

Sixty-fifth
Legislative Assembly
of North Dakota

ENGROSSED 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.~~for an Act to amend and
3 reenact subsection 4 of section 12-60-07 and section 12-63-04 of the North Dakota Century
4 Code, relating to powers, duties, and functions of the bureau of criminal investigation and
5 powers and duties of the peace officer standards and training board.

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

7 ~~—~~**SECTION 1.** ~~Chapter 29-29.5 of the North Dakota Century Code is created and enacted as~~
8 ~~follows:~~

9 ~~—~~**29-29.5-01. Definitions.**

10 ~~—~~As used in this chapter, unless the context or subject matter otherwise requires:

11 ~~—~~1. ~~"Benefit" means any of the following conferred on a confidential informant or a third~~
12 ~~party:~~

13 ~~—~~a. ~~Leniency in a criminal case or probation or parole matter, including the decision~~
14 ~~not to arrest for or charge an offense or to limit the number or severity of charges;~~

15 ~~—~~b. ~~Sentence reduction of any kind or amount;~~

16 ~~—~~c. ~~Money;~~

17 ~~—~~d. ~~Change of immigration status;~~

18 ~~—~~e. ~~Witness protection;~~

19 ~~—~~f. ~~In-kind benefits such as food, rent, and travel; or~~

20 ~~—~~g. ~~In-custody benefits such as visiting privileges, transfer to better living conditions,~~
21 ~~and enhanced access to food and entertainment.~~

22 ~~—~~2. ~~"Confidential informant" means an individual who cooperates with a law enforcement~~
23 ~~agency confidentially:~~

1 ~~_____ a. To avoid arrest or prosecution for a crime or mitigate punishment for a crime in~~
2 ~~_____ which a sentence will be or has been imposed; and~~

3 ~~_____ b. By reason of familiarity or close association with suspected criminals, is able to:~~

4 ~~_____ (1) Make a controlled buy or controlled sale;~~

5 ~~_____ (2) Supply regular or constant information about suspected or actual criminal~~
6 ~~_____ activities to a law enforcement agency; or~~

7 ~~_____ (3) Otherwise provide information important to ongoing criminal intelligence~~
8 ~~_____ gathering or criminal investigative efforts.~~

9 ~~_____ 3. "Controlled buy" means the purchase of contraband, controlled substances, or other~~
10 ~~_____ items 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 ~~_____ 4. "Controlled sale" means the sale of contraband, controlled substances, or other items~~
14 ~~_____ material to a criminal investigation which is initiated, managed, overseen, or~~
15 ~~_____ participated in by law enforcement personnel with the knowledge of a confidential~~
16 ~~_____ informant.~~

17 ~~_____ 5. "Informant agreement" means a written agreement describing the rights and~~
18 ~~_____ obligations of the confidential informant.~~

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

21 ~~_____ 7. "Target offender" means a person suspected by law enforcement personnel to be~~
22 ~~_____ implicated in a criminal act.~~

23 ~~_____ **29-29.5-02. Limitation on use of vulnerable confidential informants.**~~

24 ~~_____ 1. A law enforcement agency may not use a juvenile fifteen years of age or younger as a~~
25 ~~_____ confidential informant.~~

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

28 ~~_____ (1) The juvenile is subject to criminal charges or subject to having criminal~~
29 ~~_____ charges filed;~~

