

1816

2013-2014 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2013

Introduced by M. of A. BRAUNSTEIN -- read once and referred to the
Committee on Codes

AN ACT to amend the criminal procedure law, in relation to confidential
informants

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. The criminal procedure law is amended by adding a new
2 section 60.23 to read as follows:
3 S 60.23 RULES OF EVIDENCE; CONFIDENTIAL INFORMANTS.
4 1. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE
5 FOLLOWING MEANINGS:
6 (A) "CONFIDENTIAL INFORMANT" MEANS A PERSON WHO COOPERATES WITH A LAW
7 ENFORCEMENT AGENCY CONFIDENTIALLY IN ORDER TO PROTECT THE PERSON OR THE
8 AGENCY'S INTELLIGENCE GATHERING OR INVESTIGATIVE EFFORTS AND:
9 (I) SEEKS TO AVOID ARREST OR PROSECUTION FOR A CRIME, OR MITIGATE
10 PUNISHMENT FOR A CRIME IN WHICH A SENTENCE WILL BE OR HAS BEEN IMPOSED;
11 AND
12 (II) IS ABLE, BY REASON OF HIS OR HER FAMILIARITY OR CLOSE ASSOCIATION
13 WITH SUSPECTED CRIMINALS, TO:
14 (A) MAKE A CONTROLLED BUY OR CONTROLLED SALE OF CONTRABAND, CONTROLLED
15 SUBSTANCES, OR OTHER ITEMS THAT ARE MATERIAL TO A CRIMINAL INVESTI-
16 GATION;
17 (B) SUPPLY REGULAR OR CONSTANT INFORMATION ABOUT SUSPECTED OR ACTUAL
18 CRIMINAL ACTIVITIES TO A LAW ENFORCEMENT AGENCY; OR
19 (C) OTHERWISE PROVIDE INFORMATION IMPORTANT TO ONGOING CRIMINAL INTEL-
20 LIGENCE GATHERING OR CRIMINAL INVESTIGATIVE EFFORTS.
21 (B) "CONTROLLED BUY" MEANS THE PURCHASE OF CONTRABAND, CONTROLLED
22 SUBSTANCES, OR OTHER ITEMS THAT ARE MATERIAL TO A CRIMINAL INVESTIGATION
23 FROM A TARGET OFFENDER WHICH IS INITIATED, MANAGED, OVERSEEN OR PARTIC-

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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IPATED IN BY LAW ENFORCEMENT PERSONNEL WITH THE KNOWLEDGE OF A CONFIDENTIAL INFORMANT.

(C) "CONTROLLED SALE" MEANS 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.

(D) "LAW ENFORCEMENT AGENCY" MEANS ANY 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.

(E) "TARGET OFFENDER" MEANS THE PERSON SUSPECTED BY LAW ENFORCEMENT PERSONNEL TO BE IMPLICATED IN CRIMINAL ACTS BY THE ACTIVITIES OF A CONFIDENTIAL INFORMANT.

2. A LAW ENFORCEMENT AGENCY THAT USED CONFIDENTIAL INFORMANTS SHALL:

(A) INFORM EACH PERSON WHO IS REQUESTED TO SERVE AS A CONFIDENTIAL INFORMANT 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 CONFIDENTIAL INFORMANT.

(B) INFORM EACH PERSON WHO IS REQUESTED TO SERVE AS A CONFIDENTIAL INFORMANT THAT THE VALUE OF HIS OR HER ASSISTANCE AS A CONFIDENTIAL INFORMANT AND ANY EFFECT THAT ASSISTANCE MAY HAVE ON PENDING CRIMINAL MATTERS CAN BE DETERMINED ONLY BY THE APPROPRIATE LEGAL AUTHORITY.

(C) 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.

(D) ENSURE THAT ALL PERSONNEL WHO ARE INVOLVED IN THE USE OR RECRUITMENT OF CONFIDENTIAL INFORMANTS ARE TRAINED IN THE LAW ENFORCEMENT AGENCY'S POLICIES AND PROCEDURES. THE AGENCY SHALL KEEP DOCUMENTATION DEMONSTRATING THE DATE OF SUCH TRAINING.

(E) ADOPT POLICIES AND PROCEDURES THAT ASSIGN THE HIGHEST PRIORITY IN OPERATIONAL DECISIONS AND ACTIONS TO THE PRESERVATION OF THE SAFETY OF CONFIDENTIAL INFORMANTS, LAW ENFORCEMENT PERSONNEL, TARGET OFFENDERS, AND THE PUBLIC.

3. A LAW ENFORCEMENT AGENCY THAT USES CONFIDENTIAL INFORMANTS SHALL ESTABLISH POLICIES AND PROCEDURES ADDRESSING THE RECRUITMENT, CONTROL AND USE OF CONFIDENTIAL INFORMANTS. THE POLICIES AND PROCEDURES SHALL STATE THE:

(A) INFORMATION THAT THE LAW ENFORCEMENT AGENCY SHALL MAINTAIN CONCERNING EACH CONFIDENTIAL INFORMANT;

(B) GENERAL GUIDELINES FOR HANDLING CONFIDENTIAL INFORMANTS;

(C) PROCESS TO ADVISE A CONFIDENTIAL INFORMANT OF CONDITIONS, RESTRICTIONS, AND PROCEDURES ASSOCIATED WITH PARTICIPATING IN THE AGENCY'S INVESTIGATIVE OR INTELLIGENCE GATHERING ACTIVITIES;

(D) DESIGNATED SUPERVISORY OR COMMAND LEVEL REVIEW AND OVERSIGHT IN THE USE OF A CONFIDENTIAL INFORMANT;

(E) LIMITS OR RESTRICTIONS ON OFF-DUTY ASSOCIATION OR SOCIAL RELATIONSHIPS BY AGENCY PERSONNEL INVOLVED IN INVESTIGATIVE OR INTELLIGENCE GATHERING WITH CONFIDENTIAL INFORMANTS;

(F) GUIDELINES TO DEACTIVATE CONFIDENTIAL INFORMANTS, INCLUDING GUIDELINES FOR DEACTIVATING COMMUNICATIONS WITH CONFIDENTIAL INFORMANTS; AND

1 (G) LEVEL OF SUPERVISORY APPROVAL REQUIRED BEFORE A JUVENILE IS USED
2 AS A CONFIDENTIAL INFORMANT.

