

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.