- 1 ~~———— (2) The law enforcement agency has determined there are no other reasonable~~
2 ~~avenues to obtain evidence of the crime being investigated and has~~
3 ~~evaluated all other criteria in subsection 12 of section 29-29.5-03;~~
- 4 ~~———— (3) The prosecuting attorney and the juvenile's custodial parent or guardian has~~
5 ~~signed the informant agreement; and~~
- 6 ~~———— (4) The juvenile has consulted with legal counsel.~~
- 7 ~~———— b. A juvenile over the age of fifteen but younger than eighteen years of age may not~~
8 ~~participate in a controlled buy or controlled sale, but may provide confidential~~
9 ~~information to a law enforcement agency.~~
- 10 ~~———— 2. College or university police may not recruit, assist in the recruitment of, refer to a law~~
11 ~~enforcement agency, or otherwise use an enrolled student to participate in a controlled~~
12 ~~buy or controlled sale, regardless of whether the student is offered or receives a~~
13 ~~benefit. This section does not preclude a student from providing confidential~~
14 ~~information to college or university police.~~
- 15 ~~———— 3. An individual receiving inpatient or outpatient substance abuse treatment from a~~
16 ~~licensed service provider or who is in a treatment-based drug court program may not~~
17 ~~participate in a controlled buy or controlled sale, but may provide confidential~~
18 ~~information to a law enforcement agency while receiving substance abuse treatment.~~
- 19 ~~———— **29-29.5-03. Law enforcement guidelines.**~~
- 20 ~~———— A law enforcement agency may not use a confidential informant unless the law enforcement~~
21 ~~agency is certified by the attorney general's office at least once every three years. Certification~~
22 ~~under this section must establish the law enforcement agency:~~
- 23 ~~———— 1. Trains all personnel who are involved in the use or recruitment of confidential~~
24 ~~informants in the law enforcement agency's policies and procedures in a manner~~
25 ~~consistent with national law enforcement standards, and document the date and scope~~
26 ~~of each training.~~
- 27 ~~———— 2. Assigns the consideration of the preservation of the safety of a confidential informant,~~
28 ~~law enforcement personnel, and the public as the highest priority in operational~~
29 ~~decisions and actions.~~

- 1 ~~3. Executes reasonable protective measures for a confidential informant when the law~~
- 2 ~~enforcement agency knows or should know of a specific risk or threat of harm to a~~
- 3 ~~confidential informant as a result of serving as a confidential informant.~~
- 4 ~~4. Trains confidential informants on the conditions, restrictions, and procedures~~
- 5 ~~associated with participating in the law enforcement agency's investigative or~~
- 6 ~~intelligence gathering activities, and document and date the scope of the training.~~
- 7 ~~5. Designates supervisory or command level review and oversight of the use of~~
- 8 ~~confidential informants.~~
- 9 ~~6. Restricts off duty association or social relationships by law enforcement agency~~
- 10 ~~personnel involved in investigative or intelligence gathering with confidential~~
- 11 ~~informants.~~
- 12 ~~7. Establishes guidelines to deactivate confidential informants which maintain the safety~~
- 13 ~~and anonymity of confidential informants.~~
- 14 ~~8. In the event of the death of a confidential informant, advises next of kin or the personal~~
- 15 ~~representative of the confidential informant's estate that the death of the confidential~~
- 16 ~~informant is suspected to have occurred as a result of serving as a confidential~~
- 17 ~~informant.~~
- 18 ~~9. Informs a potential confidential informant of the right to legal counsel and provide a~~
- 19 ~~potential confidential informant with the opportunity to consult with legal counsel~~
- 20 ~~before entering an informant agreement.~~
- 21 ~~10. Provides a potential confidential informant with an informant agreement before a~~
- 22 ~~potential confidential informant performs any activity as a confidential informant.~~
- 23 ~~11. Establishes a process to evaluate the criminal history and propensity for violence of~~
- 24 ~~any targeted offenders that a confidential informant will have contact with during a~~
- 25 ~~confidential informant's performance of confidential informant activities.~~
- 26 ~~12. Establishes policies and procedures to assess and document, in writing, the suitability~~
- 27 ~~of using an individual as a confidential informant which, at a minimum, requires the~~
- 28 ~~evaluation of each of the following factors:~~
- 29 ~~a. The individual's age and maturity;~~

