STATE OF NEW YORK

3348

2021-2022 Regular Sessions

IN SENATE

January 29, 2021

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:

Section 1. The criminal procedure law is amended by adding a new section 60.23 to read as follows:

§ 60.23 Rules of evidence; confidential informants.

1. As used in this section, the following terms shall have the following meanings:

(a) "Confidential informant" means a person who cooperates with a law enforcement agency confidentially in order to protect the person or the agency's intelligence gathering or investigative efforts and:

(i) 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

(ii) Is able, by reason of his or her familiarity or close association with suspected criminals, to:

(A) Make a controlled buy or controlled sale 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.

(b) "Controlled buy" means 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.

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

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(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 uses 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

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

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

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

(b) The risk the person poses to adversely affect a present or potential investigation or prosecution;

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

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

(e) 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;

(f) Whether the person has shown any indication of emotional instability, unreliability or of furnishing false information;

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

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

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

(a) 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;

(b) 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;

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

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

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

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

7. The provisions of this section 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, and any failure to abide by this section may not be relied upon to create any additional right, substantive or procedural, enforceable at law by a defendant in a criminal proceeding.

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.