CONFIDENTIAL INFORMATION AND THE POLICE COMPLAINT PROCESS

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Introduction

As with everything else in our society, policing has and is becoming an increasingly complex profession. This is due in no small part to the increased sophistication of the criminal element, including organized crime and the proliferation of gangs such as outlaw motorcycle gangs. These factions are using technically advanced state of the art communications, means of deception and cover-up, and anti-surveillance techniques. Of course, they still employ the crudest forms of tactics in order to frustrate police investigations, i.e. physical force and/or threats of force against potential witnesses and victims.

In the face of these challenges, police must change the way they investigate certain crimes and criminals. Often this includes the use of wiretaps and informants. When such methods are used, the suspect who is detained or perhaps arrested has the right to file a complaint in the event that he or she feels wronged in some way by the police conduct. This may raise issues of the confidentiality of information and/or identities of informants. What if the police stopped the complainant as a result of wiretap information that is part of an ongoing investigation? What if the information required for police officers to justify the reasonable and probable grounds for a search/detention/arrest originated from a confidential informant?

In this paper, I will examine those questions in the context of actual incidents that have occurred in Winnipeg, but could just as easily have occurred in any other police jurisdiction.

Scenario #1 - Confidential Information Regarding Wiretaps

As part of a lengthy drug project, police obtained permission to set up wiretaps on a number of suspects in Winnipeg's drug trade, many with alleged links to criminal organizations. The project was ongoing when police intercepted a phone call about a rendezvous between two suspects. They followed suspect #1 to a fast-food restaurant. He was observed exiting his vehicle and approaching the restaurant. Suspect #2 exited

the restaurant and handed him a paper bag with the restaurant's logo on it. Suspect #1 immediately returned to his vehicle with the bag and left. He had a male passenger in the front seat with him. Police (who were in unmarked surveillance units) called for uniformed general patrol cars to stop the vehicle. A marked cruiser car responded, activated the emergency equipment, and after several lengthy blocks of quick sharp turns, the suspect finally pulled over. The uniformed officers, who were briefed, removed the individuals from the car and transported them to the station. The plain-clothes officers searched the vehicle.

Suspect #1 and his male passenger were released without charges. A few days later, as a result of wiretap and surveillance information, suspect #1 was stopped again, this time with two different males as passengers. Police were acting on information that he would be in possession of a large amount of money allegedly from drug sales. Again, uniformed general patrol cars conducted the stop. After searching the individuals and their vehicle, they were allowed to proceed without charges.

It should be noted that in both stops, the occupants had large amounts of cash and multiple cellphones and pagers.

Suspect #1 filed a complaint regarding both stops. Not surprisingly, he claimed that he was the subject of police harassment and that police had no reasonable and probable grounds to stop and/or search him. Obviously, during his dealings with police, they never advised him of the wiretap evidence or of the drug project.

Scenario #2 - Information Regarding Confidential Informants

This scenario began with the murder in Winnipeg of an associate of a well-known gang. The killer was arrested, convicted and incarcerated for the crime. On the anniversary of the murder, the killer's brother was fatally shot. This crime remains

unsolved, although the most accepted theory is that this was a revenge killing. It was alleged that a confidential informant tipped police to the fact that the victim's life was in danger, and that they failed to act on that tip and warn/protect him. This matter is currently being litigated between the Winnipeg Police Association and the City of Winnipeg, given that several officers, although not charged, were placed on an extended administrative leave and later re-assigned out of the Major Crimes Unit.

During the course of the arbitration hearing, the City has been vigorously resisting the release of any information that may allow anyone to determine, directly or indirectly, the identification of the confidential informant. The Winnipeg Police Association has taken the position that their ability to defend the officers has been compromised and if the information is to remain privileged, the officers should be reimbursed fully for all their losses.

This second scenario is being put forward in this paper because there could just as easily have been a complaint filed by the victim's family under the *Law Enforcement Review Act of Manitoba*. If such had been the case, no doubt the City of Winnipeg would have resisted any attempts at obtaining disclosure by either party to the complaint. The officers on the other hand would be arguing that their ability to mount a full and fair defence in the civilian oversight process was compromised.

The Issues Arising From Confidential Information

Any Civilian Oversight Agency that must deal with the fact situations set out above will find itself having to perform numerous balancing acts between the rights of the parties to full disclosure, the safety of informants and the integrity of sensitive police investigations to name a few.

Some of the issues resulting from the wiretap scenario (Scenario #1) may be:

- The Civilian Oversight Agency (hereinafter referred to as the Agency) may not even be told about the undercover operation.
- Even if told about the undercover operation, the Agency may only be given scant or insufficient details.
- In the unlikely event that the Agency receives significant detail including documents and transcripts:
    - how much, if anything, do they disclose to the complainant and the respondent officers?
    - if they give more information to the officers than to the complainant, that would likely be problematic;
    - the complainant may try legal means to compel production.
- Does the Agency choose to delay the matter partially or totally?
    - if so, for how long?
- What effect does disclosure (even disclosure of the mere existence of an undercover investigation) have on the project, i.e. does it make certain suspects more surveillance conscious or even drive them underground?
- Will the safety of any undercover officers be compromised, especially given that the project is ongoing?