- 1 ~~_____ b. The risk of physical harm to the individual or the individual's immediate family or~~
2 ~~close associates as a result of providing information or assistance, or upon the~~
3 ~~release of information that discloses an individual's assistance;~~
- 4 ~~_____ c. The risk the individual poses to adversely affect a present or potential~~
5 ~~investigation or prosecution;~~
- 6 ~~_____ d. The effect the disclosure of the individual's cooperation may have on the~~
7 ~~agency's investigative or intelligence gathering activities;~~
- 8 ~~_____ e. Whether the individual is a substance abuser, has a history of substance abuse,~~
9 ~~or is in a drug treatment program;~~
- 10 ~~_____ f. Whether the individual has shown an indication of emotional instability,~~
11 ~~unreliability, or of furnishing false information;~~
- 12 ~~_____ g. The individual's criminal history or prior criminal record; and~~
- 13 ~~_____ h. Whether the use of the individual is important or vital to the success of an~~
14 ~~investigation and the likelihood that information the individual could provide is not~~
15 ~~readily available through other sources of a more direct means.~~
- 16 ~~_____ 13. Establishes recordkeeping procedures that, at a minimum:~~
- 17 ~~_____ a. Create a separate file for every confidential informant to be maintained in a~~
18 ~~central or special division of the agency;~~
- 19 ~~_____ b. Collect and record each confidential informant's name, age, gender, race,~~
20 ~~ethnicity, and residential zip code; and~~
- 21 ~~_____ c. Collect and record any contacts or actions between a confidential informant and~~
22 ~~the law enforcement agency or agent, financial transactions, informant~~
23 ~~agreements, and all types of information required by subsection 1 of section~~
24 ~~29-29.5-05.~~
- 25 ~~_____ 14. Establishes written security procedures that, at a minimum:~~
- 26 ~~_____ a. Provide for the secured retention of all records related to the law enforcement~~
27 ~~agency's confidential sources, including access to files identifying the identity of~~
28 ~~confidential sources.~~
- 29 ~~_____ b. Limit availability to records relating to confidential informants to those within the~~
30 ~~law enforcement agency or law enforcement community having a need to know~~
31 ~~or review those records, the confidential informant, an attorney representing the~~

1 ~~confidential informant, an individual who has been charged with a criminal-~~
2 ~~violation where the confidential informant may be called by the prosecution as a~~
3 ~~witness based on the confidential informant's work as a confidential informant,~~
4 ~~and an attorney representing such an individual.~~

5 ~~———— e. Require notation of each individual who accesses the records and the date the~~
6 ~~records are accessed.~~

7 ~~———— d. Provide for review and oversight by the law enforcement agency to ensure record~~
8 ~~access and security procedures are followed.~~

9 ~~———— e. Define the process by which records concerning a confidential informant may be~~
10 ~~lawfully destroyed.~~

11 ~~———— 15. Performs an annual review of actual agency confidential informant practices to ensure~~
12 ~~conformity with the agency's policies and procedures and this chapter.~~

13 ~~———— **29-29.5-04. Informant agreement.**~~

14 ~~———— 1. An informant agreement must include:~~

15 ~~———— a. Notice of an individual's right to legal counsel and the opportunity to consult with~~
16 ~~legal counsel before signing the informant agreement and before performing~~
17 ~~service as a confidential informant. A waiver of the right to legal counsel by an~~
18 ~~individual must be documented in writing and acknowledged by the individual that~~
19 ~~the waiver of the right to legal counsel was knowingly, intelligently, and voluntarily~~
20 ~~made.~~

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

25 ~~———— c. A description of the activities required of a confidential informant, any promised~~
26 ~~benefit, and the service period required of the confidential informant.~~

27 ~~———— d. Notice that it is a violation of the informant agreement for a confidential informant~~
28 ~~to be asked or permitted to use sexual enticement or promises of future sexual~~
29 ~~acts as part of service as a confidential informant.~~

30 ~~———— e. The requirement that a confidential informant provide the names and contact~~
31 ~~information for next of kin or a personal representative of the confidential~~

1 ~~informant's estate in the event the law enforcement agency suspects the death of~~
2 ~~a confidential informant was a result of services performed as a confidential~~
3 ~~informant.~~

4 ~~f. Notification that the informant agreement may not release an individual or law~~
5 ~~enforcement agency of liability for a negligent or intentional act alleged in a civil~~
6 ~~action.~~

7 ~~2. The informant agreement must be reviewed and signed by a supervising law~~
8 ~~enforcement agent and a confidential informant.~~

9 ~~**29-29.5-05. Report to the attorney general.**~~

10 ~~1. A law enforcement agency using confidential informants shall collect and report data~~
11 ~~including the information required by this subsection. Data required to be collected~~
12 ~~under this subsection is confidential. The attorney general shall develop and~~
13 ~~disseminate a standardized form that must be completed by every law enforcement~~
14 ~~agency using confidential informants. A law enforcement agency using confidential~~
15 ~~informants shall collect the data for the preceding calendar year and submit a report~~
16 ~~by March first of each year to the attorney general for review. The data and report may~~
17 ~~not disclose the identity of a confidential informant, but must include:~~

18 ~~a. The number of active confidential informants.~~

19 ~~b. The number of active confidential informants used by case category.~~

20 ~~c. The categories of active confidential informants compiled by race, ethnicity,~~
21 ~~gender, age, and zip code.~~

