

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 271 Confidential Informants

SPONSOR(S): Nehr and others

TIED BILLS: IDEN./SIM. BILLS: SB 604

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee		Kramer	Kramer
2)	Criminal & Civil Justice Policy Council			
3)	Criminal & Civil Justice Appropriations Committee			
4)	Full Appropriations Council on General Government & Health Care			
5)				

SUMMARY ANALYSIS

The bill prohibits a law enforcement agency from using a person as a confidential informant in a law enforcement undercover operation if that person is:

1. Currently participating in a court-ordered drug or substance abuse treatment program unless the law enforcement agency receives express approval from the circuit judge supervising the drug court.
2. Voluntarily enrolled in a drug or substance abuse treatment program unless the law enforcement agency receives the express approval from the state attorney of the circuit in which the law enforcement agency is located.
3. Currently on parole or probation unless the law enforcement agency receives the express approval from the state attorney in the circuit in which the law enforcement agency is located and the approval of the parole and probation officer supervising the parolee or probationer.

The bill provides that if a person has no prior convictions for committing a violent crime, that person may not be used as a confidential informant in a law enforcement undercover operation involving a target offender who is known or suspected to have engaged in violence in the past or if the law enforcement agency has reason to believe that the person may be exposed to harm.

The bill requires 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. The bill requires that each person who is solicited to act as a confidential informant be given the opportunity to consult with legal counsel before entering into the substantial assistance agreement.

The bill requires each law enforcement agency that uses confidential informants to establish guidelines and protocols and maintain certain records. The bill sets forth a list of factors that a law enforcement agency must consider in determining whether a confidential informant has the ability to safely perform the required tasks.

The bill may result in additional workload for State Attorneys and state and local law enforcement agencies that will have additional responsibilities relating to confidential informants.

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.”¹

Currently, state law does not limit law enforcements use of confidential informants. Other than a California statute² 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,³ 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.⁴ 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.⁵

Effect of bill: The bill provides legislative intent relating to the use of confidential informants and provides that the section may be cited as “Rachel's Law”.⁶

¹ www.usdoj.gov/olp/dojguidelines.pdf

² Cal.Penal Code § 701.5

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

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

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

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

⁶ The bill provides the following statement of “legislative intent”:

Restrictions on selection of confidential informants: The bill provides that, except as otherwise provided in the bill, a law enforcement agency may select any qualified person to act as a confidential informant.⁷ The bill prohibits a law enforcement agency from using a person as a confidential informant in a law enforcement undercover operation if that person is:

1. Currently participating in a court-ordered drug or substance abuse treatment program unless the law enforcement agency receives express approval from the circuit judge supervising the drug court.
2. Voluntarily enrolled in a drug or substance abuse treatment program unless the law enforcement agency receives the express approval from the state attorney of the circuit in which the law enforcement agency is located.
3. Currently on parole or probation unless the law enforcement agency receives the express approval from the state attorney in the circuit in which the law enforcement agency is located and the approval of the parole and probation officer supervising the parolee or probationer.

When determining whether a person who is in a court-ordered drug or substance abuse treatment program may be used as a confidential informant, the judge will be required to consider whether the person's participation as a confidential informant may jeopardize the success of his or her treatment program. Prior to approving the use of a person who is voluntarily enrolled in a drug or substance abuse treatment program, the state attorney will be required to consult with the person's treatment provider and reasonably determine whether the person's participation as a confidential informant may jeopardize the success of his or her treatment program.

Substantial assistance agreements:

The bill provides that before a proposed confidential informant provides any assistance to a law enforcement agency, all plea negotiations and consideration offered to the proposed confidential informant must be reduced to a written substantial assistance agreement⁸ that is executed by the law enforcement agency and the confidential informant and approved by the state attorney prosecuting the case. The substantial assistance agreement must include a description of the work that the confidential informant will be doing, the length of service, and the consideration that the confidential informant will be receiving.

