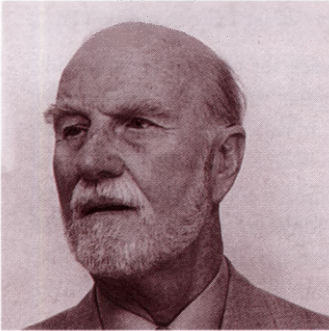


Tax informers: the immunity issue

by John Booth



John Booth

In this second article on informers, Dr Booth considers whether, in the light of recent reports, their immunity from discovery may not be in the public interest and whether or not the common law precedents which endorse that immunity are as safe in law as claimed.

The Informant Working Group was constituted by the Metropolitan Police Service (MPS) on 5 August 1997. Its terms of reference were 'to review the guidelines associated with informants' and 'to consider how community/social impact might be incorporated in the risk assessment applied to the use of individuals'. The Group's report, *Informing: the Community* (published in 1998) was a multi-agency publication supported by the MPS, the Police Complaints Authority and the Community Police Consultative Groups in the Metropolitan Police District, and, in brief, its recommendations stressed a need to re-organise the managing of informers and to consider risks in relation to the harm to the informant, police and the community.

A leaked list of some 50,000 informers, reported and published by *The Observer* (11 October 1998) and the *Guardian* (12 October 1998), indicated the scale of management required and the need to know the authority (statutory or otherwise) under which informants are controlled and accounted for.

The report stated that the informant is 'an essential element of policing' and that their use by the police has been 'since time immemorial'. The authority for the immunity of informers was merely that they were 'entitled to expect anonymity'. Whilst Customs and Excise and the inland Revenue derive their authority to control informers from the *Inland Revenue Regulation Act 1890* and the *Customs and Excise Management Act 1979*, the police authority is from a Home Office circular (*Crime and Kindred Matters*, HO 212/1969 (1986)). Regarding rewards, this circular states that:

'payments to informants from public funds should be supervised by a senior officer'.

THE ORIGINS OF INFORMERS

The Informant Group's report referred to the authority for the use of informers as existing 'since time immemorial', although the authority for their use was documented in 1956 by Sir Leon Radzinowicz in *A History of English Criminal Law*, Vol 2,

which showed that common informers had existed from 1575 until 1951 (*Common Informers Acts 1575 and 1951*).

The early acts provided for rewards to informers by statute and, for a successful prosecution for a felony, a certificate was given with exemption from the onerous parish service; known as 'Tyburn Tickets', they were frequently traded for cash. Radzinowicz regarded this as policing by the economics of *laissez faire*, and Eugene Oscapella, in *A Study of Informers in England* ([1980] Crim LR) considered that:

'[informers were] used in the absence of police forces [and] survived the organised forces that might have replaced them'.

The social threat lies in the fact that the act of an informer is often one of malice, or to settle old scores, where the giving of unverified information is that which the receiver most wants to hear (so that both are complicitors with the certain protection of the courts from discovery).

However, the keeping of an earlier public peace by the economics of *laissez faire* had, by the end of the 18th century, degenerated into a system of policing through spies, or agents provocateurs providing fabricated evidence for rewards. The historical ignominy of informers is therefore real and justified, but Home Office guidelines reminded chief constables in 1986 that:

'Informants, properly employed, are essential to criminal investigation [and] ought to be protected'

whilst

'No member of a police force, and no public informant, should counsel, incite or procure the commission of a crime.'

Therefore, in view of the very real public concern in regard to the management of present-day informers, and the known ambiguities in the history of their management, it should be of public interest to test the existing authority for that management. The following section considers this issue.

INFORMERS AND THEIR IMMUNITY

A recommendation of the Informant Working Group that:

'the use of informants must be in accordance with a proper system of accountability'

and that their use should be justified within the terms of art. 8 of the *European Union Convention on Human Rights*, is difficult to reconcile with the report's view that:

'their use and management must remain ... shrouded from public view.'

Indeed, in regard to both their immunity and rewards, if the courts do not determine the credibility of an informer and the validity of any statement, the influence of rewarding informers without providing a sanction against the false informer, is all pervasive – corrupting the informer and the informed alike. It is arguable that the sources for the precedents of immunity are of medieval origin and have no proven authenticity, with a consequence that the rulings handed down have become unsafe.

How did this come about? Paul O'Connor drew attention to these origins in *The Privilege of Non-Disclosure and Informers* ([1980] IJ, 15 NS) by quoting an *obiter* by Davitt P in *A-G v Simpson* ([1959] IR 105, 112) which stated that, on evidence:

'The ground that its disclosure would be detrimental to the public interest appears to have originated in state trials and revenue prosecutions'.