3 4. A LAW ENFORCEMENT AGENCY THAT USES CONFIDENTIAL INFORMANTS SHALL
4 ESTABLISH POLICIES AND PROCEDURES TO ASSESS THE SUITABILITY OF USING A
5 PERSON AS A CONFIDENTIAL INFORMANT BY CONSIDERING THE MINIMUM FOLLOWING
6 FACTORS:

7 (A) THE PERSON'S AGE, MATURITY AND MENTAL CAPACITY IF SUCH PERSON IS
8 MENTALLY DISABLED AS SUCH TERM IS DEFINED IN SUBDIVISION THREE OF
9 SECTION 1.03 OF THE MENTAL HYGIENE LAW;

10 (B) THE RISK THE PERSON POSES TO ADVERSELY AFFECT A PRESENT OR POTEN-
11 TIAL INVESTIGATION OR PROSECUTION;

12 (C) THE EFFECT UPON AGENCY EFFORTS THAT THE DISCLOSURE OF THE PERSON'S
13 COOPERATION IN THE COMMUNITY MAY HAVE;

14 (D) WHETHER THE PERSON IS A SUBSTANCE ABUSER OR HAS A HISTORY OF
15 SUBSTANCE ABUSE OR IS IN A COURT-SUPERVISED DRUG TREATMENT PROGRAM;

16 (E) THE RISK OF PHYSICAL HARM TO THE PERSON, HIS OR HER IMMEDIATE
17 FAMILY, OR CLOSE ASSOCIATES AS A RESULT OF PROVIDING INFORMATION OR
18 ASSISTANCE, OR UPON THE DISCLOSURE OF THE PERSON'S ASSISTANCE TO THE
19 COMMUNITY;

20 (F) WHETHER THE PERSON HAS SHOWN ANY INDICATION OF EMOTIONAL INSTABIL-
21 ITY, UNRELIABILITY OR OF FURNISHING FALSE INFORMATION;

22 (G) THE PERSON'S CRIMINAL HISTORY OR PRIOR CRIMINAL RECORD; AND

23 (H) WHETHER THE USE OF THE PERSON IS IMPORTANT TO OR VITAL TO THE
24 SUCCESS OF AN INVESTIGATION.

25 5. A LAW ENFORCEMENT AGENCY THAT USES CONFIDENTIAL INFORMANTS SHALL
26 ESTABLISH WRITTEN SECURITY PROCEDURES THAT, AT A MINIMUM:

27 (A) PROVIDE FOR THE SECURED RETENTION OF ANY RECORDS RELATED TO THE
28 LAW ENFORCEMENT AGENCY'S CONFIDENTIAL SOURCES, INCLUDING ACCESS TO FILES
29 IDENTIFYING THE IDENTITY OF CONFIDENTIAL SOURCES;

30 (B) LIMIT AVAILABILITY TO RECORDS RELATING TO CONFIDENTIAL INFORMANTS
31 TO THOSE WITHIN THE LAW ENFORCEMENT AGENCY OR LAW ENFORCEMENT COMMUNITY
32 HAVING A NEED TO KNOW OR REVIEW THOSE RECORDS, OR TO THOSE WHOSE ACCESS
33 HAS BEEN REQUIRED BY COURT PROCESS OR ORDER;

34 (C) REQUIRE NOTATION OF EACH PERSON WHO ACCESSES SUCH RECORDS AND THE
35 DATE THAT THE RECORDS ARE ACCESSED;

36 (D) PROVIDE FOR REVIEW AND OVERSIGHT BY THE LAW ENFORCEMENT AGENCY TO
37 ENSURE THAT THE SECURITY PROCEDURES ARE FOLLOWED; AND

38 (E) DEFINE THE PROCESS BY WHICH RECORDS CONCERNING A CONFIDENTIAL
39 INFORMANT MAY BE LAWFULLY DESTROYED.

40 6. A STATE OR LOCAL LAW ENFORCEMENT AGENCY THAT USES CONFIDENTIAL
41 INFORMANTS SHALL PERFORM A PERIODIC REVIEW OF ACTUAL AGENCY CONFIDENTIAL
42 INFORMANT PRACTICES TO ENSURE CONFORMITY WITH THE AGENCY'S POLICIES AND
43 PROCEDURES AND THIS SECTION.

44 7. THE PROVISIONS OF THIS SECTION AND POLICIES AND PROCEDURES ADOPTED
45 PURSUANT TO THIS SECTION DO NOT GRANT ANY RIGHT OR ENTITLEMENT TO A
46 CONFIDENTIAL INFORMANT OR A PERSON WHO IS REQUESTED TO BE A CONFIDENTIAL
47 INFORMANT, AND ANY FAILURE TO ABIDE BY THIS SECTION MAY NOT BE RELIED
48 UPON TO CREATE ANY ADDITIONAL RIGHT, SUBSTANTIVE OR PROCEDURAL, ENFORCE-
49 ABLE AT LAW BY A DEFENDANT IN A CRIMINAL PROCEEDING.

50 S 2. This act shall take effect on the first of November next succeed-
51 ing the date on which it shall have become a law.