Biographical Sketch

JUDGE RICHARD W. CARTER (RET.)

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Judge Richard Carter served on the benches of the cities of Arlington, Richland Hills, and DeSoto, Texas, during his 25 years of criminal justice work. Along the way, he also served as Hunt County Attorney and Waco Police Legal Advisor.

He has always been active in professional organizations, having been elected by his peers as Chair of the *Texas Association of Police Attorneys*; Chair of the Legal Officers Section of the *International Association of Chiefs of Police*; and Chair of the Municipal Judges Section of the *State Bar of Texas*.

Judge Carter enjoys writing and lecturing. He has taught as an instructor at *Texas A&M University at Commerce*; *McLennan Community College*; and *Baylor University*. Among the books he has authored are: The Crime Stoppers Case Digest; Crime Stoppers Statutes with Commentaries; and Court Security for Judges, Bailiffs and Other Court Personnel.

Richard Carter has been very active in *Crime Stoppers* on the state, national, and international levels since 1981. He chaired the *Texas Crime Stoppers Advisory Council* for two two-year terms (1983-87) under Governors White and Clements; and as a member of the board and secretary of what is now *Crime Stoppers International, Inc.* 1982-86). He is the only "General Counsel" in the history of *Crime Stoppers International, Inc.*, and continues to serve in such capacity. He has lectured and spoken to over *Crime Stoppers* groups in four nations, and trained more than 80,000 *Crime Stoppers* participants since 1982. Judge Carter has been featured as a spokesperson for *Crime Stoppers* on CNN, NBC, CBS, and other television and radio stations and periodicals.

Since leaving the full-time bench, Judge Carter, in addition to his *Crime Stoppers* activities, maintains a small "unlisted" law practice, and serves as General Counsel to *Correctional Systems, Inc.* (California & Texas), and as Assistant General Counsel for the *Combined Law Enforcement Associations of Texas*.

In his spare time, approximately 53 minutes each day, he enjoys the company of his wife Brenda and their children ranging from age 3 ½ to 29.

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VII. *Crime Stoppers* Cases Upholding the 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* informant disclosed.

The most significant case is the United States Court of Appeals decision in *U.S. v. Zamora.*[14] The Tenth Circuit upheld the defendant's federal conviction for manufacture of a controlled substance and possession of methamphetamine with intention 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."[15]

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

- You will remain anonymous.
- You do not have to disclose your identity.
- You may remain anonymous.
- You can remain anonymous.
- *Crime Stoppers* guarantees that you will 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 Stoppers* case in which Crime Stoppers has been successfully sued for not keeping the promise of anonymity, there is a case in the State of Oregon where an informant in a non-*Crime Stoppers* case sued because her identity was revealed to the criminal defendant and his attorney. The informant lost the case in the trial court, but appealed.[1]

II. The Best Way To Preserve The Informant's Identity

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 telephone conversation: "Please do NOT tell me who you are, so that you can remain anonymous." Occasionally, however, the call will give his or her name, or other identifying information, in spite

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

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 taking 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.

III. 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

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

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 recommended that each and every effort to obtain the disclosure of an informant's identity and/or *Crime Stoppers* records be met with the greatest resistance possible. Never 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 become 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 *ineffective* or *incompetent* legal representation.

IV. Special Legislation That Protects *Crime Stoppers* Information

A few very fortunate jurisdictions have special statutes which give added protection to *Crime Stoppers* records and information. The first such statute was enacted in New Mexico in 1978.[3] The statute provides that the records, reports, and files of the New Mexico State 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.

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

information in 1981. The Texas statutes[4] make it almost impossible to obtain the records not only of the Texas Crime Stoppers Advisory Council, but of all *Crime Stoppers* organizations operating within the State of Texas. Like New Mexico, Texas has a criminal penalty for unlawful disclosure.

Other states having similar legislation include Louisiana and Kentucky.

Court decisions in the states having such special statutes have interpreted the respective statutes favorably to *Crime Stoppers*.[5]

State and provincial legislative bodies should be encouraged to enact similar legislation in those jurisdictions not yet having such protective laws. The text of the Texas statute is cited as an example of model legislation and can be found in this publication.

There are, nevertheless, other legal means of protecting *Crime Stoppers* records and information if special legislation is lacking.

V. 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" or "Public Information"-type statute. Most national, state, and provincial governments have such statutes which allow citizens to view and/or purchase copies of certain governmental records.[6]

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[4] Chapter 414, *Texas Government Code*.

[5] 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); Ex Parte: George Hendon, No. C-6624 (Tex. Sup. August 24, 1987).

