

# STATE OF NEW YORK

2182

2019-2020 Regular Sessions

## IN SENATE

January 23, 2019

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed 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 Assembly, 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 § 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-  
24 ipated in by law enforcement personnel with the knowledge of a confiden-  
25 tial informant.

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

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1 (c) "Controlled sale" means the sale of contraband, controlled  
2 substances, or other items that are material to a criminal investigation  
3 to a target offender which is initiated, managed, overseen, or partic-  
4 ipated in by law enforcement personnel with the knowledge of a confiden-  
5 tial informant.

6 (d) "Law enforcement agency" means any agency having a primary mission  
7 of preventing and detecting crime and the enforcement of the penal,  
8 criminal, traffic, or highway laws of the state and that in furtherance  
9 of that primary mission employs law enforcement officers.

10 (e) "Target offender" means the person suspected by law enforcement  
11 personnel to be implicated in criminal acts by the activities of a  
12 confidential informant.

13 2. A law enforcement agency that uses confidential informants shall:

14 (a) Inform each person who is requested to serve as a confidential  
15 informant that the agency cannot promise inducements such as a grant of  
16 immunity, dropped or reduced charges, or reduced sentences or placement  
17 on probation in exchange for serving as a confidential informant.

18 (b) Inform each person who is requested to serve as a confidential  
19 informant that the value of his or her assistance as a confidential  
20 informant and any effect that assistance may have on pending criminal  
21 matters can be determined only by the appropriate legal authority.

22 (c) Each person who is solicited to act as a confidential informant  
23 must be given the opportunity to consult with legal counsel before  
24 entering into a substantial assistance agreement. If the person is not  
25 represented by legal counsel at the time of the solicitation, the law  
26 enforcement agency must advise the person of his or her right to consult  
27 with legal counsel before entering into the substantial assistance  
28 agreement.

29 (d) Ensure that all personnel who are involved in the use or recruit-  
30 ment of confidential informants are trained in the law enforcement agen-  
31 cy's policies and procedures. The agency shall keep documentation demon-  
32 strating the date of such training.

33 (e) Adopt policies and procedures that assign the highest priority in  
34 operational decisions and actions to the preservation of the safety of  
35 confidential informants, law enforcement personnel, target offenders,  
36 and the public.

37 3. A law enforcement agency that uses confidential informants shall  
38 establish policies and procedures addressing the recruitment, control  
39 and use of confidential informants. The policies and procedures shall  
40 state the:

41 (a) Information that the law enforcement agency shall maintain  
42 concerning each confidential informant;

43 (b) General guidelines for handling confidential informants;

44 (c) Process to advise a confidential informant of conditions,  
45 restrictions, and procedures associated with participating in the agen-  
46 cy's investigative or intelligence gathering activities;

47 (d) Designated supervisory or command level review and oversight in  
48 the use of a confidential informant;

49 (e) Limits or restrictions on off-duty association or social relation-  
50 ships by agency personnel involved in investigative or intelligence  
51 gathering with confidential informants;

52 (f) Guidelines to deactivate confidential informants, including guide-  
53 lines for deactivating communications with confidential informants; and

54 (g) Level of supervisory approval required before a juvenile is used  
55 as a confidential informant.

1 4. A law enforcement agency that uses confidential informants shall  
2 establish policies and procedures to assess the suitability of using a  
3 person as a confidential informant by considering the minimum following  
4 factors:

5 (a) The person's age, maturity, youthful offender status, and mental  
6 capacity if such person is mentally disabled as such term is defined in  
7 subdivision three of section 1.03 of the mental hygiene law;

8 (b) The risk the person poses to adversely affect a present or poten-  
9 tial investigation or prosecution;

10 (c) The effect upon agency efforts that the disclosure of the person's  
11 cooperation in the community may have;

12 (d) Whether the person is a substance abuser or has a history of  
13 substance abuse or is in a court-supervised drug treatment program;

14 (e) The risk of physical harm to the person, his or her immediate  
15 family, or close associates as a result of providing information or  
16 assistance, or upon the disclosure of the person's assistance to the  
17 community;

18 (f) Whether the person has shown any indication of emotional instabil-  
19 ity, unreliability or of furnishing false information;

20 (g) The person's criminal history or prior criminal record; and

21 (h) Whether the use of the person is important to or vital to the  
22 success of an investigation.

23 5. A law enforcement agency that uses confidential informants shall  
24 establish written security procedures that, at a minimum:

25 (a) Provide for the secured retention of any records related to the  
26 law enforcement agency's confidential sources, including access to files  
27 identifying the identity of confidential sources;

28 (b) Limit availability to records relating to confidential informants  
29 to those within the law enforcement agency or law enforcement community  
30 having a need to know or review those records, or to those whose access  
31 has been required by court process or order;

32 (c) Require notation of each person who accesses such records and the  
33 date that the records are accessed;

34 (d) Provide for review and oversight by the law enforcement agency to  
35 ensure that the security procedures are followed; and

36 (e) Define the process by which records concerning a confidential  
37 informant may be lawfully destroyed.

38 6. A state or local law enforcement agency that uses confidential  
39 informants shall perform a periodic review of actual agency confidential  
40 informant practices to ensure conformity with the agency's policies and  
41 procedures and this section.

42 7. The provisions of this section and policies and procedures adopted  
43 pursuant to this section do not grant any right or entitlement to a  
44 confidential informant or a person who is requested to be a confidential  
45 informant, and any failure to abide by this section may not be relied  
46 upon to create any additional right, substantive or procedural, enforce-  
47 able at law by a defendant in a criminal proceeding.

48 § 2. This act shall take effect on the first of November next succeed-  
49 ing the date on which it shall have become a law.