The state trials became political show trials, as in the earliest quoted case of *Bishop Atterbury* ((1723) 16 St Tr 464). Atterbury was charged with treason under the *Treason Act 1350* (although the indictment is not stated) and was denied access to information regarding the interception of his letters under the *Post Office Act 1710* s. 40. The court stated that:

'It is inconsistent with public safety ... to suffer any further inquiry to be made ... into the warrants granted ... for the stopping and opening of letters which should come or go by the post'.

Atterbury was convicted, hung, drawn, quartered and beheaded as *'an example to others not to offend in the like manner'*.

The significance of this is that in the House of Lords, Lord Diplock LJ, in *D v NSPCC* [1977] 1 All ER 589, 595, whilst rejecting an appeal against allowing the disclosure of the name of a false informant, noted Lord Esher's view in *Marks v Beyfus* [1890] 25 QB 494,498, that the withholding of the identity of informers had already hardened into a *'rule of law'*. It is this assertion which now calls for further study, because Lord Esher added, in regard to the disclosure of a name to show a prisoner's innocence, that:

'then one public policy is in conflict with another ... and that which says that an innocent man is not to be condemned ... must prevail'.

It was in *Marks v Beyfus* that the Director of Public Prosecutions relied on the precedents from *A-G v Briant* [1846] 153 ER 809, *R v Watson* (1817) 32 St Tr 692 and *R v Hardy* (1794) 24 St Tr 604, in justifying his refusal to give the name of his informant. *Briant* was a Revenue case while *Hardy* and *Watson* were state trials.

In *A-G v Briant* it was judged that:

'the rule of public policy protects a witness from being asked such questions as would disclose the informer'.

But had these precedents hardened into a rule of law? Before 1846, the public policy of the political show trials was the unquestioned use of evidence which may have been fabricated, with protection of the identities of false informers and the provision of sinecures overseas (see, e.g. the case of the provocateur Oliver (Hansard 16 and 22 June 1825), in addition to the suspension of habeas corpus. It was part of the political system.

These policies were then directed against Corresponding Societies which were deemed to be plotting insurrection. The trials of *Hardy*, with those of *Watt* (*R v Watt* (1794) 23 St Tr 1167), and *Downie* (*R v Downie* (1794) 24 St Tr 603), were the political show trials of the day and relied on fabricated evidence of informers. *Watt* and *Downie* were first tried, convicted and sentenced to be hung, drawn, quartered and beheaded, as in the earlier example of *Atterbury*.

TREASON ACT 1350: SUSPECT?

Why is this Act suspect? The clue is in the defending barrister's remarks in the *Downie* case concerning his indictment, which was common to all four defendants. The act is written in Norman French and had been reprinted in 1763 (O Ruffhead, *Statutes at Large*). Its use is odd because, from 1695, all acts were required to be in the English language (*Treason Act 1695*). Cullen, the defending barrister, explained to *Downie's* jury that the statute, written in the French language, was flawed because of the consequence that:

'the life of every British subject prosecuted by the Crown for treason should continue to depend upon the critical construction of two obsolete French words'.

The two French words were *'compasser ou imaginer'* (referring to the death of the King), and the clerk would have rendered these verbs as *'compass or imagine'*. An English translation of the statute exists alongside the French in the *Statutes at Large* of 1763, but the translation, made for Henry VIII, never received parliamentary sanction and does not replace the French text. Additionally, the *Treason Act 1350* is undated and Halsbury notes the duty of the Clerk of the Parliament to endorse on every statute after 1793 the title, date, month and year on which the royal assent was received (*Halsbury's Laws*, Vol.44, 4th edn (1983), para. 813). Finally, the trilingual (French, Latin and English) system for parliamentary recording ended in 1731, after which all proceedings were in English.

Some attempts were made to try to resolve the French/English translation of the statute through the use of interpretations made by Sir Edward Coke (1552–1634), but the latter (also in Norman French) have never been printed and the translations are claimed to be very inaccurate (*Dictionary of National Biography*, Vol XI (1887), p. 242). Sir William Holdsworth also claimed that:

'Coke's law and political theories were essentially medieval and therefore wholly illogical'. (A History of English Law, Vol V (1924), p. 480)

Ruffhead's Preface also noted *'very material mistakes'* in the early statutes and that:

'the learned Reader will be able to determine for himself, and may adopt or reject the Marginal Alterations, as his better Judgment shall direct him'. (Statutes at Large (1786–1800), Preface, xxvi)

The justification for Cullen's defence of Downie is that Downie was pardoned, although Watt, without counsel, was executed, but, as Hardy and Watson's trials were to follow, it is suggested that the latter's indictments were also unsafe, as were the precedents which have been used to assert the immunity from discovery of the identity of all subsequent informers.

