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MEMORANDUM TO: Stephen Beckett
Assistant Deputy Minister
Public Safety Division and Public Safety Training Division Ministry of
Community Safety and Correctional Services

FROM: Susan Kyle
Assistant Deputy Attorney General
Criminal Law Division
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DATE: January 4, 2018

SUBJECT: Disclosure of “911 tapes” and the MOU in the wake of *R. v. M.G.T.*
(OCA 2017) decision

Introduction

This memo deals with the Court of Appeal’s decision in *R. v. M.G.T.*, 2017 ONCA 736 and how the disclosure of 911 calls is dealt with in the *Framework Memorandum of Understanding* (“MOU”).

The M.G.T. Decision

This is a sexual assault case involving a recanting witness. The appellant was convicted of sexually assaulting his wife. Her evidence at trial was corroborated by a third person who overheard the assault and called 911. After conviction, but before sentencing, the appellant brought an application to re-open his case. He filed affidavits from people who claimed to have heard that the 911 caller had fabricated his evidence at trial. The trial judge refused to re-open the case.

On appeal, the appellant argued that the trial judge should have allowed him to re-open. He also sought to introduce fresh evidence of the alleged recantation, and a transcript of the 911 call, which had not been disclosed before trial.

The Peel Crown office policy was not to provide the 911 calls as part of the initial disclosure package. Justice Watt, writing for the Court of Appeal states at paragraph 151:

It is unfathomable that over two decades after *Stinchcombe*, a local Crown Attorney’s office would promulgate and adhere to a policy of non-disclosure, at once ill-conceived and constitutionally infirm. Such a policy amounts to an abrogation of the Crown’s constitutional obligation, the creation of a *Charter*-free zone that bars entry by an accused to obtain his or her constitutional entitlement. If it persists to this day, it has exceeded its best before date by about 35 years and should cease immediately.
[Emphasis added]

The MOU

Our MOU, dated June 13, 2017, is a framework agreement endorsed by the Ministry of the Attorney General (MAG) and the Ontario Association of Chiefs of Police (OACAP) for use as a disclosure protocol across Ontario. Disclosure of 911 tapes (and other “recorded incoming communications from public”) is specifically addressed in the MOU, at section 5.3:

- 5.3.1 Audio of incoming communications from the public (for example: emergency response calls from civilians or “911 tapes”) containing **direct evidence** of the commission of the offence(s) will be provided as part of Initial Disclosure,¹ and where feasible, as part of Bail Briefs.²
- 5.3.2 In preparation for preliminary inquiry or trial, and upon the request of the Crown, transcripts of emergency response calls containing **direct evidence** will be produced by Police. The digital format of the audio and/or video recorded emergency response calls must be available for use as an exhibit with a transcript.

“Direct Evidence”, as defined in the MOU, refers to “all information establishing and/or corroborating the commission of an offence” (see §1.4.9).

In order for the definition of “direct evidence” to conform to the Court of Appeal’s decision in R. v. M.G.T., it must include the following:

- Both inculpatory and exculpatory information;
- Any information that can reasonably be used by the accused in meeting the case for the prosecution, advancing a defence or otherwise determining how to conduct a defence; and
- Unless the information is protected by privilege or clearly irrelevant (e.g. where the communications are clearly not “the fruits of an investigation”), the disclosure practice is to err on the side of inclusion.

Local police chiefs should consult their local Crown Attorneys to ensure that their disclosure with respect to 911 calls is consistent with *R. v. M.G.T.*

Sincerely,



Susan Kyle
Assistant Deputy Attorney General
Criminal Law Division
Ministry of the Attorney General

¹ The MOU defines Initial Disclosure as “the first, main, and substantive documentary and/or electronic evidence package provided to the Crown by police following an investigation” (see §1.4.11)

² The MOU defines Bail Brief as “the disclosure brief relating to matter where the accused is held in-custody for bail hearing” (see §1.4.5)