

HOUSE BILL NO. 1221

Introduced by

Representatives Rick C. Becker, Johnston, Kiefert, Louser, Schreiber-Beck

Senators Luick, Robinson

1 A BILL for an Act to create and enact chapter 29-29.5 of the North Dakota Century Code,
2 relating to the use of confidential informants by law enforcement.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** Chapter 29-29.5 of the North Dakota Century Code is created and enacted as
5 follows:

6 **29-29.5-01. Definitions.**

7 As used in this chapter, unless the context or subject matter otherwise requires:

- 8 1. "Benefit" means any of the following conferred on a confidential informant or a third
9 party:
- 10 a. Leniency in a criminal case or probation or parole matter, including the decision
11 not to arrest for or charge an offense or to limit the number or severity of charges;
 - 12 b. Sentence reduction of any kind or amount;
 - 13 c. Money;
 - 14 d. Change of immigration status;
 - 15 e. Witness protection;
 - 16 f. In-kind benefits such as food, rent, and travel; or
 - 17 g. In-custody benefits such as visiting privileges, transfer to better living conditions,
18 and enhanced access to food and entertainment.
- 19 2. "Confidential informant" means an individual who cooperates with a law enforcement
20 agency confidentially:
- 21 a. To avoid arrest or prosecution for a crime or mitigate punishment for a crime in
22 which a sentence will be or has been imposed; and
 - 23 b. By reason of familiarity or close association with suspected criminals, is able to:
24 (1) Make a controlled buy or controlled sale;

1 (2) Supply regular or constant information about suspected or actual criminal
2 activities to a law enforcement agency; or

3 (3) Otherwise provide information important to ongoing criminal intelligence
4 gathering or criminal investigative efforts.

5 3. "Controlled buy" means the purchase of contraband, controlled substances, or other
6 items material to a criminal investigation which is initiated, managed, overseen, or
7 participated in by law enforcement personnel with the knowledge of a confidential
8 informant.

9 4. "Controlled sale" means the sale of contraband, controlled substances, or other items
10 material to a criminal investigation which is initiated, managed, overseen, or
11 participated in by law enforcement personnel with the knowledge of a confidential
12 informant.

13 5. "Informant agreement" means a written agreement describing the rights and
14 obligations of the confidential informant.

15 6. "Law enforcement agency" means a government agency or branch that enforces the
16 law and conducts or engages in investigations or prosecutions for violations of law.

17 7. "Target offender" means a person suspected by law enforcement personnel to be
18 implicated in a criminal act.

19 **29-29.5-02. Limitation on use of vulnerable confidential informants.**

20 1. A law enforcement agency may not use a juvenile fifteen years of age or younger as a
21 confidential informant.

22 2. a. A juvenile over the age of fifteen but younger than eighteen years of age may not
23 be used as a confidential informant unless:

24 (1) The juvenile is subject to criminal charges or subject to having criminal
25 charges filed;

26 (2) The law enforcement agency has determined there are no other reasonable
27 avenues to obtain evidence of the crime being investigated and has
28 evaluated all other criteria in subsection 12 of section 29-29.5-03;

29 (3) The prosecuting attorney and the juvenile's custodial parent or guardian has
30 signed the informant agreement; and

31 (4) The juvenile has consulted with legal counsel.

1 b. A juvenile over the age of fifteen but younger than eighteen years of age may not
2 participate in a controlled buy or controlled sale, but may provide confidential
3 information to a law enforcement agency.

4 2. College or university police may not recruit, assist in the recruitment of, refer to a law
5 enforcement agency, or otherwise use an enrolled student to participate in a controlled
6 buy or controlled sale, regardless of whether the student is offered or receives a
7 benefit. This section does not preclude a student from providing confidential
8 information to college or university police.

9 3. An individual receiving inpatient or outpatient substance abuse treatment from a
10 licensed service provider or who is in a treatment-based drug court program may not
11 participate in a controlled buy or controlled sale, but may provide confidential
12 information to a law enforcement agency while receiving substance abuse treatment.