22 ~~d. The number of confidential informants used to conduct controlled buys or~~
23 ~~controlled sales on behalf of an agency.~~

24 ~~e. The number of deaths or injuries to confidential informants whose cause of death~~
25 ~~or injury may be related to service as confidential informants or whose death or~~
26 ~~injury occurs during the service period described in the informant agreement.~~

27 ~~f. The total amount of cash payments and value of any non-leniency-related~~
28 ~~benefits provided to confidential informants.~~

29 ~~g. The total number of decisions not to arrest, dropped or reduced charges,~~
30 ~~sentence reductions, or other leniency-related benefits provided to confidential~~
31 ~~informants.~~

- 1 ~~h. The disposition of all charges brought against target offenders.~~
2 ~~i. The total number of instances in which a law enforcement agency's use of~~
3 ~~confidential informants resulted in the criminal prosecution of target offenders.~~
4 ~~j. The total number of administrative disciplinary proceedings conducted by a law~~
5 ~~enforcement agency for violations of this chapter by a law enforcement agent.~~
6 ~~2. Upon the death of a confidential informant, the supervising law enforcement agency~~
7 ~~shall withdraw from the investigation of the death of its confidential informant. The~~
8 ~~supervising law enforcement agency shall promptly notify the attorney general of its~~
9 ~~withdrawal from the investigation, and the attorney general shall authorize an~~
10 ~~independent law enforcement agency investigation.~~
11 ~~3. If a law enforcement agency head determines a law enforcement agent has violated a~~
12 ~~provision of this chapter and finds the circumstances surrounding the violation raise~~
13 ~~serious questions about whether the law enforcement agent acted willfully or~~
14 ~~intentionally with respect to the violation, the agency head promptly shall initiate a~~
15 ~~proceeding to determine whether disciplinary action against the law enforcement~~
16 ~~agent is warranted. The agency head shall report the proceeding and the outcome in~~
17 ~~the annual report required by subsection 1.~~

18 **SECTION 1. AMENDMENT.** Subsection 4 of section 12-60-07 of the North Dakota Century
19 Code is amended and reenacted as follows:

- 20 4. The bureau shall assist the sheriffs and other peace officers in establishing a system
21 for the apprehension of criminals and detection of crime. The assistance must include
22 offering guidelines and training for the proper handling of confidential informants.

23 **SECTION 2. AMENDMENT.** Section 12-63-04 of the North Dakota Century Code is
24 amended and reenacted as follows:

25 **12-63-04. Board - Powers - Duties - Authority.**

26 The board shall administer, coordinate, and enforce the provisions of this chapter, evaluate
27 the qualifications of applicants, and approve the examinations for licensing under this chapter.

28 1. The board shall:

- 29 a. Prescribe the criteria for certification of basic, advanced, and specialized peace
30 officer training curriculum, instructors, and schools;

- 1 b. Certify curriculum, instructors, schools, and officers that have met the training
2 certification criteria;
- 3 c. Establish the curriculum for basic and advanced peace officer training; and
4 d. Prescribe minimum standards of sidearm training and certification for peace
5 officers before they may carry a sidearm.
- 6 2. The board shall keep records and minutes necessary to carry out its functions. The
7 board may:
- 8 a. Issue subpoenas, examine witnesses, administer oaths, and investigate
9 allegations of practices violating the provisions of this chapter or rules adopted by
10 the board.
- 11 b. Examine, under oath, any applicant for licensing.
- 12 c. Examine, under oath, any licensed peace officer during a hearing to suspend,
13 revoke, or to not renew a license of a peace officer.
- 14 ~~d. Adopt rules relating to the professional conduct of peace officers and to~~
15 ~~implement the requirements of this chapter, including rules relating to~~
16 ~~professional licensure, continuing education, and ethical standards of practice,~~
17 ~~for persons holding a license to practice peace officer duties.~~
- 18 3. The board shall adopt rules relating to the professional conduct of licensed peace
19 officers and to implement the requirements of this chapter, including rules:
- 20 a. Relating to professional licensure and continuing education;
21 b. Establishing ethical standards of practice; and
22 c. Establishing standards for proper confidential informant handling procedures and
23 setting limits on officer conduct in recruiting an individual to operate as a
24 confidential informant.