

U.S. Department of Justice  
Office of Justice Programs



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# Managing Confidential Informants

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## Bureau of Justice Assistance

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**Bureau of Justice Assistance**  
633 Indiana Avenue, N.W.  
Washington, D.C. 20531  
(202) 514-6638

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program Offices and Bureaus: Bureau of Justice Assistance, National Institute of Justice, Bureau of Justice Statistics, Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

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# Managing Confidential Informants

Hugh Nugent  
Frank J. Leahy, Jr.  
Edward F. Connors

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MONOGRAPH

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Bureau of  
Justice  
Assistance

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July 1991

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Overall guidance from the Bureau of Justice Assistance was provided by Richard H. Ward, Chief, Law Enforcement Branch.

## ABOUT THE BUREAU OF JUSTICE ASSISTANCE

The Bureau of Justice Assistance provides federal assistance to state and local units of government for programs that improve the functioning of the criminal justice system. The Bureau administers a major grant program and a number of direct assistance programs.

**Edward Byrne Memorial State and Local Law Enforcement Assistance Program** provides grant assistance to enhance state and local drug control efforts. Programs eligible for funding include those that improve the apprehension, prosecution, adjudication, detection, and rehabilitation of drug offenders. Eradication programs, treatment programs, and programs that concentrate on major drug offenders are also eligible for funding. The states, District of Columbia, and territories receive block grant awards that are administered at the state level. The discretionary grant program administered by the Bureau is used to enhance, coordinate, and fill gaps in state and local efforts through national and multistate programs.

**Direct Assistance Programs** administered by the Bureau include the Public Safety Officers' Benefits, Emergency Federal Law Enforcement Assistance, Regional Information Sharing Systems, Mariel-Cuban Reimbursement, Surplus Federal Property, and the Prison Industry Certification Programs.

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# INTRODUCTION

## CONFIDENTIAL INFORMANTS AND EFFECTIVE LAW ENFORCEMENT

Law enforcement agencies and their criminal investigators are awash with official information about crime from a variety of sources:

- Agency reports of crime, from petty theft to homicide, supplemented by follow-up investigative reports
- Agency reports of arrests and bookings, with fingerprint cards and criminal history (rap) sheets, all routinely filed in manual and automated files
- Agency analyses of crimes, arrests, and other events indicating disruptions of order

Beyond official information lie many other kinds of information sources that might be categorized as follows: (1) *general sources*: officers from one's own or other agencies, reporters covering the police beat, and many others; (2) *citizen sources*: victims, witnesses, concerned citizens active in crime prevention, and those willing to report crimes or other valuable information; and (3) *street sources*: persons living or working in high crime areas, including residents, bartenders, and street people.

Despite these official and unofficial sources, often there is little specific information that an investigator can use to aid in solving a crime, arresting a perpetrator, or better still, interdicting a crime in the planning stages or in progress. This specific information most often comes from confidential informants.

Enlisting the assistance of informants is neither new nor unique; they have been used for centuries. Although ethical and moral questions are still raised, the use of confidential informants is fully recognized in law and in the everyday practices of most law enforcement agencies throughout the world. Without informants, investigating consensual offenses and organized crime would be virtually impossible.

Writing in the *American Bar Foundation Review*, Geoffrey R. Stone makes the following points:

The police use of spies, secret agents, and informers to deceive individuals into revealing information to the authorities has traditionally been viewed with distrust and disdain. There is, indeed, a uniquely odious quality in the sorts of stratagems, betrayals, and invasions of privacy the practice engenders. At the same time, however, the practice is a singularly effective one, and any government dedicated to ferreting out crime at any cost or determined to keep a watchful eye on the behavior and beliefs of its citizens will naturally resort to the widespread or even unrestrained use of spies and informers to accomplish its ends. Even our own society, committed though it is to the preservation of

personal privacy and individual liberty, has tended to tolerate the practice in the name of effective law enforcement.<sup>1</sup>

Gary T. Marx, professor of sociology at Massachusetts Institute of Technology, documents the problems and pitfalls of covert tactics in American domestic policing. He succinctly states his perspective on police undercover work in the preface to his book, *Undercover: Police Surveillance in America*:

In starting this book, I viewed undercover tactics as an *unnecessary evil*. But, in the course of the research I have concluded, however reluctantly, that in the United States they are a *necessary evil*.<sup>2</sup> [Emphasis in original.]

