

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 372

INTRODUCER: Senator Dean

SUBJECT: Confidential Informants

DATE: March 20, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 372 amends s. 914.28, F.S. (“Rachel’s Law”), on confidential informants to:

- Require a law enforcement agency that uses confidential informants to adopt policies and procedures that provide reasonable protective measures when a law enforcement agency knows or should have known of a risk or threat of harm to a confidential informant and the risk or threat of harm is a result of the informant’s service to the agency;
- Require a law enforcement agency to refer prospective and current confidential informants known to be substance abusers or at risk of substance abuse to prevention or treatment services;
- Require that policies and procedures addressing recruitment, control, and use of confidential informants include general guidelines for the management and safety of informants and training requirements that agency personnel must complete in order to recruit and manage informants (consistent with national law enforcement standards);
- Require that policies and procedures to assess the suitability of using a person as a confidential informant include the person’s experience to serve as an informant, the effect that the disclosure of the person’s cooperation may have on the agency’s investigative or intelligence gathering activities, and whether the use of the person is necessary to the success of an investigation;
- Require a law enforcement agency that solicits a person to act as a confidential informant to give that person an opportunity to consult with an attorney before entering into an assistance agreement and serving as a confidential informant;
- Prohibit a minor or a person receiving inpatient or outpatient treatment from a licensed service provider, in a treatment-based drug court program, or otherwise receiving treatment or related services pursuant to ch. 397, F.S., from participating in a controlled buy or sale of contraband or related activities, but authorize the minor or person to provide confidential information to a law enforcement agency while receiving substance abuse treatment;

- Prohibit college and university police from using an enrolled student to participate in a controlled buy or sale of contraband or related activities, but authorize the student to provide confidential information to such police or another law enforcement agency;
- Require law enforcement agencies that use confidential informants to annually collect specified confidential informant data and report it to the Florida Department of Law Enforcement (FDLE);
- Require the FDLE to compile the data and annually issue a publicly available report; and
- Provide that it is a third degree felony for a law enforcement officer or a person designated as support personnel to willfully fail to comply with Rachel's Law.

II. Present Situation:

Rachel's Law

Section 914.28, F.S. ("Rachel's Law"), addresses the use of confidential informants by law enforcement agencies. A "confidential informant" is a person who cooperates with a law enforcement agency¹ confidentially in order to protect the person or the agency's intelligence-gathering or investigative efforts and 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 is able, by reason of his or her familiarity or close association with suspected criminals, to:

- Make a controlled buy² or controlled sale³ of contraband, controlled substances, or other items that are material to a criminal investigation;
- Supply regular or constant information about suspected or actual criminal activities to a law enforcement agency; or
- Otherwise provide information important to ongoing criminal intelligence-gathering or criminal investigative efforts.

A law enforcement agency must also establish policies and procedures addressing the recruitment, control, and use of confidential informants, which must include:

- Information that the agency shall maintain concerning each confidential informant;
- General guidelines for handling confidential informants;
- A process to advise a confidential informant of conditions, restrictions, and procedures associated with participating in the agency's investigative or intelligence-gathering activities;

¹ A "law enforcement agency" is 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 at s. 943.10, F.S. Section 914.28(2)(d), F.S. Section 943.10(1), F.S., defines "law enforcement officer" as any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.

² A "controlled buy" is 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. Section 914.28(2)(b), F.S.

³ A "controlled sale" is 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. Section 914.28(2)(c), F.S. A "target offender" is a person suspected by law enforcement personnel to be implicated in criminal acts by the activities of a confidential informant. Section 914.28(2)(e), F.S.

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

A law enforcement agency must also establish policies and procedures to assess the suitability of using a person as a confidential informant by considering, at a minimum, the 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.

A law enforcement agency must also 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 confidential informants 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 confidential informant may be lawfully destroyed; and
- Perform a periodic review of actual agency confidential informant practices to ensure conformity with the agency's policies and procedures and this section.

The provisions of s. 914.28, F.S., and policies and procedures adopted pursuant to this section do not grant any right or entitlement to a confidential informant or a person who is requested to be a confidential informant.