13 **29-29.5-03. Law enforcement guidelines.**

14 A law enforcement agency using a confidential informant shall:

- 15 1. Train all personnel who are involved in the use or recruitment of confidential
16 informants in the law enforcement agency's policies and procedures in a manner
17 consistent with national law enforcement standards, and document the date and scope
18 of each training.
- 19 2. Assign the consideration of the preservation of the safety of a confidential informant,
20 law enforcement personnel, and the public as the highest priority in operational
21 decisions and actions.
- 22 3. Execute reasonable protective measures for a confidential informant when the law
23 enforcement agency knows or should know of a specific risk or threat of harm to a
24 confidential informant as a result of serving as a confidential informant.
- 25 4. Train confidential informants on the conditions, restrictions, and procedures
26 associated with participating in the law enforcement agency's investigative or
27 intelligence gathering activities, and document and date the scope of the training.
- 28 5. Designate supervisory or command-level review and oversight of the use of
29 confidential informants.

- 1 6. Restrict off-duty association or social relationships by law enforcement agency
- 2 personnel involved in investigative or intelligence gathering with confidential
- 3 informants.
- 4 7. Establish guidelines to deactivate confidential informants which maintain the safety
- 5 and anonymity of confidential informants.
- 6 8. In the event of the death of a confidential informant, advise next of kin or the personal
- 7 representative of the confidential informant's estate that the death of the confidential
- 8 informant is suspected to have occurred as a result of serving as a confidential
- 9 informant.
- 10 9. Inform a potential confidential informant of the right to legal counsel and provide a
- 11 potential confidential informant with the opportunity to consult with legal counsel
- 12 before entering an informant agreement. If an individual cannot afford legal counsel,
- 13 appointed counsel must be provided.
- 14 10. Provide a potential confidential informant with an informant agreement before a
- 15 potential confidential informant performs any activity as a confidential informant.
- 16 11. Establish a process to evaluate the criminal history and propensity for violence of any
- 17 targeted offenders that a confidential informant will have contact with during a
- 18 confidential informant's performance of confidential informant activities.
- 19 12. Establish policies and procedures to assess and document, in writing, the suitability of
- 20 using an individual as a confidential informant which, at a minimum, requires the
- 21 evaluation of each of the following factors:
- 22 a. The individual's age and maturity;
- 23 b. The risk of physical harm to the individual or the individual's immediate family or
- 24 close associates as a result of providing information or assistance, or upon the
- 25 release of information that discloses an individual's assistance;
- 26 c. The risk the individual poses to adversely affect a present or potential
- 27 investigation or prosecution;
- 28 d. The effect the disclosure of the individual's cooperation may have on the
- 29 agency's investigative or intelligence gathering activities;
- 30 e. Whether the individual is a substance abuser, has a history of substance abuse,
- 31 or is in a drug treatment program;

- 1 f. Whether the individual has shown an indication of emotional instability,
2 unreliability, or of furnishing false information;
- 3 g. The individual's criminal history or prior criminal record; and
- 4 h. Whether the use of the individual is important or vital to the success of an
5 investigation and the likelihood that information the individual could provide is not
6 readily available through other sources of a more direct means.
- 7 13. Establish recordkeeping procedures that, at a minimum:
- 8 a. Create a separate file for every confidential informant to be maintained in a
9 central or special division of the agency;
- 10 b. Collect and record each confidential informant's name, age, gender, race,
11 ethnicity, and residential zip code; and
- 12 c. Collect and record any contacts or actions between a confidential informant and
13 the law enforcement agency or agent, financial transactions, informant
14 agreements, and all types of information required by subsection 1 of section
15 29-29.5-05.
- 16 14. Establish written security procedures that, at a minimum:
- 17 a. Provide for the secured retention of all records related to the law enforcement
18 agency's confidential sources, including access to files identifying the identity of
19 confidential sources.
- 20 b. Limit availability to records relating to confidential informants to those within the
21 law enforcement agency or law enforcement community having a need to know
22 or review those records, the confidential informant, an attorney representing the
23 confidential informant, an individual who has been charged with a criminal
24 violation where the confidential informant may be called by the prosecution as a
25 witness based on the confidential informant's work as a confidential informant,
26 and an attorney representing such an individual.
- 27 c. Require notation of each individual who accesses the records and the date the
28 records are accessed.
- 29 d. Provide for review and oversight by the law enforcement agency to ensure record
30 access and security procedures are followed.

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

3 15. Perform an annual review of actual agency confidential informant practices to ensure
4 conformity with the agency's policies and procedures and this chapter.