TRACING THE IMMUNITY PRECEDENTS

In the first *Atterbury* case (1723), the reason for the immunity from discovery was in the motion that 'it is inconsistent with public safety'. In the *Hardy* case (1794), Hardy's counsel Gibbs claimed that:

'... when a man's credit is sifted by being asked whether he has ever told the same story to another person, and he says he has told it to a particular person, he is always asked who that particular person is ...'.

To which Eyre, LCJ responded that 'the channels of communication are not to be disclosed' and that:

'... there is such a rule, and that we have this day determined that such a rule exists'. ((1794) 24 St Tr 604, 809)

In the *Watson* case (1817), notwithstanding the fact that the informer, Castle, was discredited, Lord Ellenborough extended the protection of the identity of informers, despite the acquittal, on the grounds that:

'There will be no safety in communicating the important intelligence ... If the channels of communication are to be revealed.' ((1817) 32 St Tr 692)

In the *Briant* case (1846), the rule was further extended by Lord Pollock CB who asserted that:

'... the rule of public policy, which protected witnesses from being asked such questions as would disclose the informer ... equally applies to questions which would disclose whether the witness is himself the informer.' ([1846] 153 ER 809)

The *Beufus* case (1890) ruling was Lord Esher's view that the withholding of the identity of informers had already hardened into 'a rule of law', and that a prosecutor is entitled to:

'... refuse to disclose the names of persons from whom he has received information ... (unless it) is necessary or desirable in order to show the prisoner's innocence'. ([1890] 25 QB 494, 498)

But these rulings are really tautological assertions, and some of the ambiguities emerged in the *D v NSPCC* case in the Court of Appeal (1976) and the House of Lords (1977). In the Court of Appeal Lord Scarman LJ, finding for the appellant, observed that if:

'... informers may invoke the public interest to protect their anonymity, the law may be found to encourage a Star Chamber world alien to the English tradition'. ([1976] 2 All ER 993, 1007c).

Many considered it was unfortunate that in the House of Lords the finding was reversed, and in 1980 O'Connell noted in *A Study of Informers in England* that 'Sadly, the House of Lords ... chose not to follow Lord Scarman's advice'. However the ruling did include a qualification that:

'The categories of public interest are not closed and must alter from time to time ... as social conditions and social legislation develop ...' ([1977] ALL ER 589, 590, 605B)

The difficulty in accepting the precedent which has been claimed in the *D v NSPCC* case is that it was a civil case being subsumed under the head of public policy of preserving from disclosure in a civil case the identity of informants when no certification of any public interest immunity was provided, and which Sir Richard Scott showed was a requirement in the Export of Defence Equipment Inquiry (1996 HC 115, III, Ch 10).

Sir Rupert Cross and Colin Tapper considered the ambiguities of the public interest immunity certificate (*Cross on Evidence*, 7th edn (1990) 471–472), noting that 'public interest immunity' was limited to claims 'on behalf of central government'. Also that 'the question is usually vented at the preliminary stage of discovery' from a certificate made by a minister and that the 'certificate should set out the precise grounds upon which immunity is claimed' for which the *Crown Proceedings Act 1947*, s. 28, places the responsibility with the courts.

FURTHER READING

See Issue 14, January 1999, for an earlier article by Dr Booth which examines the case of a false informer.

The need to examine the considerations 'where vital interests of state are affected' and then other 'less vital interests of state' were identified in *Duncan v Cammell Laird Co Ltd* ([1942] 1 All ER 587) concerning information about a submarine in time of war. But this restriction, Cross and Tapper noted,

'could hardly prevail once the campaign had been fought, or the design ... becomes common knowledge'.

Other documents were noted where a ministerial certificate is hardly necessary, such as Cabinet minutes or despatches from ambassadors, and that immunity may apply in the European Union 'in respect of the interests of organs of the Community'. *Halsbury's Laws* identifies other special grounds for resisting discovery as professional privilege, self-incrimination or statutory provisions, (Vol 13, 4th edn (1975), para. 7), but not the existence of a document (RSC Ord 77, r. 12(2)). It was also considered in the Runciman Report in 1993 (Cm. 2263, para. 53–4) that the framework for prosecution disclosures should be laid down in primary legislation.

All of these comments only serve as a reminder that the 'hard rule of law' claimed in regard to immunities from disclosure of sources of information is far from precise, and that the recommendation of the Informant Working Group that the management of informers should remain 'shrouded from public view' might only lead to further miscarriages of justice.

REWARDING INFORMERS

Although the Informant Working Group noted that a 'small number of informants receive modest payments', there were no recommendations as to this practice. However the Home Office guidelines do accept the policy and advise that payments to informants from public funds should be supervised by a senior officer, despite other police sources which consider that this practice 'increases the likelihood that the informer will manufacture information'. Nevertheless *Halsbury's Laws* also shows that a Crown Court may:

‘... order the sheriff to pay such person such sum of money as seems to the court reasonable and sufficient to compensate him’. (Vol 11(2), 4th edn (1990), para. 1525)

Additionally, in the 19th century, the police themselves shared rewards to informers paid by the Board of Inland Revenue from the proceeds of customs seizures and penalties (PRO MEPO 7/134 and T 29/606), so the policies are of long standing.

