

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 271

Confidential Informants

**SPONSOR(S):** Criminal & Civil Justice Policy Council; Public Safety & Domestic Security Policy Committee; Nehr and others

**TIED BILLS:**

**IDEN./SIM. BILLS:** CS/CS/SB 604

	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	Public Safety & Domestic Security Policy Committee	7 Y, 0 N, As CS	Kramer	Kramer
2)	Criminal & Civil Justice Policy Council	12 Y, 0 N, As CS	Kramer	Havlicak
3)	Criminal & Civil Justice Appropriations Committee	8 Y, 0 N	McAuliffe	Davis
4)	Full Appropriations Council on General Government & Health Care		McAuliffe	Leznoff
5)				

### SUMMARY ANALYSIS

The bill requires law enforcement agencies that use confidential informants to:

- provide certain information and opportunities to each person who is requested to serve as a confidential informant;
- ensure that all personnel who are involved in the use or recruitment of confidential informants receive training in the agency's policies and procedures;
- establish policies and procedures addressing the recruitment, control and use of confidential informants;
- establish policies and procedures to assess the suitability of using a person as a confidential informant by considering certain factors;
- establish written security procedures relating to files identifying a confidential informant;
- periodically review actual agency confidential informant practices to ensure conformity with the agency's policies and procedures.

The bill appears to have an insignificant fiscal impact on state and local law enforcement agencies.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

*Background:* Generally, a confidential informant is an individual who provides information or assistance to law enforcement in exchange for a benefit. Guidelines from the United States Attorney General define the term as “any individual who provides useful and credible information to a [law enforcement agency] regarding felonious criminal activities, and from whom the [law enforcement agency] expects or intends to obtain additional useful and credible information regarding such activities in the future.”<sup>1</sup>

Currently, state law does not limit law enforcements use of confidential informants. Other than a California statute<sup>2</sup> limiting the use of minors as confidential informants, staff was unable to find any other state laws relating to the use of confidential informants by law enforcement. Many law enforcement agencies have adopted procedures governing the use of confidential informants by officers in their agency. The Commission for Accreditation for Law Enforcement Agencies and the Commission for Florida Law Enforcement Accreditation,<sup>3</sup> two organizations which provide accreditation to many local law enforcement agencies, have policies and procedures related to the use of confidential informants.

On May 7, 2008, Rachel Hoffman, who was being used as a confidential informant by the Tallahassee Police Department, was killed during the course of a police operation. While she was being used as a confidential informant, Hoffman was a participant in a drug court program. Two men who she was scheduled to purchase drugs and a firearm from have been indicted for first degree murder in her death. The grand jury issuing the indictments was critical of the Tallahassee Police Department and questioned the decision to use Hoffman as a confidential informant and the adequacy of the planning and supervision of the operation.<sup>4</sup> The Office of the Attorney General has issued reports detailing potential violations of the Tallahassee Police Department's operating procedures and a list of recommendations for changes to the department's procedures.<sup>5</sup>

*Effect of bill:* The bill defines the term “confidential informant” as follows:

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<sup>1</sup> [www.usdoj.gov/olp/doiguidelines.pdf](http://www.usdoj.gov/olp/doiguidelines.pdf)

<sup>2</sup> Cal.Penal Code § 701.5

<sup>3</sup> <http://www.flaccreditation.org/CFA%20Standards%20Manual%20Fourth%20Edition%204%200%2014.pdf>

<sup>4</sup> <http://www.tallahassee.com/assets/pdf/CD11437281.PDF>

<sup>5</sup> <http://www.tallahassee.com/assets/pdf/CD118678925.PDF>

<http://www.tallahassee.com/assets/pdf/CD117720912.PDF>

The term “confidential informant” means a person who cooperates with a law enforcement agency<sup>6</sup> confidentially in order to protect the person or the agency’s intelligence-gathering or investigative efforts and:

1. Seeks to avoid arrest or prosecution for a crime, or mitigate punishment for a crime in which a sentence will be or has been imposed; and
2. Is able, by reason of his or her familiarity or close association with suspected criminals, to:
  - a. Make a controlled buy<sup>7</sup> or controlled sale<sup>8</sup> of contraband, controlled substances, or other items that are material to a criminal investigation;
  - b. Supply regular or constant information about suspected or actual criminal activities to a law enforcement agency; or
  - c. Otherwise provide information important to ongoing criminal intelligence-gathering or criminal investigative efforts.

The bill requires a law enforcement agency that uses confidential informants (C.I.s) to:

- Inform each person who is requested to serve as a C.I. that the agency cannot promise inducements such as a grant of immunity, dropped or reduced charges, or reduced sentences or placement on probation in exchange for serving as a C.I.
- Inform each person who is requested to serve as a C.I. that the value of the C.I.’s assistance and any effect that assistance may have on pending criminal matters can be determined only by the appropriate legal authority.
- Provide a person who is requested to serve as a C.I. with an opportunity to consult with legal counsel upon request before the person agrees to perform any activities as a C.I. The bill specifies that this does not create a right to publicly funded legal counsel.
- Ensure that all personnel who are involved in the use or recruitment of C.I.s are trained in the agency’s policies and procedures. The bill requires the agency to document the date of the training.
- Adopt policies and procedures that assign the highest priority in operational decisions and actions to the preservation of the safety of C.I.s, law enforcement personnel, target offenders,<sup>9</sup> and the public.

