

**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 Judiciary Committee

BILL: CS/CS/SB 604

INTRODUCER: Judiciary Committee, Criminal Justice Committee, and Senators Fasano and Joyner

SUBJECT: Confidential Informants

DATE: April 7, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Treadwell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The bill addresses the use of confidential informants by law enforcement agents. The main provisions of the bill:

- Require a law enforcement agency that uses confidential informants to inform a person requested to be a confidential informant that the agency cannot promise inducements or assess the value and effect that assistance might have on pending criminal matters. Law enforcement must also provide this person, upon request, with an opportunity to consult with legal counsel before performing informant activities, and adopt policies that assign the highest priority in operational decisions and actions to the preservation of the safety of confidential informants and others.
- Provide that the opportunity to consult with counsel does not create a right to publicly funded legal counsel.
- Require a law enforcement agency that uses confidential informants to establish:
  - Policies and procedures that address the recruitment, control, and use of confidential

- informants, including general guidelines for handling confidential informants;
  - A process to advise a confidential informant of conditions, restrictions, and procedures associated with the agency's investigative or intelligence-gathering activities;
  - Designated supervisory or command-level review and oversight in the use of confidential informants;
  - Limits or restrictions on off-duty association or social relationships by agency investigative personnel with confidential informants;
  - Guidelines to deactivate confidential informants; and
  - The level of supervisory approval required before a juvenile is used as a confidential informant.
- Require a law enforcement agency that uses confidential informants to establish policies and procedures to assess the suitability of using a person as a confidential informant by considering, at a minimum, factors specified in the bill, such as the age and maturity of the person.
  - Require a law enforcement agency that uses confidential informants to establish written security procedures that, at a minimum, address secured retention, restricted access, and lawful destruction of records relating to confidential informants. The bill also provides review and oversight of security procedures and periodic review of agency's practices to ensure conformity with the agency's policies and procedures and the requirements of the bill.
  - Provide that the provisions of the bill and policies and procedures adopted pursuant to the bill do not grant any right or entitlement to a confidential informant or a person requested to be a confidential informant.

This bill creates a new and currently unnumbered section of the Florida Statutes.

## II. Present Situation:

There is no definition of the term "confidential informant" in the Florida Statutes. For discussion purposes, a general definition of the term that could be applied is that a confidential informant is "a person who supplies information to police or law enforcement agents pursuant to an agreement that the police or investigative agency will seek not to disclose the person's identity."<sup>1</sup> According to one commentary on use of confidential informants, "[c]onfidential informants are crucial to many law enforcement investigations and are especially essential in the field of narcotics investigations. Informants can provide specific information that is simply not available from other sources."<sup>2</sup> In narcotics investigations, a confidential informant is often used:

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<sup>1</sup> Standard 2.4 - Use of Confidential Informants, Criminal Justice Section Standards, American Bar Association (approved February 2008) (<http://www.abanet.org/crimjust/standards/pinvestigate.html#2.4>).

<sup>2</sup> Brian Lieberman, *Ethical Issues in the Use of Confidential Informants for Narcotic Operations*, POLICE CHIEF, Vol. 74, Issue 6 (June 2007) available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1210&issue\\_id=62007](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1210&issue_id=62007) (last visited Mar. 30, 2009).

to lead investigators to their key targets; they are the insiders to the drug world and have the ability to go places and speak with people inaccessible to the police. Informants work within an illegal enterprise system and therefore are for the most part involved in illegal activities.<sup>3</sup>

Confidential informants frequently come “from the same criminal pool that police work hard to arrest. These informants can range from petty thieves to violent career offenders. More times than not, they supply police with information merely in an attempt to ‘work off’ their own criminal actions.”<sup>4</sup>

The Commission for Accreditation for Law Enforcement Agencies (CALEA) and the Commission for Florida Law Enforcement Accreditation (CFA), two organizations that provide accreditation to many local law enforcement agencies, provide standards relating to the use of confidential informants. Presumably, policies and procedures on use of informants by accredited law enforcement agencies would be consistent with the standards of the accrediting organization. State law does not provided for any minimum statewide standards relevant to use of confidential informants. However, it appears that no other state has adopted standards governing confidential informants.

