

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 create and enact
3 chapter 29-29.5 of the North Dakota Century Code, relating to the use of confidential
4 informants; to amend and reenact section 12-63-04 of the North Dakota Century Code, relating
5 to the powers and duties of the peace officer standards and training board; and to provide a
6 penalty.

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

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

10 ~~29-29.5-01. Definitions.~~

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

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

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

16 ~~b. Sentence reduction of any kind or amount;~~

17 ~~c. Money;~~

18 ~~d. Change of immigration status;~~

19 ~~e. Witness protection;~~

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

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

23 ~~2. "Confidential informant" means an individual who cooperates with a law enforcement~~
24 ~~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.** Section 12-63-04 of the North Dakota Century Code is
19 amended and reenacted as follows:

20 **12-63-04. Board - Powers - Duties - Authority.**

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

23 1. The board shall:

- 24 a. Prescribe the criteria for certification of basic, advanced, and specialized peace
25 officer training curriculum, instructors, and schools;
26 b. Certify curriculum, instructors, schools, and officers that have met the training
27 certification criteria;
28 c. Establish the curriculum for basic and advanced peace officer training; and
29 d. Prescribe minimum standards of sidearm training and certification for peace
30 officers before they may carry a sidearm.

- 1 2. The board shall keep records and minutes necessary to carry out its functions. The
2 board may:
- 3 a. Issue subpoenas, examine witnesses, administer oaths, and investigate
4 allegations of practices violating the provisions of this chapter or rules adopted by
5 the board.
- 6 b. Examine, under oath, any applicant for licensing.
- 7 c. Examine, under oath, any licensed peace officer during a hearing to suspend,
8 revoke, or to not renew a license of a peace officer.
- 9 d. Adopt rules relating to the professional conduct of peace officers and to
10 implement the requirements of this chapter, including rules relating to
11 professional licensure, continuing education, and ethical standards of practice,
12 for persons holding a license to practice peace officer duties.

13 3. The board shall adopt rules relating to the professional conduct of licensed peace
14 officers involved in confidential informant agreements under chapter 29-29.5, and shall
15 receive complaints and make determinations if an officer's conduct violated the
16 protections provided in chapter 29-29.5. Annually, the board shall conduct an audit
17 evaluating the effectiveness of confidential informant training requirements.

18 4. The board shall establish penalties and enforce violations of protections provided in
19 chapter 29-29.5. The penalties established must be formulated based on the nature,
20 severity, gravity, and recurrence of violations. The board may deny, suspend, or
21 revoke a license or may impose probationary conditions, including remedial training.

22 **SECTION 2.** Chapter 29-29.5 of the North Dakota Century Code is created and enacted as
23 follows:

24 **29-29.5-01. Definitions.**

25 1. "Benefit" means any of the following conferred on a confidential informant or a third
26 party:

27 a. Leniency in a criminal case or probation or parole matter, including a decision
28 whether to arrest or charge an offense or to limit the number or severity of
29 charges;

30 b. Sentence reduction of any kind or amount; or

31 c. A favorable sentencing or bond recommendation.

1 2. "Confidential informant" means an individual who cooperates with a law enforcement
2 agency and:

3 a. Is willing to attempt a controlled buy or controlled sale or agrees to surreptitiously
4 record a target offender; and

5 b. Seeks or is offered a benefit.

6 3. "Controlled buy" means the purchase or attempted purchase of contraband, controlled
7 substances, or other items material to a criminal investigation while under supervision
8 or direction of law enforcement.

9 4. "Controlled sale" means the sale or attempted sale of contraband, controlled
10 substances, or other items material to a criminal investigation while under supervision
11 or direction of enforcement.

12 5. "Informant agreement" means a written agreement describing the rights and
13 obligations of a confidential informant and law enforcement agency.

14 6. "Law enforcement agency" means an agency authorized by law to enforce the law and
15 to conduct or engage in investigations or prosecutions for violations of the law.

16 7. "Target offender" means an individual suspected of a violation of the law, whose
17 identity is known or unknown, and who is the focus of an informant agreement.

18 **29-29.5-02. Limitation on use of juvenile confidential informants.**

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

21 2. A juvenile over the age of fifteen, but under the age of eighteen, may not be used as a
22 confidential informant unless:

23 a. The juvenile is married;

24 b. The juvenile is emancipated;

25 c. The juvenile is serving in the active duty armed forces; or

26 d. The juvenile is subject to criminal charges; and

27 (1) There are no other reasonable avenues to obtain evidence of the crime
28 being investigated and the risk of harm to the juvenile is minimal;

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

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

29-29.5-03. Limitation on use of campus police.

A law enforcement officer employed under section 15-10-17 may not enter an informant agreement with a student enrolled in an institution under the control of the state board of higher education.

