5. INFORMANTS AND CONFIDENTIAL SOURCES OF INFORMATION

In some cases, school officials develop their reasonable grounds to conduct a search based in part on information provided by a confidential source, which in the law enforcement context is sometimes referred to as an "informant" or "informer."

In the school setting, few students could be likened to the paid or professional informers who "work" for law enforcement agencies, or who are cooperating with law enforcement in consideration for a reduced sentence as part of a "plea bargain." Rather, information is typically provided to teachers and school administrators by students on an ad hoc and highly informal basis. For this reason, it is perhaps inappropriate to use an intimidating and colorful term such as "informant" to describe a student who reports facts or suspicious circumstances to school employees. That term is used in this Manual only for convenience and because this terminology is frequently used in the caselaw that discusses when police may rely and act upon information supplied by private citizens, and when police and prosecutors may refuse to divulge the identity of a confidential source of information.

The law distinguishes between two different types of information sources: (1) information provided by persons who are themselves involved in criminal activity, and (2) information provided by persons for whom there is no reason to believe that they have committed crimes or are otherwise untrustworthy. These distinct circumstances are discussed in §§ 5.1 and 5.2, respectively.

Although some students believe that it is inappropriate to "squeal" or "rat" on classmates, in fact, it is important that every member of the school community understand that they have a responsibility to contribute to the safety and security of their classmates and teachers. Students should be made to understand that it is not "cool" to engage in dangerous behavior, such as bringing drugs or weapons on to school grounds. Students must also understand that the best chance for ensuring a safe and secure environment is to let would-be offenders know that they face a significant risk of being caught precisely because their classmates have the courage to report offenses to their teachers and other appropriate school officials.

5.1. Information Reported by Persons Involved in Criminal Activities.

For purposes of Fourth Amendment law, the phrase "confidential informant" generally refers to a person who has knowledge about someone else's criminal behavior because the informant is also involved in the criminal conduct about which he or she is reporting. These informants are said to be "involved in the criminal milieu" and are

distinguished from so-called "citizen" informants, who are not believed to be in any way involved in criminal activity. (The law concerning the latter type of informer is discussed in § 5.2.)

When information is provided by a person who is himself or herself engaged in criminal activity, courts are naturally skeptical about the informant's motives and his or her capacity to be truthful. Consider that information given about a suspected drug dealer may be provided by another drug dealer who hopes to have his "competition" arrested or expelled.

When judging the reliability of information provided by confidential informants, that is, persons who are themselves engaged in criminal activity, courts will examine the "totality of the circumstances" to decide whether the information provided is credible, and whether that information establishes probable cause (in the case of a law enforcement search) or reasonable grounds (in the case of a search to be conducted by school officials under the less stringent legal standard announced in New Jersey v. T.L.O.). A determination of probable cause or, where appropriate, reasonable grounds, will always take into account *all* of the facts and attendant circumstances known to the police officer or school official, as well as all reasonable inferences that can be drawn from those facts or circumstances. Ultimately, the test under the Fourth Amendment is one of reasonableness: would a reasonable school official or police officer believe and rely upon the information provided by the confidential source, considering not only all information known about that source, but also other information that tends to support or contradict the informant's story.

Although the courts have rejected a rigid test to determine the reliability of confidential informants, it is still useful for analytical purposes to refer to what was once known as the "two-pronged" test of informant reliability. Although the United States Supreme Court has technically abandoned this "two-prong" test in favor of a more amorphous "totality of the circumstances" test, see Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the factors that constitute the "two-prongs" remain "highly relevant." See Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990).

The first "prong" to be considered requires the police officer (or school official) to examine the *basis* for the informant's knowledge. In other words, we must ask, how does the informant know about the suspected crime or incident that he or she is reporting? Was the informant present during an earlier criminal event or transaction? Did the informant actually see someone using or distributing drugs or carrying a

weapon? Did the informant actually see another student place drugs or a weapon into a particular locker or container?

The second "prong" requires police officers or school officials to examine the *veracity* of the informant. Why would a reasonable person believe that this particular confidential informant — who is him/herself involved in criminal activity — is telling the truth? Often, this question is answered by looking at the informant's reputation for truthfulness and his or her "track record" for providing information that has proven to be reliable and truthful in the past.

School officials or police officers should look closely to any motives that the informant may have to lie, as well as to the amount of detail that the informant can provide. When the informant is able to provide these so-called "self-verifying details" about the suspect's criminal conduct, then government officials are better able to determine whether the informant's information is accurate.

