

## The Informer's Privilege

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The court of appeals recently decided [State v. Dark](#). It's a concise opinion that summarizes and applies the black-letter law on an issue that comes up regularly: when must the state disclose the identity of a confidential informant to the defendant?

[G.S. 15A-904\(a1\)](#) says that "[t]he State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law." This is simply the statutory codification of the so-called informer's privilege -- actually the privilege of the state to keep secret the identity of confidential informants, in the interest of ensuring the informants' safety and continued usefulness. So, an informant's identity isn't *normally* part of open file discovery. But what about the qualifier "unless the disclosure is otherwise required by law"?

The cornerstone case regarding disclosure is *Roviario v. United States*, 353 N.C. 53 (1957), which holds that when disclosure would be "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," it is required. There are a number of North Carolina cases interpreting and applying *Roviario*, such as *State v. Stokley*, 184 N.C. App. 336 (2007), *State v. Withers*, 179 N.C. App. 249 (2006), *State v. Gaither*, 148 N.C. App. 534 (2002), and *State v. Johnson*, 81 N.C. App. 454 (1986). The following general rules emerge from these cases:

1. The burden is on the defendant to show that disclosure should be required.
2. Factors supporting disclosure include: (a) the informant was a participant in the crime, (b) there is a conflict between the state's evidence and the defendant's evidence that the informant could clarify, and (c) the informant is a likely witness for the state at trial.
3. Factors opposing disclosure include: (a) the informant was a mere "tipster," (b) the defendant admits culpability or presents no evidence, thus leaving no conflict for the informant to clarify, (c) substantial evidence independent of the informant establishes the defendant's guilt, and (d) disclosure would endanger the informant.

There's no hard and fast rule about how these factors weigh against each other -- it is a "totality of the circumstances" analysis. Older cases tended to suggest that if the informant was a participant in the crime, disclosure was automatically required, but *Dark* is an example of a recent trend away from that position. In *Dark*, the informant arranged and was present for a drug sale between the defendant and an undercover officer. The defendant moved for disclosure of the informant's identity, but the trial court denied the motion. The court of appeals affirmed, reasoning that "only the informant's presence and role in arranging the purchase weigh in favor of disclosure," given that the state relied on the undercover officer's testimony and that the defendant presented no evidence, and that factor alone was insufficient.

There are a number of tricky questions about the informer's privilege -- like how to handle a statement by an informant when the contents of the statement tends to identify the informant -- but I'll save those for another post.