The bill provides that the confidential informant must be provided with a complete and legible copy of the executed and approved substantial assistance agreement.

The legislature recognizes that by using confidential informants in law enforcement undercover operations, law enforcement agencies can improve efforts to reduce crime and remove dangerous criminals from the community. However, because many confidential informants are not trained law enforcement personnel, the Legislature believes that if a law enforcement agency elects to use a confidential informant, the agency must take special care when evaluating the abilities of the confidential informant to perform the required tasks of the undercover operation and must, at all times, closely supervise the activities of the confidential informant. The Legislature further recognizes that a confidential informant's participation in a law enforcement undercover operation may be detrimental and dangerous to the informant and to others. Therefore, it is the intent of the Legislature to allow law enforcement agencies to use confidential informants, but to do so in a fair and reasonably safe manner in order to reduce adverse risks, including injury or death, to the confidential informant, law enforcement personnel, the target offender and the public.

⁷ The bill defines the term "confidential informant" to mean a person who is not employed by a law enforcement agency and who, in exchange for consideration, supplies information about potential criminal activity to law enforcement personnel or participates in a law enforcement undercover operation. The term "consideration" is defined to mean "anything of value, including but not limited to, monetary payment; leniency consideration concerning any criminal activity, charge or potential charge; or a recommendation from a law enforcement agency for a reduction of a criminal charge or sentence.

⁸ The bill defines the term "substantial assistance agreement" to mean a written contract between a law enforcement agency and a confidential informant who has been charged with or convicted of a crime, or who may be charged with a crime, which provides that the state attorney may move the sentencing court to reduce or suspend the sentence of the confidential informant or reduce or dismiss charges if the confidential informant provides assistance to the law enforcement agency or state attorney by assisting in the identification, arrest, or conviction of a codefendant, an accessory, a coconspirator, a principal, or any other person believed to be engaged in a violation of state law.

Legal counsel: The bill provides that each person who is solicited to act as a confidential informant must be given the opportunity to consult with legal counsel before entering into a substantial assistance agreement. If the person is not represented by legal counsel at the time of the solicitation, the law enforcement agency must advise the person of his or her right to consult with legal counsel before entering into the substantial assistance agreement.

Immunity: The bill provides that an agent of a law enforcement agency may not promise, agree or suggest to a prospective confidential informant any type of immunity from prosecution without the express authority of the state attorney.

Conclusion of agreement: The bill provides that the law enforcement agency is the controlling agent with respect to such agreement and must report to the state attorney upon the successful conclusion of the agreement or the informant's inability or unwillingness to fulfill the agreement.

*Guidelines:*⁹ The bill will require each law enforcement agency to:

1. Establish guidelines and protocols to prepare and maintain a record of all contacts with confidential informants.
2. Develop protocols governing the training of personnel who deal with confidential informants and for implementing and enforcing the requirements of the bill.

Factors in considering use of confidential informants:

The bill provides that when using a confidential informant, the first priority of a law enforcement agency is to preserve the safety of confidential informant, law enforcement personnel, the target offender,¹⁰ and the public. All operational decisions and actions must be based on this principle and law enforcement personnel must exercise the utmost care and judgment in order to minimize the risk of harm to all persons involved.

The bill provides that to effectuate this principle, a law enforcement agency must determine whether the confidential informant has the ability to safely perform the tasks required. In making this determination, a law enforcement agency must consider, without limitation:

1. The age, maturity, emotional stability, and relevant experience of the confidential informant;
2. The criminal history of the confidential informant, including the number and nature of any prior offenses;
3. The consideration that is promised to the confidential informant;
4. The nature of assistance sought from the confidential informant;
5. The age and maturity of the target offender;
6. The criminal history of the target offender, including the number and nature of any prior offenses and the nature of the target offense; and
7. The propensity of the target offender for violence.