## PURPOSE AND SCOPE OF MONOGRAPH

The purpose of this monograph is to provide law enforcement agencies specific guidance on managing confidential informants. The monograph will help agencies establish or revise written directives for employing and handling informants. It will also show how to gain maximum benefits from using informants while maintaining the integrity of the agencies and investigators who rely on informant information.

The monograph is organized around the confidential informant's employment: recruitment, selection, orientation, and training; direction and control; interviewing and debriefing; evaluation; and termination. Special attention is devoted to forms, reports, records, and files that are the foundation of the information gathering and control procedures.

Before analyzing the informant's employment cycle, the monograph considers several preliminary matters: additional information about unofficial sources, notes on who confidential informants are and what motivates them, and pitfalls that can create problems for the agency or the investigator who recruits a confidential informant. The monograph also examines responsibilities of the chief executive officer (chief of police, sheriff, director), investigations commander, investigative supervisor, and investigator.

This monograph presents an introduction to legal issues involved in using confidential informants. However, because the controlling law varies greatly from state to state, agencies should consult with their local legal advisors and prosecutors before drafting a new or revised standard operating procedure on confidential informants.

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<sup>1</sup> "The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers," *American Bar Foundation Review Journal*, Vol. 1976, Issue 4, pp. 1195 ff.

<sup>2</sup> Berkeley, California, University of California Press, 1988.



## OTHER INFORMATION SOURCES

While the focus of this monograph is on the confidential informant (CI), there are other information sources in the community that are available without the costs and problems associated with CIs. These other information sources should not be overlooked in the rush to employ a CI.

Investigators cannot always rely on their own knowledge; rather, they must seek, develop, and use information from other sources. Developing these sources presents several challenges to the investigator:

- Who is a source?
- What information can that source provide?
- How accurate and reliable is the information?
- Why is the source supplying the information?
- Whose interest is the source serving?
- Can the source be an asset to the agency again?

There are numerous sources of information that cannot be classified as informants. It is critical that investigators know the difference. Generally, sources of information are persons who are not party to an incident or investigation and who are not working for a law enforcement agency. We can group them in three broad categories: general, citizen, and street sources.

### General Sources

General sources are people with whom an investigator comes in contact on a regular basis, not necessarily in connection with a specific investigation. These sources include members or employees of several organizations: the investigator's own agency and other law enforcement agencies; other criminal justice agencies (prosecution, public defender, judiciary, pretrial release, probation, parole, and corrections); the department of motor vehicles; credit reporting agencies; banks; utilities (electric, water, gas, cable TV). Most general sources provide information and often documentation critical to a given investigation. Subpoenas may be required to obtain information from some of these sources, causing frustration and delay. But these sources should always be used.

The best of these general sources is often the closest one, the uniformed patrol officer. By developing good relations with beat officers, many investigators obtain important information. Recognizing and demonstrating appreciation of the beat officer's information can build a valued relationship and an invaluable resource.

## Citizen Sources

Citizens in the community can also be good sources for investigators. These sources include victims, witnesses, and concerned citizens. Generally, their information is useful and credible. Crime prevention programs (e.g., Neighborhood Watch), community policing initiatives, and hotlines are bringing more citizens into contact with law enforcement officers. Regular police-community contact through crime prevention units could save a great deal of time and effort identifying appropriate citizen sources for specific investigations.