The bill also requires a law enforcement agency that uses confidential informants to establish policies and procedures addressing the recruitment, control and use of C.I.s that must state the:

- Information that the agency must maintain concerning each C.I.;
- General guidelines for handling C.I.s;
- Process to advise a C.I. of conditions, restrictions, and procedures associated with participating in the agency’s investigative or intelligence-gathering activities;

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<sup>6</sup> The bill defines the term “law enforcement agency” to mean “an agency having a primary mission of preventing and detecting crime and the enforcement of the penal, criminal, traffic, or highway laws of the state and that in furtherance of that primary mission employs law enforcement officers as defined in s. 943.10”.

<sup>7</sup> The bill defines the term “controlled buy” to mean “the purchase of contraband, controlled substances, or other items that are material to a criminal investigation from a target offender which is initiated, managed, overseen, or participated in by law enforcement personnel with the knowledge of a confidential informant.”

<sup>8</sup> The bill defines the term “controlled sale” to mean “the sale of contraband, controlled substances or other items that are material to a criminal investigation to a target offender which is initiated, managed, overseen, or participated in by law enforcement personnel with the knowledge of a confidential informant.”

<sup>9</sup> The term “target offender” is defined to mean “the person suspected by law enforcement personnel to be implicated in criminal acts by the activities of a confidential informant.”

- Designated supervisory or command-level review and oversight in the use of a C.I.;
- Limits or restrictions on off-duty association or social relationships by agency personnel involved in investigative or intelligence gathering with C.I.s;
- Guidelines to deactivate C.I.s, including guidelines for deactivating communications with C.I.s; and
- Level of supervisory approval required before a juvenile is used as a C.I.

The bill requires a law enforcement agency that uses C.I.s to establish policies and procedures to assess the suitability of using a person as a C.I. by considering the minimum following factors:

- The person's age and maturity;
- The risk the person poses to adversely affect a present or potential investigation or prosecution;
- The effect upon agency efforts that the disclosure of the person's cooperation in the community may have;
- Whether the person is a substance abuser or has a history of substance abuse or is in a court-supervised drug treatment program;
- The risk of physical harm to the person, his or her immediate family, or close associates as a result of providing information or assistance, or upon the disclosure of the person's assistance to the community;
- Whether the person has shown any indication of emotional instability, unreliability, or of furnishing false information;
- The person's criminal history or prior criminal record; and
- Whether the use of the person is important to or vital to the success of an investigation.

The bill also requires a law enforcement agency that uses C.I.s to establish written security procedures that, at a minimum:

- Provide for the secured retention of any records related to the law enforcement agency's confidential sources, including access to files identifying the identity of confidential sources;
- Limit availability to records relating to C.I.s to those within the law enforcement agency or law enforcement community having a need to know or review those records, or to those whose access has been required by court process or order;
- Require notation of each person who accesses such records and the date that the records are accessed;
- Provide for review and oversight by the law enforcement agency to ensure that the security procedures are followed;
- Define the process by which records concerning a C.I. may be lawfully destroyed.

The bill requires an agency that uses C.I.s to perform a periodic review of actual agency C.I. practices to ensure conformity with the agency's policies and procedures and the section of statute created by the bill. The bill also provides that the provisions of this bill and policies and procedures adopted

pursuant to this section do not grant any right or entitlement to a C.I. or a person who is requested to be a C.I.

**B. SECTION DIRECTORY:**

Section 1. Creates unnumbered section of statute relating to confidential informants.

Section 2. Provides effective date of July 1, 2009.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

There may be a cost to state law enforcement agencies that will be required to develop and adopt policies and procedures relating to the use of confidential informants.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

There may be a cost to local law enforcement agencies that will be required to develop and adopt policies and procedures relating to the use of confidential informants.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

To the extent that the bill requires law enforcement agencies to adopt practices that they are not currently following, the bill may result in additional workload to agencies that could have additional recordkeeping and other responsibilities relating to confidential informants. However, it appears this provision will have an insignificant fiscal impact on state and local law enforcement agencies.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

The Public Safety & Domestic Security Committee adopted a strike all amendment to the bill and the bill was made a committee substitute. This analysis is drafted to the committee substitute. The original bill would have:

- prohibited law enforcement agencies from using certain persons as a confidential informant in a law enforcement undercover operation or would have required the approval of other entities prior to being able to use certain persons as a confidential informant;
- required the development of a written substantial assistance agreement that is executed by the law enforcement agency and the confidential informant and approved by the state attorney prior to the confidential informant providing any assistance;
- required each law enforcement agency that uses confidential informants to establish guidelines and protocols and maintain certain records;
- provided a list of factors that a law enforcement agency would be required to consider in determining whether a confidential informant has the ability to safely perform the required tasks.

The Criminal & Civil Justice Policy Council adopted an amendment to define the term "law enforcement agency".