Implementation of Rachel's Law by the Florida Department of Law Enforcement

The Florida Department of Law Enforcement (FDLE) has provided the following information regarding the department's implementation of Rachel's Law:

Currently, Florida Department of Law Enforcement (FDLE) personnel are governed by confidential informant policies and guidelines documented in FDLE Policy 4.5 (Confidential Sources), Florida Statute 914.28, and "Guidelines for Florida State and Local Law Enforcement Agencies in Dealing with Confidential Informants."⁴ The Guidelines were developed and adopted in conjunction with the Florida Police Chiefs Association, the Florida Sheriff's Association, the State Law Enforcement Chiefs Association and the FDLE. FDLE Policy 4.5 addresses confidential informant safety considerations, confidential informant suitability, and recruitment practices. This policy establishes department standards on the recruitment and management of confidential informants. Additionally, this policy requires all FDLE personnel involved with the recruitment of confidential informants to have training in FDLE policies and procedures, requirements of the Guidelines, and Florida Statute 914.28.

The FDLE, Criminal Justice Professionalism Program (CJPP), Bureau of Professional Development (BPD) maintains an online training course, available through the FDLE public website, called "Use and Control of Informants: A Patrol Officer's Primer"⁵ which provides training and guidance pertaining to confidential informants and F.S. 914.28 (Rachel's Law).⁶

III. Effect of Proposed Changes:

The bill amends s. 914.28, F.S. ("Rachel's Law"), on confidential informants. The bill requires a law enforcement agency that uses confidential informants to:

- Require a law enforcement agency that uses confidential informants to adopt policies and procedures that provide reasonable protective measures when a law enforcement agency knows or should have known of a risk or threat of harm to a confidential informant and the risk or threat of harm is a result of the informant's service to the agency;
- Require a law enforcement agency to refer prospective and current confidential informants known to be substance abusers or at risk of substance abuse to prevention or treatment services;
- Require that policies and procedures addressing recruitment, control, and use of confidential informants include general guidelines for the management and safety of informants and training requirements that agency personnel must complete in order to recruit and manage informants (consistent with national law enforcement standards);⁷ and

⁴ This document is available at <http://www.fdle.state.fl.us/Content/getdoc/6bf82b10-54db-4c2a-b0e9-973f98901c9e/CIGuidelinesMARCH-final.aspx> (last visited on March 2, 2015).

⁵ This information is available at <http://www.fdle.state.fl.us/Content/getdoc/de32fdf7-7e70-4c3d-8452-f094f39df1a0/Use-and-Control-of-Informants--A-Patrol-Officer-s-.aspx> (last visited on March 2, 2015).

⁶ Analysis of SB 372 (January 21, 2015), Florida Department of Law Enforcement (on file with the Senate Committee on Criminal Justice). This analysis is further cited as "FDLE Analysis."

⁷ The FDLE notes that the bill "does not provide a grace period or specific timeline to modify state guidelines, in the event that the national guidelines change." *Id.*

- Require that policies and procedures to assess the suitability of using a person as a confidential informant include the person's experience to serve as an informant, the effect that the disclosure of the person's cooperation may have on the agency's investigative or intelligence gathering activities, and whether the use of the person is necessary to the success of an investigation.

The bill also requires a law enforcement agency that solicits a person to act as a confidential informant to give that person an opportunity to consult with an attorney before entering into an assistance agreement and serving as a confidential informant.⁸ However, the agency may advise the prospective confidential informant that he or she may waive the right to consult with an attorney before entering into the assistance agreement, and he or she may serve as a confidential informant without an attorney if the waiver is documented.

The bill also prohibits a minor or a person receiving inpatient or outpatient treatment from a licensed service provider, in a treatment-based drug court program, or otherwise receiving treatment or related services pursuant to ch. 397 F.S. (substance abuse services), from participating in a controlled buy or sale of contraband or related activities, but authorizes the minor or person to provide confidential information to a law enforcement agency while receiving substance abuse treatment.

Further, college or university police are prohibited from recruiting, assisting in the recruitment of, referring to another law enforcement agency, or otherwise using an enrolled student to participate in a controlled buy or sale of contraband or related activities, but the student may provide confidential information to such police or another law enforcement agency.