[6] The United States has the *Freedom of Information Act* (5 U.S.C. Section 552). The State of Texas has a "Public Information Act" (Chapter 552 of the *Texas Government Code*). Ontario, Canada has the

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*, and it cannot, under an Open Records or Public Information statute, obtain the records of a private, non-profit, charitable corporation such as *Crime Stoppers*.

Many *Crime Stoppers* programs use rubber stamps or printed information 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.[7]

The State of Arizona enacted a statute to protect *Crime Stoppers*-type records from "Open Records" act requests. The 1990 statute[8] 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."**

Another way to oppose "Open Records" requests, if the above method is unsuccessful, or if the *Crime Stoppers* tip information has been co-mingled or

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Freedom of Information and Protection of Privacy Act, 1987, and the *Municipal Freedom of Information and Protection of Privacy Act, 1989*.

[7] In Texas, one rubber stamp often used reads: "CONFIDENTIAL: Property of *Crime Stoppers of* _____, *Inc.*. Unauthorized copying, use, or dissemination punishable by law. *Texas Government Code*, Sect. 414.09."

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

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the necessity for disclosure of the name of an informant. Those factors are where the informer:

- **Participated in the offense**
- **Was present at the time of the offense or arrest, or Was otherwise shown to be a *material witness* to the transaction 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 non-disclosure. 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 a 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 must depend on the particular circumstances of the case, taking into consideration the crime charged, the possible defense[12], 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, found in most law libraries.[13]

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need for disclosure, and this need must be one which overrides the government's interest. Mere speculation will not suffice." Quoting *State v. Sykes*, 683 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."

VIII. 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 law enforcement officers are seeking a warrant, and may be gone into in 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 timely made and no exception shown. Thus, a prosecutor can "have his cake, and eat it, too"! The prosecutor can use hearsay to secure the 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 *State v. Garcia*[20], 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 admissibility 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 Stoppers* case during a trial, if the defense does not object.[21]

Cases of great 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 more often.

In the *Zamora* case[22], 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 United States Attorney objectd to the questions as calling for *hearsay*.

The basis of the hearsay objection in *Crime Stoppers* cases was best demonstrated in *State v. Esparza*[23]:

> **"In this case, the statements made during the calls were made by someone outside the business activity with no**

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[20] 133 Ariz. 522, 652 P.2d 1045 (Ariz. 1982).
[21] 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."
[22] 784 F.2d 1024, at 1030-31.
[23] Court of Appeals of Ohio, Sixth Appellate District, Lucas County, Slip Opinion, August 26, 1986.

judge would modify the court order to provide for an *in camera* (in the judge's chamber) examination of the records by the judge to determine whether the records should be disclosed. The *in camera* procedures may vary among jurisdictions[24]. 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.

C. 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 such disclosure; and that any reward the informant received was for *information*, not for any *testimony* or dependent upon the quality of or result of any testimony.

D. 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

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[24] The State of Texas has a special statute that provides for *in camera* examinations in *Crime Stoppers* cases. See Section 414. of the *Texas Government Code*.

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]

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[25] On January 25, 1989, Hunt County, Texas District Attorney F. 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 judge of the 196th District Court. Not too long afterwards, *justice* was obtained by a *Higher Authority* when Brookshire was killed in a one vehicle accident in Oklahoma in which no other human beings were injured.

(c) A person convicted of an offense under this section is not eligible for state employment during the five-year period following the date that the conviction becomes final.

CHECKLIST FOR "MOTION TO QUASH"

[ ] **Is the recipient of the Subpoena Duces Tecum actually the person who has care, control, and custody of the records sought? If not, object and point to the person, persons, or agency having such control or custody.**

[ ] **Does the Subpoena Duces Tecum properly describe the items sought? If overly broad or vague, object.**

[ ] **If the Subpoena Duces Tecum has not met any applicable procedural requirements of the law, cite the legal authority and point out the failures to comply.**

[ ] **Make a strong argument for the public policy which favors *Crime Stoppers* and the keeping of the promise of "anonymity", and stress that allowing the Subpoena Duces Tecum to stand will have a *chilling* effect on *Crime Stoppers* and take away from the right of the people to be able to safely communicate crime-solving information without the fear of retaliation.**

[ ] **Whether provided for by law or not, ask that the Court consider an *in camera* inspection of the *Crime Stoppers* documents as an alternative to simply allowing the Subpoena Duces Tecum to be enforced.**

[ ] **Cite any court decisions and statutes applicable for your jurisdiction. If there are none, then list court decisions from other jurisdictions which are favorable to protecting *Crime Stoppers* records and information. These cases can be urged as *secondary* or *persuasive authority*.**

APPENDIX