Some of the issues resulting from Scenario #2 may be:

- The Agency may not be told about the existence of a confidential informant.

- Even if told about the existence of one, the Agency may be given only scant or insufficient detail.

- It is virtually unlikely that the police service will reveal the identity of the confidential informant to the Agency, or for that matter what type of information they received from that person.

- Does the Agency choose to delay the matter partially or totally?

  *It should be noted that the divulging of the wiretap information after a project winds down (such as in Scenario #1) may not be critical, especially since individuals who are charged will get full disclosure from the Crown in any event. But in the case of an informant, that person's name can never be revealed, no matter how many months or years have elapsed, without endangering that person and/or their family.

Are There Any Solutions to These Problems?

The writer does not pretend to have the solutions for all of these problems, in part because these types of situations are very difficult, if not often impossible to resolve. There are however certain areas that can assist oversight agencies:

(i) Delay - sometimes, especially with ongoing criminal investigations, delay can solve disclosure problems. The *Law Enforcement Review Act of Manitoba* provides:

> 12(1.1) Notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing criminal investigation, the Commissioner may delay the investigation of the complaint for such period as the Commissioner considers reasonable in the circumstances.

This type of provision is essential to any legislative scheme of civilian oversight. In Manitoba it is often used in situations where the complainant has outstanding charges for Assault Peace Officer. The question is usually what constitutes an ongoing criminal investigation, especially if the undercover project has been put on hold for several months. I recommend language that covers this last point.

*Your Agency may also wish to consider holding off in requesting disclosure from the police service during the delay period. That way, attempts to obtain documents from the Agency would be futile. In other words "you can't turn over what you don't have".

(ii) Disclosure - The *Law Enforcement Review Act* has disclosure provisions at various stages:

(1) The respondent officer must be provided with a copy of the complaint "as soon as it is practicable" (s. 7(2)).

(2) The respondent officer or the Commissioner can require the complainant to provide further particulars of conduct complaint of (s. 10).

(3) The Commissioner has investigative powers under Part V of the *Manitoba Evidence Act* (s. 12(1)). These include powers to:

- summon witnesses to provide statements under oath and produce documents;
- view premises;
- issue a warrant for non-appearance;
- commit the person to jail for refusing to testify;
- engage the service of experts.

(4) The Commissioner can request copies of all documents/statements and other relevant materials from the Chief of Police (s. 12(2)).

- This is subject to the ability of the Commissioner to grant an extension to the Chief where the documents are required for the purposes of a criminal investigation.

  *This is rather open-ended in that it does not specify an "ongoing" criminal investigation. It is also unclear why they can't be turned over since all the Commissioner can request is to receive copies of the materials.

(5) The Commissioner can obtain an order to search and seize from a justice (s. 12(5)).

(iii) Third Party Resolution of Disclosure Issues - The *Law Enforcement Review Act of Manitoba* provides for third party resolution of disclosure issues by a Queen's Bench Judge in two scenarios:

(1) When the Chief of Police is claiming privilege over documents requested by the Commissioner.

(2) When the Commissioner is claiming privilege over documents or statements requested by the complainant or the respondent officers.

This type of legislated third party resolution of disclosure issues is significant because it removes the responsibility from the Agency and places it squarely with the Queen's Bench Judge. Indeed, oversight

agencies should be proactive in using this type of third party resolution in sensitive situations before requesting or receiving documents from the police service. Remember that once those documents are in your file, your Agency is vulnerable to several legal avenues that complainants may use to try to obtain them.

(iv) Avoiding the Fishing Expedition - I would think that many of you would be familiar with the tactic of certain factions of organized crime whereby the complaint process is used as a "fishing expedition" to see what information the police have about them and/or their associates. This can be avoided in sensitive situations if the Agency has sought to have disclosure issues resolved by a third party such as a Queen's Bench Judge well in advance. The Agency may obtain the documents by order from the Judge and may also be proactive in asking the Judge to prescribe limits on their use i.e. a further order denying access to certain confidential information for persons other than the Commissioner.

Conclusion

It has been my experience that issues of disclosure in sensitive situations often produce complex and protracted litigation. These issues are often quite stressful for an oversight agency that on the one hand does not want to be seen as "withholding" evidence, and on the other hand, does not want to jeopardize people or delicate criminal investigations. When an Agency walks into this type of legal "minefield" without carefully weighing the consequences, it usually results in a lose-lose situation, with all of the stakeholders feeling that the Agency has mishandled the problem.

To avoid this, oversight agencies should:

(1) Examine their respective legislative schemes to ensure that they adequately address the issues of delay, particulars, privilege and third party resolution of disclosure disputes. If not, change the legislation.

(2) Analyze the situation very carefully before requesting particulars and/or committing to providing particulars.

(3) Use third party resolution of disclosure issues in a proactive fashion, i.e. before asking for and receiving potentially privileged information (remember, you cannot be forced to turn over what you don't have).

(4) Develop and publish a protocol for dealing with the issue of confidential information.

These simple steps may not answer all of the problems created by confidential information but they will certainly assist the perception that your oversight agency has a procedure in place for dealing with the issues in a professional and fair manner*.

*AUTHOR'S NOTE: I stopped short of declaring that the above would make everyone happy because I know that is a "pipedream", especially in the often thorny reality of civilian oversight.

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