One way to bolster a weak "prong" is to conduct some kind of further investigation to corroborate the informant's story. This independent investigation should be conducted *before* a full-blown search is undertaken. Recall that the legality of a search will be determined on the basis of the information that was known to school officials or police officers at the time the search was conducted. An unlawful search cannot be justified by what it reveals, or by information that might have been available to the official conducting the search but that was not actually known and relied upon.

School officials or police officers should always try to determine whether there is any other information that is known or readily available that would lend credibility to the informant's story, including information provided by another independent source and/or an examination of the record or reputation of the person the informant alleges to be involved in criminal activity.

There are a number of other ways to corroborate information provided by an informant. In many cases, it may be appropriate to conduct a surveillance of the suspect (which is not a search under the Fourth Amendment) to see if the suspect engages in any suspicious conduct that would tend to corroborate the information provided by the confidential source, thus indicating that the informant was telling the truth. See Chapter 9 for a more detailed discussion of permissible surveillance techniques.

School officials and police officers should always consider whether the information provided by a confidential source is "stale." Information about a suspect may be so old that it no longer provides probable cause or even reasonable grounds to believe

that the suspect continues to be involved in criminal activity or that evidence of that criminal activity will be found in a particular location. For example, otherwise reliable information that a student kept drugs in a locker during the course of the last school year may not provide reasonable grounds to conduct a search of the locker today, although such information would certainly justify an investigation to determine whether any other information is available to support the suspicion that the student continues to be concealing drugs on school property. (See also Chapter 2.3A(8).)

5.2. Information Provided by Innocent Victims and Witnesses.

As noted above, and especially in the school setting, many if not most "informants," that is, persons who supply information to school officials, are not themselves involved in criminal activity or infractions of school rules. These sources are sometimes referred to in the caselaw as "citizen" informants. They may be innocent witnesses or even the victims of another's unlawful behavior.

There is no reason to assume that a citizen informant — one who is not part of the so-called criminal milieu — is lying when he or she reports suspicious behavior. For this reason, it is not necessary to establish the second "prong" of the above-described two-pronged analysis. Rather, when school officials learn that information is provided by a citizen informant, they can assume that the person is being truthful.

School officials should still consider whether there is some *basis* for the student's knowledge of the reported criminal activity. If, for example, the information learned of concerning a criminal violation or school rule infraction comes from yet another source (i.e., second-hand information), school officials should try to determine whether the original source of the information was reliable. As children, we all played the game "telephone," in which a story would be handed down from playmate-to-playmate until the final version bore little resemblance to the original. School officials in deciding whether information provided to them constitutes "reasonable grounds" must always consider the original source of the information.

Finally, it must be noted that in many cases, courts seem to tacitly assume that a confidential source of information is reliable, especially where there is no reason to believe that the informant is involved in criminal activity or is otherwise untrustworthy. In State v. Moore, 254 N.J. Super. 295 (App. Div. 1992), for example, the court had little difficulty in concluding that a report by a specific student to a guidance counsellor that the defendant possessed a controlled dangerous substance provided reasonable grounds for the assistant principal to conduct a search of a bookbag believed to belong to the defendant, especially since the information was bolstered by the fact that the

assistant principal knew that the defendant had previously been disciplined for possessing a partially-burned marijuana cigarette that had been found in defendant's jacket pocket. 254 N.J. Super. at 296, 299.

So too, in State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), certif. denied 143 N.J. 516 (1996), the court, without elaboration, held that when the vice-principal was "informed by a confidential informant that [a particular student] was distributing drugs," the vice-principal "certainly had a reasonable suspicion that [the identified student] might have such drugs in his possession" 284 N.J. Super. at 660. The court in its published decision did not probe deeply into the background of the confidential informant or even how the informant had become aware of the drug-distribution scheme.

5.3. Anonymous Tips.

In common parlance, the terms "anonymous" and "confidential" are sometimes used interchangeably when referring to a source of information. News reporters, for example, will often refer to an "anonymous source" when they really mean a known source of information who has given information with the understanding that the reporter will not reveal the source's identity. In the law, and for the purposes of this Manual, the two terms have distinctly different meanings. An "anonymous" source, sometimes referred to as a "tipster," is one whose identity is unknown to the official receiving and relying upon the information. These kinds of sources are discussed in this subchapter. A "confidential" source, in contrast, is a person whose identity is known to the official receiving and relying upon the source's information, but the official has impliedly or expressly agreed not to disclose the person's identity to others as a practical means of encouraging the person to provide the information. The legal issues involved in preserving the confidentiality of an informant's identity are discussed in Chapter 5.4.