29-29.5-04. Law enforcement confidential informant training and guidelines.

1. After July 1, 2018, a law enforcement agency may not use a confidential informant unless the law enforcement agency is trained in the use of confidential informants in a training course approved by the attorney general.

a. Training must occur at least once every three years, and must establish that the law enforcement agency has trained all personnel who are involved in the use or recruitment of confidential informants in the law enforcement agency's policies and procedures in a manner consistent with the peace officer standards and training requirements.

b. The law enforcement agency shall document the date and scope of all training along with all law enforcement personnel trained.

2. The peace officers standards and training board shall adopt rules for the use of confidential informants which at a minimum:

a. Assign the consideration of the preservation of the safety of a confidential informant.

b. Execute reasonable protective measures for a confidential informant.

c. Establish guidelines for the training and briefing of confidential informants.

d. Restrict off-duty association or social relationships by law enforcement agency personnel with confidential informants.

e. Establish procedures to deactivate confidential informants which maintain the safety and anonymity of confidential informants.

f. Establish a process to evaluate and report the criminal history and propensity for violence of any target offenders.

g. Establish written security procedures protecting the identity of a confidential informant.

h. Establish written procedures relating to the use of a paid confidential informant.

29-29.5-05. Written agreement required.

Except for court proceedings, a law enforcement agency may use a confidential informant only with a written agreement executed by the confidential informant and the law enforcement agency. An agreement for use of a confidential informant must be in writing, and include:

1. The confidential informant's right to remain silent, the right to speak with legal counsel at any time, and the right to cease working as a confidential informant;
2. A statement of the benefit, which will be recommended upon substantial compliance with the informant agreement;
3. A statement that an absolute guarantee or promise may not be made to the confidential informant other than law enforcement will truthfully report cooperation;
4. A statement of the inherent risk associated with acting as a confidential informant;
5. Confidential informant responsibilities, including testifying truthfully if called as a witness in a court proceeding;
6. A written waiver of right to counsel which must be executed separately and attached to the informant agreement, signed by the confidential informant and a law enforcement officer, and include language stating that consulting legal counsel at any time will not invalidate the agreement;
7. The parameters of the agreement, detailing the anticipated number of buys, sales, acts, or the duration of service;
8. A description of any penalty for violating the terms of the written agreement, including any additional criminal charges;
9. A warning that sexual relations with an intended target of a police investigation is a violation of the agreement and may be a violation of the law;
10. A statement that money or property loaned or entrusted to the confidential informant by law enforcement may not be used for personal use and must be accounted for at all times; and
11. Specification of any known crimes of violence committed by a target offender.

29-29.5-06. Death of a confidential informant.

Upon the death of a confidential informant, the supervising law enforcement agency shall withdraw from the investigation of the death of its confidential informant. The supervising law enforcement agency promptly shall notify the attorney general of its withdrawal from the

1 investigation, and the attorney general shall authorize an independent law enforcement agency
2 investigation.

3 **29-29.5-07. Reporting violations of this chapter.**

4 1. An individual may report a suspected violation of this chapter to the appropriate law
5 enforcement agency administration. The law enforcement agency shall investigate any
6 reported violation within twenty days from receiving the complaint and, within forty-five
7 days from receiving the complaint, make a written determination on whether a violation
8 occurred. Upon completion, the law enforcement agency shall forward the written
9 report to the individual who filed the initial complaint and to the peace officer standards
10 and training board for review. An individual who filed a report for a suspected violation
11 may seek additional remedies from the peace officer standards and training board.

12 2. A licensed peace officer or a prosecutor who reasonably believes a law enforcement
13 officer or a law enforcement agency has violated this chapter shall file a written report
14 with the peace officer standards and training board.

15 **29-29.5-08. Disposition of cases involving confidential informants.**

16 1. An informant agreement may be presented to the court at the time of sentencing. A
17 court shall give consideration at sentencing to a confidential informant who has
18 substantially complied with an informant agreement.

19 2. After consideration of an informant agreement, notwithstanding section 19-03.1-23.2,
20 a court may defer imposition of sentence or suspend a portion of a minimum
21 mandatory sentence when a confidential informant has substantially complied with an
22 informant agreement.

23 3. If necessary to protect a confidential informant or the integrity of an ongoing
24 investigation, a court may direct submission of sentencing memoranda in writing under
25 seal when sentencing or deferring imposition of sentence of a confidential informant.

26 4. If necessary to protect a confidential informant or the integrity of an investigation, a
27 court may dispense with reporting departure from a mandatory sentence under
28 subsection 3 of section 12.1-32-03.

29 5. This section does not prohibit disposition of cases by deferral of prosecution with or
30 without court approval.