The bill also requires law enforcement agencies that use confidential informants to collect the following data for the preceding calendar year and report it to the FDLE by March 1 of each year:⁹

- The number of active confidential informants;
- Categories of active confidential informants compiled by race, ethnicity, gender, age, and zip code;
- The number of confidential informants used to conduct controlled buys or sales of contraband, or related activities conducted on behalf of the agency;
- The number of deaths of confidential informants which occurred during controlled buys or sales of contraband, or related activities conducted on behalf of the agency;
- The number of injuries to confidential informants that occurred during controlled buys or sales of contraband, or related activities conducted on behalf of the agency;
- The number of deaths of confidential informants whose cause of death may be related to their service as a confidential informant;
- The number of injuries to confidential informants whose cause of injury may be related to their service as a confidential informant;
- The total amount of cash payments provided to a confidential informant by the agency;

⁸ The FDLE states: "Currently, FDLE Policy 4.5 states that confidential informants can be afforded the opportunity to consult with legal counsel *upon request*, prior to performing any activities as a confidential informant." *Id.* (emphasis provided by the FDLE).

⁹ The bill requires the FDLE to develop and disseminate a standardized form to these agencies for them to complete.

- The total number of dropped or reduced charges provided to a prospective or current confidential informant by the agency; and
- The total number of instances in which the law enforcement agency recommended leniency for a confidential informant at sentencing.

The FDLE must compile the data and, by June of each year, issue a publicly available report. The data and report may not disclose the identity of a confidential informant.

Finally, the bill provides that it is a third degree felony¹⁰ for a law enforcement officer or a person designated as support personnel as defined in s. 943.10(11), F.S.,¹¹ to willfully fail to comply with Rachel's Law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill provides that it is a third degree felony for a law enforcement officer or a person designated as support personnel to willfully fail to comply with Rachel's Law. The FDLE notes that several terms used in the bill are undefined and may be susceptible to different interpretations: "reasonable protective measures"; "risk for substance abuse"; "national law enforcement standards"; "experience" to serve as a confidential informant; and use of a person as a confidential informant is "necessary" to the success of an investigation.¹²

"The legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense."¹³ However, a statutory provision may be unconstitutionally

¹⁰ A third degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082 and 775.083, F.S. However, if total sentence points scored under the Criminal Punishment Code are 22 points or fewer, the court must impose a nonstate prison sanction, unless the court makes written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

¹¹ This subsection defines "support personnel" as any person employed or appointed by an employing agency who is not an officer or, as specified by the commission, other professional employee in the criminal justice system.

¹² FDLE Analysis.

¹³ *State v. Hagan*, 387 So.2d 943, 945 (Fla. 1980).

vague (a violation of due process) if “men of common intelligence must necessarily guess at its meaning. The test of vagueness of a statute is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.”¹⁴

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Impact on Local Law Enforcement and FDLE

The FDLE states there may be “potential costs” to local law enforcement agencies “associated with the changes in requirements for collection and storage of confidential informant information.”¹⁵

The FDLE further states:

FDLE would need to design, develop, test, and implement a system for FDLE to receive, securely maintain and report the information on confidential informants from law enforcement agencies.

This effort will require 3,648 hours of programming at \$312,080.

Current staff resources are fully committed to the maintenance of existing production systems. This effort would require the new hire of 2 contractors for development.

Assuming development will begin once the funds have been allocated and the hiring process begins on July 1, 2015. The effective date of this bill should be amended to July 1, 2016 or another date once technology changes are completed.

¹⁴ *Id.* (citations omitted). A statute is also unconstitutionally vague “if it encourages arbitrary enforcement and gives the police too much discretion in determining whether it is applicable to a particular individual.” *Simmons v. State*, 944 So.2d 317, 324 (Fla. 2006) (citation omitted). Section 775.021(1), F.S., provides that “provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.” This statute codifies “the rule of lenity” that is part of common law. *Carawan v. State*, 515 So.2d 161, 165 (Fla. 1987).

¹⁵ FDLE Analysis. All further information in this section of the bill analysis relating to the FDLE is from this source.

Impact on Universities and Colleges

The Board of Governors indicates that fiscal impact of SB 372 on universities would include:

- Staff hours and associated resources needed to create/revise policies, procedures, forms and annual reporting requirements.
- Failure to have procedures and practices consistent with the law or to consistently follow such procedures and practices could expose the university to legal and financial liability.¹⁶

Prison Bed Impact

The bill provides that it is a third degree felony for a law enforcement officer or a person designated as support personnel to willfully fail to comply with Rachel's Law. The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation estimates that bill will have a positive insignificant prison bed impact (an increase of 10 or fewer prison beds per year).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 914.28 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁶ Analysis of SB 372 (February 2, 2015), Board of Governors (on file with the Senate Committee on Criminal Justice).