Citizen sources are not without potential pitfalls. Every community has "frustrated cops," persons who want to be law enforcement officers and imagine themselves as unofficial extensions of the law enforcement agency. Some may have vigilante attitudes or motives. Some enjoy associations with officers and often use police jargon or have radio scanners in their cars or homes. While they cannot be disregarded, caution should be used in acting upon their information. Investigators should evaluate their credibility and corroborate their statements through documentation, testimony from other persons, and thorough investigation of the information provided.

A pre-existing relationship between a citizen source and a suspect should also be viewed with caution. Such relationships may give rise to anger or a desire for revenge or retribution against the suspect, undermining the credibility of the source.

## Street Sources

Generally, street sources are persons who come into frequent contact with law enforcement officers because of their occupations, activities, or residence. Examples include:

- Bar and restaurant employees (managers, bartenders, waiters and waitresses, valet parking attendants)
- Hotel employees (desk clerks, maids, bellhops, security personnel)
- Prostitutes and pimps
- Employees of 24-hour establishments (gas stations, fast food restaurants, convenience stores, etc.)

Street sources are often motivated by a desire to be a "friend." Although some will accept money for information, their primary concern is to develop a relationship with an officer or investigator.

Street sources can be valuable, but they can pose dangers and pitfalls. Like the "frustrated cop," street sources can deceive, mislead, or supply information that sounds valuable but ends up wasting many hours to substantiate. Investigators must know with whom they are dealing, seek documentation or testimony from other persons, and thoroughly investigate the information supplied.

In general, investigators should always use caution when discussing police investigations with citizen or street sources.

In the final analysis, investigators should be encouraged to identify and to develop relationships with sources of information that may be of value in their specialty (e.g., burglary) or in the geographic area they serve. Besides yielding information about crime and criminals, these sources may suggest persons who could be employed as confidential informants.

## **CONFORMANCE WITH FEDERAL REQUIREMENTS**

This publication incorporates the mandatory provisions on documenting and paying confidential informants developed by the Office of Justice Programs (OJP), United States Department of Justice, for agencies (as grantees or subgrantees) that have received OJP funds to pay informants. At this writing, the most current version of those mandatory procedures is found in OJP M 7100.1D (May 15, 1990): *Financial and Administrative Guide for Grants*, Paragraph 62 ("Confidential Funds") and Appendix 11 ("Control and Use of Confidential Funds"). Most of the OJP M 7100.1D information on informant documentation and payment processing is contained here. However, agencies that receive OJP grants involving the administration of confidential funds should carefully review the cited document and any revisions. Pertinent excerpts from the OJP guidelines can be found in Appendix A. OJP grantees with additional questions related to control and payment of confidential informants should contact the Office of the Comptroller.



# CHAPTER 1

## CONFIDENTIAL INFORMANTS

Law enforcement officers and agencies would be well advised to consider all CIs as "criminals in our midst." Obviously, many persons who assist the agency are not criminals. But agency personnel should be cautious whenever any person volunteers information about crimes or criminals. Certain questions should be posed: Who are these people? What motivates them? What pitfalls should be avoided? What policies are needed to govern their use?

### WHO ARE THESE PEOPLE?

To be of value as a CI, a person should have one or more of the following characteristics:

- Past or present association with or intimate knowledge of one or more active criminals
- Association with or intimate knowledge of persons practicing a criminal specialty (e.g., bank robbery, safe burglary) or committing crimes within a specific geographic area (e.g., the "North End")
- Occupation or residence that lends itself to gathering information about criminals and their plans to commit crime
- Status in some sector of the criminal justice system (e.g., on pretrial release or bail pending arraignment or indictment, on bail pending sentencing, incarcerated in a jail or prison, on probation or parole)

Additionally, as stated below, the CI must meet four criteria before employment.

1. Be a private citizen and not a member of a law enforcement agency.
2. Sign an agreement with the law enforcement agency to follow the CI policies of the agency.
3. Agree to work under the direction of an investigator and perform certain lawful acts as directed.
4. Agree to exchange information for monetary or other lawful considerations.