The paradox is that there is no statutory authority for the police to pay (or receive) payments for information, whereas HM Customs and Excise and the Inland Revenue have had statutory authority since 1736 (*Offences Against Customs and Excise Act*). The present statutory authority for the Inland Revenue is from 1890 (*Inland Revenue Regulation Act*) and for Customs and Excise from 1979 (*Customs and Excise Management Act*); these acts provide that the Commissioners may, at their discretion, reward any person informing them of any offence against the Revenue. At the very least, if these ambiguous policies are to be continued for the police or Revenue departments, of paying informers from public funds, then it should be under a sole statutory authority and with clear accountability for those funds to Parliament.

THE FALSE INFORMANT

It is unfortunate that the earlier court rulings were unable to distinguish between the genuine and the false informant, where both enjoyed the protection of immunity by the courts as if providing an equal service to the state, although the latter was committing perjury. Indeed, earlier *Taxing Acts* (1803 and 1806) provided penalties of transportation or the pillory for false claims of rewards, and the *Consolidating Taxing Act* of 1842 recognised the offence of perjury, providing for:

‘Persons giving false evidence, or swearing falsely, [to be] liable to the Penalties of Perjury’. (TA 1842 s. 180)

This tax penalty existed until repealed by the *Perjury Act* 1911. However, the *Statutory Declarations Act* 1835 provided that the ‘Treasury may substitute a declaration in lieu of an oath’. This was not repealed by the *Perjury Act* and could therefore still be used.

Other courts have expressed stronger views about the perjurer. Lord Goddard CJ claimed in *Hargreaves v Bretherton* ([1959] 1 QB 45) that:

‘they should be sentenced for the crime ... and by a criminal court’.

The problem of the false informant was addressed by the Criminal Law Revision Committee (1963–64 Cmnd 2465, para. 24), which recommended a statutory law to deal with false evidence, similar to the Australian *Crimes Act* 1914. JUSTICE, in 1973, also noted wrong decisions in civil and criminal courts through perjury ‘committed without shame, and effective sanction’ and that as ‘the effectiveness of the law declines, the incidence of perjury is likely to increase’. One recommendation was that a judicial proceeding should include an administrative tribunal, making the *Perjury Act* far more effective.

Notwithstanding these positive recommendations to counter the increasing problem of the false informant, the anonymous false informant presents a deeper pit of deception for which there are fewer records. One such case did identify the consequences for an innocent appellant for whom there was no redress. In *D v NSPCC* ([1976] 2 All ER 993), Lord Denning MR,

in the Court of Appeal, outlined what was at stake when an NSPCC inspector responded to a telephone call about a baby on a pre-Christmas night. Following a distressing interview, the innocent mother had to consult a psychiatrist, who reported a ‘severe degree of clinical depression following the visit of the NSPCC’. The unsuccessful appeal to the House of Lords ([1977] 1 All ER 589) protected the anonymity of the informant who gave false information.

In this case, because the information was telephoned, even had the caller been identified, there would have been no redress in tort (*Stand and Deliver*, J Booth, Waterside Press (1998), at p. 104). The case of another false tax informant was discussed in *Amicus Curiae* in an article entitled *An Informer’s tale* (Issue 14, January 1999). The false and anonymous informer has always been, and remains, a serious social threat which another criminal law revision committee could again redress.

CONCLUSION

This article shows that the recent public concern over the managing of informers was justified, that this concern is not new and has been documented from the 18th century. The secrecy over the managing of informers stems from the immunity from the disclosure of their identities, which has been extended by the courts over the years from treason to civil cases. The causes of the secrecy surrounding informers stem from unsafe precedents with origins in obsolete and non-statutory medieval writings, which have been interpreted through tautological assertions without proof.

The rewarding of informers, whilst well-documented, is mainly hidden within departmental procedures and the thirty-year rule for public release. This authority should now be codified by legislation and made accountable to Parliament.

The most serious failings have been over the lack of control over the false informant. This control could be made more effective through legislation codifying the *Statutory Declarations Act* and the *Perjury Act*.

Finally, it has been shown that a multiplicity of differing authorities have been handed down by statutes and by the courts, from which each publicly-funded department has safeguarded their own interpretations. A single authority to manage all informers, and accountable to Parliament, is suggested to meet a clearly-identified need. TRS Allan (in *Public Interest Immunity and Ministers’ Responsibilities*, [1993] Crim LR 668) reminds us that:

‘the essence of a free society [is] that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty.’ 🔗

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He would like to thank the Information Working Group for permission to quote from their report.