There are some provisions in existing law protecting the identity of confidential informants. For example, any information revealing the identity of a confidential informant or a confidential source is exempt from public disclosure.<sup>5</sup> In addition, any information in a court file revealing the identity of a confidential informant or confidential source is exempt from public disclosure.<sup>6</sup> Current law also prohibits tampering with or harassing an informant.<sup>7</sup>

In March of 2009, the Florida Sheriffs Association, the Florida Police Chiefs Association, the State Law Enforcement Chiefs Association, and the Florida Department of Law Enforcement adopted “Guidelines For Florida State And Local Law Enforcement Agencies In Dealing With Confidential Informants.”<sup>8</sup>

### III. Effect of Proposed Changes:

The bill addresses the use of confidential informants by law enforcement agencies. The bill creates a new and currently unnumbered section of the Florida Statutes, and provides for a short title for the new section: “Rachel’s Law.”

Legislative findings and intent are provided in the following preamble to the bill:

WHEREAS, by using confidential informants in law enforcement undercover operations, law enforcement agencies can improve efforts to reduce crime and remove dangerous criminals from the community, and

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Section 119.071(2)(f), F.S.

<sup>6</sup> Section 119.0714(1)(f), F.S.

<sup>7</sup> Section 914.22, F.S.

<sup>8</sup> E-mail from Mike Ramage, General Counsel, FDLE, to legislative staff of the Criminal Justice Committee (Mar. 11, 2009).

WHEREAS, because most confidential informants are not trained law enforcement personnel, a law enforcement agency that elects to use a confidential informant must take special care to evaluate the abilities of the confidential informant to perform the required tasks of the undercover operation and must, at all times, closely supervise the activities of the confidential informant, and

WHEREAS, the participation of a confidential informant in a law enforcement undercover operation may be detrimental and dangerous to the informant and to others, and

WHEREAS, the Legislature intends for law enforcement agencies to continue to use confidential informants subject to policies and procedures that will ensure that such use is in a fair and reasonably safe manner that reduces adverse risks, including injury or death, to the confidential informant, law enforcement personnel, and other persons, and

WHEREAS, there are currently no statewide mandatory and uniform standards or guidelines that apply to the use of confidential informants, and

WHEREAS, in March of 2009, the Florida Police Chiefs Association, the Florida Sheriffs Association, the State Law Enforcement and Chiefs Association, and the Florida Department of Law Enforcement voluntarily adopted “Guidelines To Be Used By Florida State And Local Law Enforcement Agencies In Dealing With Confidential Informants,” which provide minimum expectations for agency policies for dealing with confidential informants, and

WHEREAS, if the minimum expectations contained in those guidelines were to be required of every law enforcement agency that uses confidential informants, the Legislature’s intent to promote safer use of confidential informants in the state would be substantially advanced, and

WHEREAS, the Legislature intends to codify the standards set forth in the “Guidelines To Be Used By Florida State and Local Law Enforcement Agencies In Dealing With Confidential Informants,” and to require those standards to be followed by all law enforcement agencies in this state which use confidential informants. . . .

The bill defines the following key terms:

- A “confidential informant” is 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 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 buy or controlled sale 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 “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.
- 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.
- 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.<sup>9</sup>
- A “target offender” is a person suspected by law enforcement personnel to be implicated in criminal acts by the activities of a confidential informant.

It does not appear that the definition of “confidential informant” includes a person who cooperates with a law enforcement agency confidentially for intelligence-gathering or other investigative efforts, but has not been charged with a crime or is not otherwise seeking to avoid arrest or prosecution for a crime, or mitigate punishment for a crime. In addition, because the primary mission of the Department of Corrections is not prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of this state, the definition of “law enforcement agency” excludes the Department of Corrections.

The bill requires a law enforcement agency that uses confidential informants to:

- Inform each person who is requested to serve as a confidential informant that the agency cannot promise inducements in exchange for serving as a confidential informant and that the value of the confidential informant’s assistance and any effect that assistance may have on pending criminal matters can be determined only by the appropriate legal authority.
- Provide a person who is requested to serve as a confidential informant with an opportunity to consult with legal counsel upon request before the person agrees to perform any activities as a confidential informant (but the bill does not create a right to publicly funded legal counsel).
- Ensure that personnel involved in the use or recruitment of confidential informants are trained in the agency’s policies and procedures (the date of training must be documented).
- 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.