Based on these characteristics and requirements, we can now define a confidential informant: A private citizen (not a law enforcement agency employee) who, by reason of his or her familiarity or close association with criminals, regularly supplies information about criminals or criminal activities to a law enforcement agency, and who has entered into a working agreement with the agency that involves keeping his or her identity confidential.

## WHAT MOTIVATES INFORMANTS?

Of equal interest and importance is this question: Why do people become informants? Investigators must understand what motivates a CI and must continue to monitor motivational factors in case the CI changes over time. A change of motivation may signal problems with the CI's mode of operation or a desire to end the relationship.

There are several common motivations:

- **Money**—When information is scarce, the CI could be "creative" in order to maintain the flow of funds.
- **Revenge/Spite/Retaliation**—Mistreatment by associates, jealousies, and quarrels are all possible motivating factors.
- **Elimination of Competition**—Diversion of suspicion is a motivation very much in the same vein.
- **Fear**—Fear ranges from fear of law enforcement officers to fear of current or former associates. Obviously, the fearful CI looks to the investigator and to the agency for protection.
- **Self-aggrandizement**—CIs may be motivated by a desire to feed their egos or to enhance their image or their self-importance. Maintaining the confidentiality of persons interested in enhancing their image is a challenging task for a busy investigator.
- **Prosecutorial or Judicial Leniency**—Usually this motivation pertains to a specific criminal case.
- **Repentance**—There are good reasons for suspecting the sincerity of the self-proclaimed repenter. The repentance may be self-serving.

Because motivation could be inextricably bound to the "fall" of a CI or the investigator, there are two principles that should be stated:

- The investigator must know the CI's motivations and accept them as a given.
- Understanding the CI's motives makes it more likely that the investigator will be able to direct and control the CI.

## PITFALLS FOR AGENCY, SUPERVISOR, AND INVESTIGATOR

Pitfalls that can negate the possible benefits from using confidential informants can be encountered at three different levels: agency, supervisory, and investigative. At the top level are pitfalls associated with agency readiness to use CIs to full advantage. At supervisory level, there are concerns about readiness to provide direction and control. And there are questions of whether investigators have been prepared to accept a new role, with new responsibilities.

## Agency Pitfalls

Given a commitment by the agency's chief executive officer (CEO) to employ CIs, the agency can fall into several traps:

- Failure to define roles and responsibilities of all persons in the chain of command, from CEO down to investigator
- Failure to complement the role structure with an explicit written directive setting forth policies and procedures
- Failure to orient and train agency personnel in techniques of working with CIs
- Failure to orient and train CIs in what is expected of them, including an explicit set of "do's and don'ts"
- Failure to execute a written agreement with the CI spelling out role and responsibilities, "do's and don'ts," and possible penalties for transgressions

## Supervisory Pitfalls

As with most law enforcement operations, the supervisor is the key to long-term success of ongoing field operations. Pitfalls in five areas could cause problems for the supervisor:

- Poor selection of an informant, or poor selection of an informant to work with a given investigator
- Failure to take precautions in special cases:
  - When the CI and investigator are of the opposite sex
  - When the CI is in or out of custody pending a prosecutorial or judicial outcome
  - When the CI is on probation or parole
  - When the CI is a juvenile
- Lack of supervision, especially in periodically evaluating activities and results as part of retention/termination conferences
- Lack of direction and control, especially in those areas identified below as pitfalls for the investigator
- Failure to closely supervise the handling of confidential funds

## Investigator Pitfalls

Five pitfall areas for the investigator are listed here, but there may be many more potential pitfalls. Hopefully, these five will assist the agency, the supervisor, and the investigator to avoid at least a few problems. They are:

- Inadequate documentation of the CI's activities, including written reports and logs that should become part of the CI's operational file
- Inadequate attention to handling money and property, especially controlled substances and payments to CIs
- Inadequate attention to maintaining a professional relationship with the CI, including maintaining confidentiality
- Gullibility, failure to question the CI fully about his or her activities, and failure to seek corroboration from other sources
- Making promises that neither the agency nor agency personnel can keep with regard to large money payments or favorable prosecutorial or judicial outcomes