Prohibition on use of certain informants: The bill provides that if a person has no prior convictions for committing a violent crime, that person may not be used as a confidential informant in a law enforcement undercover operation¹¹ involving a target offender who is known or suspected to have

⁹ The bill contains the following statement of legislative intent:

The Legislature also finds that there are no statewide, uniform standards or guidelines applicable when using confidential informants. Therefore, it is the intent of the Legislature that the minimum standards set forth in this section be followed by all law enforcement agencies in this state when using confidential informants.

¹⁰ The bill defines the term "target offender" to mean the person who a law enforcement agency suspects will be implicated by the activities of a confidential informant.

¹¹ The term "law enforcement undercover operation" is defined to mean an investigative technique in which a law enforcement agency uses a confidential informant to:

1. Assume a covert identity or purpose in order for the confidential informant to take action to acquire evidence or information that would likely be unavailable but for the target offender's reliance on the confidential informant's covert role; or
2. Participate in a controlled buy from a target offender who is under investigation.

engaged in violence in the past or if the law enforcement agency has reason to believe that the person may be exposed to harm.

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:

The bill may result in additional workload to the State Attorneys officers who would have increased responsibilities relating to confidential informants.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may result in additional workload to state and local law enforcement agencies that will have additional recordkeeping and other responsibilities relating to confidential informants.

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.

The term "controlled buy" is defined to mean the purchase of stolen goods, controlled substances, or the like from a target offender which is initiated, managed, overseen, or participated in by law enforcement personnel with the knowledge of the confidential informant.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill prohibits a person who has no prior convictions for committing a “violent crime” from being used in a law enforcement undercover operation involving a target offender who is known or suspected to have engaged in “violence” in the past. The terms “violent crime” and “violence” are not defined in the bill. The term “violent crime” is not defined in current law; the term “violence” is defined in s. 784.046, F.S. to mean “assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person.” That definition is not referred to in this bill.

The bill requires that each person who is solicited to act as a confidential informant be informed of their right to consult with legal counsel. However, the definition of the term “confidential informant” could apply to individuals who have not been charged with a crime and who do not have a right to counsel. It is not clear whether this bill is intended to establish a right of indigent individuals to be provided state-funded counsel before agreeing to be used as a confidential informant.

Senate committee staff asked several different parties for their comments on this bill. Selected comments received are summarized as follows:

- The Florida Sheriff’s Association (FSA) indicated that requirements of the bill relating to notification and approval of the use of a confidential informant could endanger confidential informants because the identity of confidential informants would be known by people other than law enforcement personnel. [For example, in certain circumstances, the bill would require consultation with the person’s treatment provider to determine whether participation as a confidential informant may jeopardize the success or his or her treatment program.] The FSA indicated that the proposal would result in fewer confidential informants and that this would lead to the loss of an effective law enforcement tool.
- Several State Attorneys offices indicated that the bill would increase their workload by requiring them to have a role in approving the use of a confidential informant and in approving the written agreement required by the bill. They indicated that the bill would require the involvement of state attorneys offices in police investigations to a degree not required under current law which will slow down investigations and may expose state attorneys to liability for decisions made during an investigation.
- The Florida Department of Law Enforcement’s analysis stated the following:
The bill as initially introduced would have serious implications to investigative operations. Although FDLE adheres to many of the suggested practices, provisions within this bill are an impediment to conducting successful investigations; the bill will hinder the actions of both investigator and confidential informant by overly restricting the use of accepted practices that are sound and reasonable within the law enforcement profession. The bill’s “one size fits all” informant practices approach is unrealistic. The use of informants varies greatly from agency to agency. The various notification and “approval” obligations in the bill as filed are unrealistic. The value and safety of many informants is maximized by using them in an informant capacity quickly after their arrest, before the fact that they have been arrested and/or are working with law enforcement becomes known “on the streets.” By requiring notification and/or approval of persons outside the law enforcement agency proposing to use the informant, the bill actually increases the risk to the informant since the law enforcement agency has no direct control over those to whom such notification is required to be made.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES