



SPECIAL REPORT BY THE GARDA OMBUDSMAN
TO THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE
ISSUED PURSUANT TO SECTION 80 (5) OF THE GARDA SÍOCHÁNA ACT 2005.

1. Introduction

- 1.1 On 15 October 2008, the Garda Síochána Ombudsman Commission (the “Ombudsman Commission”) opened a public interest investigation pursuant to the provisions of Section 102 (4) of the Garda Síochána Act 2005, as amended (the “Act”).
- 1.2 On completion of this investigation a file was sent to the Director of Public Prosecutions (the “DPP”) on 13 December, 2012. On 23 April, 2013 that Office advised that no prosecutions were warranted.
- 1.3 Thereafter the Ombudsman Commission considered, and – for a number of policy reasons - decided against, the launching of an investigation pursuant to section 95 of the Act (of matters that may constitute indiscipline).
- 1.4 As part of this investigation, matters – relating to the implementation and operation of informant handling procedures, both historic and current, by the Garda Síochána – have come to the notice of the Ombudsman Commission that, in our opinion, because of their gravity – merit the sending of this report to the Minister for Justice, Equality and Defence (the “Minister”).

2. Note of caution

- 2.1 The Ombudsman Commission, mindful of the requirement to be considerate of the safety of people, will not be naming individuals in this report. For the same reason, the Ombudsman Commission has not revealed specific details of this particular investigation. We are cognisant of the fact that others have, in the past, named certain individuals and made certain statements about them. In this report we make reference to matters of a sensitive nature, including the implementation and management of informant handling procedures, both historic and current. That our investigation led us to make enquiries regarding the operation of these procedures does not necessarily imply participation in that system. It means, simply, that we were obliged to make enquiries in an effort to establish certain facts. Our comments regarding the system are, consequently, general in nature and should be taken as such.

3. Background - Criminal Participation of Informants

- 3.1 In practical terms police forces rely on, and use, informants to provide information relating to criminal activity. Inevitably, therefore, informants - and the information that they provide - become part of some Garda Síochána investigations. Accordingly, informant information may influence the taking of prosecutions (where the Gardaí send a file to the DPP).
- 3.2 The use of informants gives rise to complex legal and ethical issues, e.g. the credibility of informants or their motivation in providing information and the provision of any advantages/credit (e.g. mitigation of sentence) for the provision of information.
- 3.3 Some informants have no involvement in the criminal activity being investigated (though they may have some links with crime) but are in a position to provide information to the Garda Síochána that assists in the investigation, and detection, of that criminal activity. Many such individuals have a relationship with gardaí and provide information on an ongoing basis. For the purposes of this report we call such persons "informants" (this is to be distinguished from public spirited individuals who, on occasion, provide a tip-

off to the gardaí in relation to a criminal act, e.g. where a neighbour sees a burglar enter a house on his street and rings the gardaí with the identity of the perpetrator).

- 3.4 Other informants provide information in relation to criminality in which they have an involvement – e.g. the driver of the car during a bank robbery. For the purposes of this report we call such persons “participating informants” in that they have participated in the criminal activity that they are informing on. Obviously this gives rise to more complex considerations, not least the fact that the participating informant could also be charged with an offence. Accordingly some jurisdictions provide express regulation on the use of ‘participating informants’ as well as the advantages that may accrue to them.
- 3.5 This report deals with issues relating to informants and, in particular, ‘participating informants’. The report does not address the issue of entrapment – that is to say where a person (acting as an agent of the State, known as an *agent provocateur*) entices another to commit an offence that s/he might not have otherwise committed and then proceeds to inform against him/her in respect of that offence.
4. Informant handling procedures, both historic and current, put in place by the Garda Síochána
 - 4.1 The Ombudsman Commission examined the recruitment/registration, handling and management of informants under two Garda regimes. The first was a policy known as the Intelligence Source Management System (“ISMS”), which was launched in June 2002 and was effective until April 2006.
 - 4.2 The Morris Tribunal issued its first report in July 2004 making comment on informant-related matters. The Ombudsman Commission consider that many of the recommendations made by the Morris Tribunal remain relevant.

4.3 In April 2006, the ISMS was replaced with a new system for Garda personnel involved in the management and use of Covert Human Intelligence Sources (known as “CHIS”).

4.4 The Ombudsman Commission’s investigation covered a time period that straddled both ISMS and, albeit to a lesser extent, CHIS.

5. Intelligence Source Management System (ISMS)

5.1 A number of concerns were identified relating to the effectiveness of ISMS and its implementation.

5.2 Garda senior management has acknowledged that no training was provided to Garda members to ensure compliance with the system. The guidance, produced by the Garda Síochána on the management of informants under ISMS, was restricted to individuals who held specific managerial posts under ISMS, all of whom were of Superintendent rank or higher.

5.3 Template forms, to be used by Garda members for the registration of informants under ISMS, were not issued to individual gardaí engaged in the recruitment and handling of informants.

5.4 When personnel changes resulted in different senior gardaí assuming the specific managerial posts identified under ISMS, it was intended that the Garda Síochána’s published guidance and template forms would be transferred to them. In fact a written direction had issued stating that such materials would be transferred and signed for at handover. However, the investigation revealed that, in one national Garda unit, this did not occur.

5.5 The investigation also revealed inadequate levels of governance with regard to the management of such documents. This included failures to secure or retain these documents for subsequent examination. It also included a failure by Garda management to ensure that these documents were maintained in accordance with the rules set down in the ISMS.

- 5.6 These deficiencies (including the absence of training, lack of overall awareness of the ISMS system and non-adherence to procedures for informant handling) led to unnecessary risks in the handling and management of informants. An environment was created which, by its nature, weakened strategies for testing the provenance, quality and reliability of information/intelligence.
- 5.7 The investigation concluded that, within some Garda units, there was a culture of non-adherence to ISMS with all the attendant risks including, for example, a failure to critically examine the motivations (and any advantages/credit) for the supply of information.
- 5.8 Because of the restricted circulation of Garda guidance and template forms, referred to above, some informant handlers were unaware of the correct procedures for the registration and management of informants.
- 5.9 It was evident to this enquiry that the eventuality of an informant simultaneously providing information to more than one law enforcement agency in the State (e.g. Revenue) was not covered by ISMS. Accordingly, the system results in less than open communication between the Garda Síochána and other agencies as to the status of persons and the information they might supply.
6. The Garda Síochána's system for Garda personnel involved in the management and use of Covert Human Intelligence Sources (known as "CHIS")
- 6.1 This enquiry continued with a review of the current system for the utilisation and management of informants. This system is referred to as CHIS and was introduced in April 2006.
- 6.2 All sources previously registered under ISMS were re-evaluated under the new CHIS system.

- 6.3 The Ombudsman Commission does not believe that all of the deficiencies in the original system were fully remedied by the introduction of the new and current system. This presents the risk that information could continue to be collected from informants by gardaí in an *ad hoc* manner outside of stated Garda Síochána informant handling policies and in the absence of any formal registration process. This raises serious concerns in relation to the overall management and supervision of CHIS.
- 6.4 The Ombudsman Commission also notes that, like with the ISMS system, the eventuality of an informant simultaneously providing information to more than one law enforcement agency is not covered under the current Garda Síochána CHIS system.

Recommendations

1. It is recommended that a review of current training in respect of CHIS be conducted to ensure awareness of, compliance with and consistent use of the CHIS system, not only for those in prescribed informant management positions within the system but at all levels of the Garda Síochána.
2. It is recommended that increased emphasis be placed upon the accuracy and completeness of records made or required under the CHIS system.
3. It is recommended that mechanisms be employed to identify Garda members failing to comply with their obligations under the CHIS policy and ensure that individuals who fail to comply are removed from further involvement in CHIS-related issues until certified remedial training is successfully completed.
4. It is recommended that consideration be given by the Garda Síochána to the production of a current and effective protocol with other State law enforcement agencies to manage the eventuality of an informant providing information to more than one agency.
5. It is recommended that consideration be given to the production of guidance for intelligence gathering by gardaí from non-registered informants and the supervision thereof. Such guidance should provide clarity as to when, and in what circumstances, the collection of intelligence from non-registered

informants can be undertaken as well as the management of such interactions and the use of such information.