## **POLICY CONSIDERATIONS**

There are three policy considerations stemming from this chapter's discussion of CI motives and potential pitfalls:

- Roles and responsibilities must be defined for each person in the chain of command with CI responsibilities. A suggested role and responsibilities framework applicable to a medium-sized law enforcement agency is discussed in Chapter 2 and is included in Appendix B.
- A written directive must spell out agency policies and procedures for employing and using CIs. A suggested outline of such a written directive is discussed in Chapter 2 and is included in Appendix C.
- Investigators and their supervisors should be oriented to and trained about their role and responsibilities for managing CIs. Orientation and training are addressed in Chapter 4.



## CHAPTER 2

# RESPONSIBILITIES AND WRITTEN DIRECTIVES

This chapter is divided into two parts. The first lists the responsibilities of the affected parties: the agency's chief executive officer (CEO), the commanding officer (CO) of the investigative unit, the investigative supervisor, the investigator, and the CI. The second part presents the elements of the agency's written directive system.

## RESPONSIBILITIES OF AFFECTED PARTIES

The roles and responsibilities matrix in Appendix B displays 17 areas of responsibility for agency personnel (excluding the CI) and briefly capsulizes the nature and scope of those responsibilities. The matrix compares responsibilities of the four key players in a logical progression from initial authorization to employ, through purging of the CI's file.

The matrix shows roles and responsibilities for a mid-sized agency, one with 50 to 300 members. Smaller and larger agencies may have to adjust roles and responsibilities to reflect their organization and operations. Because roles and responsibilities should be reflected in written agency directives, agencies should adjust the matrix as necessary before revising existing directives or developing new ones.

### Chief Executive Officer

The CEO has nine specific responsibilities as shown in Appendix B. First and foremost, the CEO must authorize use of CIs, either by certain classes of employees or by specific members of the agency as recommended by the commanding officer. Without general or specific authorization, CIs should not be employed.

Following authorization by the CEO, there are eight responsibilities in which the CEO should be included. The CEO should

- Approve the written directive, ordinarily a "general order," that addresses use of CIs, so that all personnel will be apprised of CI policies and procedures.
- Approve the form and content of the orientation and training curriculum for supervisors and investigators in recruiting, training, directing, and controlling CIs.
- Approve the form and content of the orientation and training curriculum for CIs once they are employed.

- Review security and confidentiality matters in a quarterly review of informant activities. All key players have a vital interest in ensuring security and in keeping confidential the CIs' identities and the information they supply. Concern for security and confidentiality must come from the top, and it should be emphasized during quarterly reviews and periodic inspections.
- Authorize CI payments exceeding a given amount for a single payment and payments exceeding a given amount in any one month or quarter. If there are two or more supervisors between the CEO and the investigator, the CEO should not have to authorize every payment. But in exceptional circumstances (i.e., when the payment exceeds given amounts), the CEO should examine the circumstances and supporting documentation and authorize the payment. Likewise, any arrangement or accommodation for a CI with any other criminal justice agency, especially the prosecuting attorney or judiciary, should be authorized by the CEO.
- Review quarterly reports of CI use and results, including an analysis of costs, with the CO and others as appropriate.
- Require periodic staff inspections of security and confidentiality of CI records, files, and other information maintained by the agency. The CEO should set the scope of the inspection in concert with the inspector or inspections team. Inspections should be at least annual and preferably semiannual.
- Require annual purges of CI records and files deemed inactive, as defined by the agency. Inactivity might be defined as no contact for a period of five years or more.

These responsibilities require active involvement by the CEO, especially in initial authorizations and quarterly reviews. CEOs must be even more active where there is only one supervisor between CEO and investigator. Therefore, in smaller agencies without an investigative commanding officer, the CEO might have to assume certain responsibilities of the CO detailed in the next section. The net result would be a sharing of the CO's responsibilities by the CEO and the first line supervisor. In larger agencies, other accommodations could be made.