On some occasions, information about criminal activity or school rule infractions is provided to school officials anonymously (i.e., e.g., by means of a unsigned letter). When that occurs, there is no way to know if the individual providing the information was involved in the criminal activity or otherwise has a motive to lie. It may also be difficult if not impossible to demonstrate the tipster's basis of knowledge unless he or she happens to relate that information. (Obviously, when school officials do not know the identity of the source, it is usually not possible to contact the source to obtain more detailed information.) For this reason, as a general proposition, an anonymous tip, by itself, will *not* constitute reasonable grounds to justify an immediate search by school officials. Compare Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990) (holding that as a general rule, an anonymous tip provided to police

will not, by itself, constitute reasonable articulable suspicion to justify an investigative detention).

In State v. Engerud, the companion case to T.L.O., the New Jersey Supreme Court ruled that the search of the student's locker was unconstitutional because the anonymous tip the school official relied upon did not satisfy the reasonable grounds test. 94 N.J. 331, 348 (1983). Accordingly, when a school official receives information anonymously or "through the grapevine," the better practice would be to conduct some independent investigation — short of conducting a search — to try to confirm or dispel the information provided in the anonymous tip.

This does not mean that in all cases an anonymous tip is not enough to justify a search conducted by school officials. Rather, the reasonableness of the search will depend upon all of the known circumstances and must be decided on a case-by-case basis. The point, however, is that before conducting a search, school officials should pursue all available investigative options that do not entail an invasion of a student's privacy, such as checking with others to determine whether they may be aware of information that corroborates (or refutes) the anonymously-provided information, or by conducting some form of surveillance.

Note also that in State v. Williams, 251 N.J. Super. 617 (Law Div. 1991), the court held that two separate tips coming from two different anonymous sources, when viewed together, *did* provide police with a reasonable articulable suspicion — the close analog to the "reasonable grounds" standard used to justify a search conducted by school officials. In essence, the court in Williams concluded that the whole is greater than the sum of its parts. Each separate tip, viewed independently, might not have been sufficient, but when viewed together provided a reasonable basis to believe that the information provided in the tips was accurate.

5.4. Protecting the Identity of Sources of Information.

Some students will occasionally report information about school infractions or suspected criminal activity. It is critically important for police and school officials to protect the identity of these students. This is necessary not only to protect the safety of these students as against the risk of retaliation, but also to encourage students and other members of the school community to come forward with information that will allow school officials and, where appropriate, law enforcement authorities, to preserve order and discipline and to protect the interests of law-abiding members of the school community.

A state statute, which is part of New Jersey's Rules of Evidence, provides that:

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.
> [N.J.S.A. 2A:84A-28 (also codified as Evid. R. 516.).]

Although this statute is commonly referred to as the "informer's privilege," the privilege actually does not belong to the person providing information, but rather belongs to the government "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of the law." See Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The statute is designed to encourage citizens to perform their civic duty to communicate knowledge of wrongdoing to law enforcement officials without fear of reprisals. See Grodjesk v. Faghani, 104 N.J. 89, 97 (1986). As a general proposition, courts acknowledge the need to preserve the secrecy of an informer's identity, and have created what has been called a "presumption of confidentiality" that can only be overcome by a "substantial showing of a need" for disclosure. See Cashen v. Spann, 77 N.J. 138 (1978).

What is privileged is the identity of the informer, not the information that the informer may have provided. However, if disclosing the contents of the information would likely reveal the identity of the informer, such disclosure is generally precluded. Grodjesk v. Faghani, supra, 104 N.J. at 96.

In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), the court recently applied the same general principles to confidential information that was provided to school officials. In that case, the vice-principal was informed by a confidential informant that a particular student was distributing drugs. The court had no difficulty in concluding that the principal had reasonable grounds to conduct a search of the student based upon the information provided by the confidential informant.

The court further concluded that the vice-principal need not reveal the identity of his confidential informant, as the informant played no part in the discovery of the

drugs. The person providing the information, in other words, was not an "essential witness on a basic issue in the case." Nor was he or she apparently "an active participant in the crime for which defendant is prosecuted." 284 N.J. Super. at 660, citing to State v. Milligan, 71 N.J. 373, 383-384 (1976).