6. It is recommended that systems be put in place to ensure compliance with the CHIS system e.g. compliance with the system should be a positive consideration in the Garda Síochána's promotion process.

7. It is recommended that a new and specific breach of discipline, that of non-compliance with established procedures in respect of CHIS related matters, be created. This concurs with one of the recommendations made by the Morris Tribunal in July 2004, namely:

'A failure to comply with informant management procedure should lead to prompt management action. Failure to comply with the procedure or to familiarise oneself with procedure should be regarded unfavourably. It should lead to disciplinary action of some kind...' (Morris Tribunal, first report, chapter 13)

8. It is recommended that a methodology for oversight of CHIS – both internal to the Garda Síochána and by external authority - be revisited to include all issues pertaining to:

- recruitment/registration and handling of all informants,
- security and dissemination of sensitive intelligence,
- completion and security of documentation,
- rewards and incentives for information/informants,
- its relationship with other covert information gathering techniques,

This scrutiny should be transparent, accountable, comprehensive, independent and intrusive.

7. The use, by gardaí, of 'participating informants' and the regulation of such activity

7.1 This enquiry has not been advised by the Garda Síochána of:

- any Garda guidance to define a 'participating informant' or to address the proposal that a 'participating informant' be involved, even to a limited extent,

in criminality with the knowledge of the Garda Síochána in the furtherance of crime detection or prevention;

- any formal procedures in place to deploy a 'participating informant' who is acting with the knowledge of the authorities; or
- any formal procedures, under which a 'participating informant' can be tasked and his/her activities monitored by Garda handlers.

7.2 The absence of such mechanisms for the use, in garda operations, of 'participating informants' creates significant risks as, in the Ombudsman Commission's view, it is not possible to effectively manage and place parameters upon the extent to which such individuals are authorised to participate in criminality.

7.3 It is unclear whether, or in what circumstances, the gardaí seek the advice of the DPP on the utilisation of a 'participating informant' prior to his/her deployment and how, or if, the DPP's views would be incorporated by the gardaí into any operational or CHIS handling strategy.

7.4 It would be important that there would be clarity – in the form of a series of principles issued by Garda management - as to what gardaí should bring to the DPP's explicit attention, in relation to informant issues when files are submitted to that Office, in advance of a decision to prosecute.

7.5 There appears to be no formal Garda policy for the recording of communications between the Garda Síochána and the Office of the DPP when liaising on the subject of persons who may be considered to be 'participating informants'.

7.6 There is no statutory footing for the operation and regulation, by State agents, of a 'participating informant'.

Recommendations

- 9.** It is recommended that consideration be given to the formulation and introduction of:
 - a) guidance on deployment and management of 'participating informants' in garda operations;
 - b) the guidance should also stipulate if, and when, gardaí should seek the advice of the DPP on the utilisation of a participating informant prior to his/her deployment;
 - c) it should also address how, or if, the DPP's views would be incorporated by the gardaí into any operational or CHIS-handling strategy;
 - d) the guidance should also require gardaí to place, on the relevant file, a full record of all communications both internal and external (including a precise record of advice sought or received from the DPP and decisions taken during discussions or meetings concerning such cases);
 - e) this guidance should also set down as to what gardaí should bring to the DPP's explicit attention, in relation to informant issues, when files are submitted to that office, in advance of a decision to prosecute;
 - f) Any such guidance could take the form of garda guidance, protocols, codes of practice and/or legislation.
- 10.** It is recommended that any conduct of an informant which, potentially, may be viewed as that of participating in an offence with the knowledge of a State agency, be subject to the utmost scrutiny and ethical considerations. Such scrutiny should be intrusive, robust, and meticulously recorded.
- 11.** It is recommended that the scrutiny of the implementation of the CHIS system be conducted independently of the authorities involved in the activity of the informant and that this scrutiny be transparent and accountable to a Government-approved authority.
- 12.** It is recommended that training be provided in respect of the deployment and management of persons who may be considered to be a 'participating informant'. This should include the setting of parameters and the preparation of detailed written risk assessments.