The bill requires a law enforcement agency to 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;

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<sup>9</sup> 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.”

- 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;
- 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.

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

The bill requires a law enforcement agency to 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 bill provides that 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.

The bill provides that the act takes effect on July 1, 2009.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The short title of the section created by the bill is “Rachel’s Law,” a reference to Rachel Hoffman, a 25-year-old Tallahassee resident who was murdered on May 7, 2008, during a law enforcement operation by the Tallahassee Police Department in which Ms. Hoffman was acting as a confidential informant and being used to conduct a purchase of a large quantity of ecstasy and a firearm. While acting as a confidential informant, Ms. Hoffman was a participant in a drug court program. Two men identified by police as the persons whom Ms. Hoffman was to meet for the drug/firearm purchase were indicted for her murder.

The Second Circuit grand jury issuing the indictments also made findings and conclusions critical of the Tallahassee Police Department and questioned the decision to use Ms. Hoffman as a confidential informant and the adequacy of the planning and supervision of the operation.<sup>10</sup> The Office of the Attorney General issued reports detailing potential violations of the Tallahassee Police Department's operating procedures and a list of recommendations for changes to the department's procedures.<sup>11</sup> Further, an internal affairs report by the Tallahassee Police Department found violations of the department's procedures relating to the use of Ms. Hoffman as a confidential information.<sup>12</sup>

## VIII. Additional Information:

### A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

#### **CS/CS by Judiciary on April 6, 2009:**

The committee substitute defines the term “law enforcement agency” and corrects two spelling errors in the bill.

#### **CS by Criminal Justice on March 18, 2009:**

The committee substitute:

- Defines the term “confidential informant” and other key terms.
- Requires a law enforcement agency that uses confidential informants to inform a person requested to be a confidential informant that the agency cannot promise inducements or assess the value and affect that assistance might have on pending criminal matters. Law enforcement must also provide this person, upon request, with an opportunity to consult with legal counsel before performing informant activities, and adopt policies that assign the highest priority in operational decisions and actions to the preservation of the safety of confidential informants and others;
- Provides that the opportunity to consult with counsel does not create a right to publicly funded legal counsel;
- Requires a law enforcement agency that uses confidential informants to establish policies and procedures that address the recruitment, control, and use of confidential informants, as specified in the bill;
- Requires a law enforcement agency that uses confidential informants to establish policies and procedures to assess the suitability of using a person as a confidential

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<sup>10</sup> See *In re: Homicide of Rachel Morningstar Hoffman on May 7, 2008 during a controlled drug operation being conducted by the Tallahassee Police Department*, Presentment, (Leon County Grand Jury, Spring Term 2008) available at <http://www.tallahassee.com/assets/pdf/CD11437281.PDF>. The grand jury did not make any recommendations for changes in the law (last visited Mar. 31, 2009).

<sup>11</sup> See Correspondence to Chief Dennis Jones, Tallahassee Police Department, from James D. Varnado, Inspector General, Office of the Attorney General (Aug. 29, 2008), available at <http://www.tallahassee.com/assets/pdf/CD118678925.PDF> (last visited Mar. 31, 2009). The Attorney General did not make any recommendations for changes in the law. See also Department of Legal Affairs Office of the Attorney General, Office of Inspector General, *Tallahassee Police Department Review of Selected General Orders and Standard Operating Procedures Pertaining to Confidential Informants and Drug Buy/Bust* (Sept. 2008), available at <http://www.tallahassee.com/assets/pdf/CD117720912.PDF> (last visited Mar. 31, 2009).

<sup>12</sup> Tallahassee Police Department, Internal Affairs, *Internal Investigation 08-21* (Sept. 2008), available at <http://www.tallahassee.com/assets/pdf/CD118675925.PDF> (last visited Mar. 31, 2009).

informant by considering, at a minimum, factors specified in the bill, such as the age and maturity of such person;

- Requires a law enforcement agency that uses confidential informants to establish written security procedures that, at a minimum, address secured retention, restricted access, and lawful destruction of records relating to confidential informants and other matters, as specified in the bill; and
- Provides that the provisions of the bill and policies and procedures adopted pursuant to the bill do not grant any right or entitlement to a confidential informant or a person requested be a confidential informant.

B. Amendments:

None.