In light of the Court's recent ruling in State v. Biancamano, school officials in New Jersey appear to have the authority not only to rely upon information provided by confidential sources, but also to keep their sources of information confidential. Of course, if the person is an essential witness to or an active participant in the offense or infraction, a court may compel the disclosure of the informant's identity as a matter of due process and to safeguard the right of a defendant in a criminal proceeding to confront the witnesses against him or to compel the appearance of witnesses who may give testimony that is favorable to the defendant. Even in a non-criminal, school-based disciplinary proceeding, it is conceivable that a school official may in some circumstances be required to disclose the identity of a confidential informant if that informant is an essential witness or active participant in the conduct that forms the basis for the disciplinary proceeding. (In that event, a school official could still extinguish any such confrontation right, thus preserving the confidentiality of the informant's information and identity, by dismissing the disciplinary action.)

It is critical to note that the issue in the Biancamano case was whether the prosecutor was required to disclose the identity of the informant to a defendant in a criminal prosecution. The case does *not* stand for the proposition that a school official may refuse to disclose to a prosecutor the source of information concerning suspected criminal activity. Pursuant to state law and regulations promulgated by the State Board of Education, school officials are required to turn over to law enforcement information concerning at least certain forms of suspected criminal activity, including child abuse or neglect, the unlawful possession and/or distribution of controlled dangerous substances, and the unlawful possession and/or use of firearms. (See Chapter 14 for a more complete discussion of the obligation of school officials to report information to law enforcement.) In the absence of some specific federal or state law or regulation establishing confidentiality, a prosecutor or grand jury may compel any person, including a school official, to produce evidence or testimony concerning possible criminal activity. (Compare the "amnesty" feature described in Chapter 14.1C, which authorizes school officials in certain circumstances to withhold the identity of a student who voluntarily turns over controlled substances.)

Finally, it bears noting that the law governing the protection of confidential information is complicated. Courts must carefully balance the need on the one hand for law enforcement officers to encourage citizens to cooperate with authorities and to avoid

reprisals and retaliation, as against the need on the other hand for a defendant in a criminal prosecution to confront the witnesses against him or her and to have access to information that might provide a viable defense to the criminal charges. Federal law and regulations also impose significant restrictions on sharing and divulging information that was learned in the course of providing alcohol or other drug abuse diagnosis or treatment. See 42 C.F.R. Part 2, discussed in Chapter 14.2.

Any questions concerning the confidentiality of sources of information, or any disputes between school officials and law enforcement agencies with regard to these issues, should be addressed to the county prosecutor or to the Director of the Division of Criminal Justice. (See Chapter 14.5 for a more detailed discussion of the procedures for resolving disputes.)

5.5. Handling Confidential Informants.

As noted above, in most cases, students provide information to teachers or school officials on an informal, ad hoc basis. Few students serve in a capacity that can be likened to paid, professional, or "registered" informers who are said to "work" for law enforcement agencies.

As a general proposition, given the potential for reprisals and retaliation, a school official should not recruit a student to serve as an ongoing source of information about school rule infractions or criminal activity. The better practice is not to ask the student to actively obtain more information, *and in no event should a student be recruited to infiltrate a gang or criminal operation or to go "undercover."* Nor should a school official ask a student to undertake a search or to seize or secure an item for the purpose of turning it over to the school official. (See discussion in Chapter 8.8.) Rather, a student should only be asked to report further information if the student happens to learn of it.

Furthermore, it would be appropriate for the school officials to advise the student of the risks inherent in providing further information, and the student should be encouraged not to divulge to *anyone* (other than the student's parents or legal guardians) that he or she has provided information. As a general proposition, the student should be encouraged to discuss the situation with his or her parents or legal guardian unless this would be clearly inappropriate (as where the student is reporting abusive or otherwise unlawful behavior by a parent or member of the household).

Finally, it must be noted that this subchapter deals only with the use of informants by school officials. For information concerning the appropriate procedures that county prosecutors and police agencies must use in handling juvenile informants,

see the recently released *"New Jersey Law Enforcement Officers' Reference Manual: Handling Juvenile Offenders or Juveniles Involved in a Family Crisis"* developed by the Division of Criminal Justice. That Manual includes new Attorney General Guidelines on the Use of Juveniles as Informants and a model Juvenile Informant Agreement, Liability Waiver, and Parent or Guardian's Consent Form. (These materials are reprinted as Appendix 10 to this Manual.)