8. Informant Issues in Court

8.1 The Ombudsman Commission recognises that the operation and management of informants by the Garda Síochána can have implications for the decision to prosecute and, indeed, may raise disclosure issues at trials. Accordingly, we are conscious that many of the recommendations that we make may have implications for areas closely related to, though outside, the direct responsibility of the Garda Síochána including:

- credits that may accrue to an informant for his/her cooperation with gardaí;
- disclosure issues which may arise should a trial involve an informant, whether 'participating' or otherwise.

Addressing these matters by way of recommendations is beyond the remit of the Ombudsman Commission.

9. Intelligence Handling

9.1 This enquiry discovered inconsistencies in the levels of access to sensitive intelligence afforded to members of the Garda Síochána and the accurate and transparent recording of who, when, where and why the data were accessed.

9.2 This enquiry further identified instances of inappropriate distribution / dissemination of sensitive intelligence without the rigour and controls expected. This can lead to dysfunction within the investigative structure of the Garda Síochána, resulting, in part, to a culture of mistrust and competitiveness amongst national units of the Garda Síochána.

Recommendations

13. It is recommended that consideration be given to a review of access levels to sensitive intelligence and that the recording thereof be conducted to ensure compliance and probity.

14. It is recommended that consideration be given to a review of the processes in place governing intelligence dissemination and targeted distribution, including mechanisms to ensure strict compliance.
15. It is recommended that consideration be given to a review of the interaction amongst the Garda Síochána national units including their performance in respect of joint operations and shared intelligence.
16. It is recommended that non-compliance with established procedures in respect of intelligence-handling and dissemination be identified as a disciplinary offence.
17. It is recommended that compliance with established procedures in respect of intelligence-handling and dissemination related matters should be a consideration in the promotion process.
18. It is recommended that the methodology for oversight – both internal to the Garda Síochána and by external authority - of intelligence-related matters be revisited to include all issues pertaining to:
 - security and dissemination of sensitive intelligence,
 - covert information gathering techniques,
 - completion and security of documentation, and
 - rewards and incentives for information/intelligence.

This scrutiny should be transparent, accountable, comprehensive, independent and intrusive.

10. Impact on GSOC and Oversight

- 10.1 Delays in access to documentation and intelligence held by the Garda Síochána were a consistent feature of this enquiry.
- 10.2 The Ombudsman Commission, under the present Protocols, is wholly reliant upon assurances from the Garda Síochána that the evidence and information they have supplied represents the totality of such information held. This leaves scope to question the completeness and independence of oversight.

10.3 The matters of evidence and information provision to the Ombudsman Commission by the Garda Síochána are currently the subject of extensive discussions. It is hoped that the key areas of information exchange between the two organisations can be addressed and improved. Areas of specific difficulty, in addition to those discussed above, are matters in which State security and material amassed through covert means are asserted as reasons for non-provision to the Ombudsman Commission. Furthermore, the Ombudsman Commission is reliant upon Garda members to access the PULSE System and other computerised intelligence systems on its behalf. The absence of any independent access to these systems again raises issues around the effectiveness of the Ombudsman Commission's oversight investigative function.

Recommendations

- 19.** It is recommended that the Ombudsman Commission be provided with independent access to the PULSE system immediately.
- 20.** It is recommended that the disclosure and transfer, to the Ombudsman Commission, of evidence and information belonging to, held by or in the possession of the Garda Síochána, in criminal investigations, be bolstered, either through legislation or other means, to ensure full, verifiable, timely and unredacted provision. This should include the supply of sensitive and/or informant-related intelligence to the Ombudsman Commission.

9 May 2013