17(b), 17(e), 22(a)(i), and 22(a)(ii) above are not privileged.
56. As to the remainder of the documents described in paragraphs 17 and 22(a) above, the Court finds that the public interest in encouraging anonymous tips outweighs the defendant's right to disclosure, in that the documents are minimally relevant or helpful to the defendant, if at all.
57. The tips described in paragraphs 18, 19, and 22(b) are also subject to a balancing test, in that the disclosure of the information contained therein would tend to reveal the identity of the informer. As to these documents, the Court finds that the public interest in encouraging anonymous tips outweighs the defendant's right to disclosure, in that the documents are minimally relevant or helpful to the defendant, if at all.
58. The tips described in paragraphs 20 and 21 are also subject to a balancing test by the Court. At this point, the Court finds that the public interest in encouraging anonymous tips outweighs the defendant's right to disclosure. However, if at some point the identity of one or both of the informers is disclosed to the defendant, the privilege may no longer be applicable.
59. The material submitted to the Court from Gang.net (described in paragraph 23) is not discoverable, as it falls outside of the definition of discoverable materials set forth in N.C.G.S. Sect. 15A-903. A previously created database, consulted or referenced when seeking to identify the perpetrator of a crime, is not part of the "file," defined in the statute as evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.
60. The documents described in paragraph 25 contain no evidentiary value, but are included in the Court's analysis in order to be complete. They are wholly irrelevant, and are not subject to discovery.

Based on the foregoing and in an exercise of the Court's informed discretion, IT IS ORDERED, ADJUDGED, and DECREED that the State's Motion for Protective Order is addressed as follows:

1. The State shall not be required to disclose the identity of any tipster or informant who shared information via Crimestoppers.
2. The State's Motion for Protective Order is DENIED as to the substance of the tips or information described in paragraphs 17(a), 17(b), 17(c), 17(e), 22(a)(i), and 22(a)(ii), because the disclosure of the contents of those communication will not tend to reveal the identity of an informer. The attorneys are hereby ORDERED to preserve the confidentiality of this information by not disclosing any portion of this information to any person or agency except as is necessary to prepare for and conduct the trial in the above-captioned matter.
3. Except as described above, the State's Motion for Protective Order is ALLOWED and no additional information shall be provided.
4. The Clerk of Court is directed to attach this Order to the envelope (or box) containing all documents which are the subject of this Motion, which shall be preserved ***under seal*** in their entirety. These records may not be unsealed except by Order of a Superior Court Judge or an appellate court.

This, the ____ day of February, 2010.

Allen Baddour
Superior Court Judge