5 **29-29.5-04. Informant agreement.**

6 1. An informant agreement must include:

7 a. Notice of an individual's right to legal counsel and the opportunity to consult with
8 legal counsel before signing the informant agreement and before performing
9 service as a confidential informant. A waiver of the right to legal counsel by an
10 individual must be documented in writing and acknowledged by the individual that
11 the waiver of the right to legal counsel was knowingly, intelligently, and voluntarily
12 made.

13 b. Notice that there can be no promise of an inducement of any kind, such as a
14 grant of immunity, a dropped or reduced charge, a reduced sentence, or
15 placement on probation in exchange for serving as a confidential informant
16 without the express written agreement of the prosecuting attorney.

17 c. A description of the activities required of a confidential informant, the promised
18 benefit, and the service period required of the confidential informant.

19 d. Notice that it is a violation of the informant agreement for a confidential informant
20 to be asked or permitted to use sexual enticement or promises of future sexual
21 acts as part of service as a confidential informant.

22 e. The requirement that a confidential informant provide the names and contact
23 information for next of kin or a personal representative of the confidential
24 informant's estate in the event the law enforcement agency suspects the death of
25 a confidential informant was a result of services performed as a confidential
26 informant.

27 f. Notification that the informant agreement may not release an individual or law
28 enforcement agency of liability for a negligent or intentional act alleged in a civil
29 action.

30 2. The informant agreement must be reviewed and signed by a supervising law
31 enforcement agent and a confidential informant.

1 **29-29.5-05. Transparency and accountability.**

- 2 1. A law enforcement agency using confidential informants shall collect and report data
3 including the information required by this subsection. The attorney general shall
4 develop and disseminate a standardized form that must be completed by every law
5 enforcement agency using confidential informants. A law enforcement agency using
6 confidential informants shall collect the data for the preceding calendar year and
7 submit a report by March first of each year to the attorney general. Upon receipt of the
8 completed forms, the attorney general shall compile the data and issue a publicly
9 available report by June first of each year. The data and report may not disclose the
10 identity of a confidential informant, but must include:
- 11 a. The number of active confidential informants.
 - 12 b. The number of active confidential informants used by case category.
 - 13 c. The categories of active confidential informants compiled by race, ethnicity,
14 gender, age, and zip code.
 - 15 d. The number of confidential informants used to conduct controlled buys or
16 controlled sales on behalf of an agency.
 - 17 e. The number of deaths or injuries to confidential informants whose cause of death
18 or injury may be related to service as confidential informants or whose death or
19 injury occurs during the service period described in the informant agreement.
 - 20 f. The total amount of cash payments and value of any non-leniency-related
21 benefits provided to confidential informants.
 - 22 g. The total number of decisions not to arrest, dropped or reduced charges,
23 sentence reductions, or other leniency-related benefits provided to confidential
24 informants.
 - 25 h. The disposition of all charges brought against target offenders.
 - 26 i. The total number of instances in which a law enforcement agency's use of
27 confidential informants resulted in the criminal prosecution of target offenders.
 - 28 j. The total number of administrative disciplinary proceedings conducted by a law
29 enforcement agency for violations of this chapter by a law enforcement agent.
- 30 2. Upon the death of a confidential informant whose cause of death the supervising law
31 enforcement agency knows or should have known may be related to the confidential

1 informant's service, the supervising law enforcement agency shall withdraw from the
2 investigation of the death of its confidential informant. The supervising law
3 enforcement agency shall promptly notify the attorney general of its withdrawal from
4 the investigation, and the attorney general shall authorize an independent law
5 enforcement agency investigation.

6 3. If a law enforcement agency head determines a law enforcement agent has violated a
7 provision of this chapter and finds the circumstances surrounding the violation raise
8 serious questions about whether the law enforcement agent acted willfully or
9 intentionally with respect to the violation, the agency head promptly shall initiate a
10 proceeding to determine whether disciplinary action against the law enforcement
11 agent is warranted. The agency head shall report the proceeding and the outcome in
12 the annual report required by subsection 1.

13 **29-29.5-06. Legal remedies.**

- 14 1. Evidence obtained in violation of this chapter must be excluded from admission as
15 evidence in a criminal proceeding.
- 16 2. In a civil action against an individual or agency for negligent or intentional action that
17 placed a confidential informant at risk and which ultimately resulted in harm to the
18 confidential informant, a failure to adhere to this chapter constitutes a prima facie
19 showing of negligence.