## Commanding Officer

The CO has ten responsibilities as shown in the matrix in Appendix B. Of the ten, seven are performed in support of or in conjunction with the CEO. The CO's seven shared or supporting responsibilities are

- Prepare the written directive that authorizes use of CIs, unless the CEO prefers preparation by his or her staff. In any event, the CO should be an active participant in the process.
- Ensure that all supervisors and investigators authorized to employ CIs are trained before they are authorized to recruit.
- Ensure confidentiality and security of both CI identity and the scope of CI activities for the agency.

- Authorize CI payments that do not exceed the exceptional amounts noted above.
- Receive and review supervisors' quarterly reports of CI use, results, and cost analysis; prepare a summary and submit the summary to the CEO.
- Cooperate with the staff inspector or inspection team.
- Oversee the annual purge of CI records and files. In the purge, the CO should directly oversee destruction of the records by shredding or burning.

The CO's other three responsibilities concern interactions with the investigative supervisor. They involve the decision to recruit, decision to employ, and maintenance of files that contain the CI's aliases (code name or number). These files should be kept apart from the operational file to avoid employing the same person twice or a CI who has been terminated. While the CO's responsibilities are important, especially the decision to recruit and employ, the brunt of the efforts fall to the supervisor and the investigator as outlined below.

## Supervisor and Investigator

The responsibilities of supervisor and investigator fall within 15 responsibility areas.

- **Agency Directive**—Both members must be fully conversant with agency rules and regulations concerning CIs. Moreover, the supervisor must ensure that his or her subordinates fully understand the directive.
- **Orientation and Training for Investigators**—The training, which may be conducted by the supervisor, should cover (at a minimum) CI recruitment, selection, employment, orientation and training, direction, and control.
- **Decision to Recruit**—The decision to recruit should be stated in writing or orally by the supervisor to the CO. Ordinarily, the decision should relate to a given investigator, investigative area, or desired investigative result.
- **Recruitment and Selection**—The extent of the supervisor's participation prior to a decision to employ a CI depends on the investigator's experience and maturity.
- **Decision to Employ**—At least three persons should participate in the decision to employ: investigator, supervisor, and commanding officer.
- **Employment Forms and Files**—After the investigator completes all required forms and records, files should be brought to the supervisor for safekeeping. (Some agencies may wish to store files in the CO's office or under the CO's care. In any event, code names or numbers should be held separately from the operational file.)
- **Orientation and Training for Confidential Informant**—The investigator should conduct these training sessions and ensure that all CI agreements are signed, witnessed, and returned to the file. Following this, the supervisor should meet with the investigator and the CI regarding each person's role and responsibilities. The purpose is to ensure that (1) written agreements and guidelines are read and understood,

(2) signatures have been witnessed and forms returned to the secure file, and (3) orientation and training was conducted in its entirety.

- **Security and Confidentiality of Informant Information**—Both supervisor and investigator have a vested interest in ensuring that the identity of the CI is not compromised and that all information is held in a secure and confidential manner. The CI's role in ongoing investigations should be held in strictest confidence. The investigator and supervisor should be fully informed; others should be briefed on a "need-to-know" basis. The CI must be cautioned about revealing his or her role with the law enforcement agency to any third party. This should be part of the signed agreement and should be impressed on the CI during each contact.
- **Assignments and Contacts**—The investigator should prepare assignments for the CI and brief him or her on how to proceed. The investigator should collect and preserve any notes prepared by the CI, ensuring that they indicate the place, date, and time of the meeting. Notes prepared by the investigator should also record date, place, and time. The supervisor's role should be to monitor assignments and contacts between the investigator and the CI. One important purpose of monitoring is to prevent duplicate efforts on what may appear to be unrelated investigations.
- **Periodic Briefings**—Investigators should be required to brief their supervisors weekly and to provide information for the quarterly report. The briefings may be only five or ten minutes long, but they should assure the supervisor that the investigator's relationship with the CI *continues* to be productive, in accord with agency guidelines, as well as professionally and ethically correct.
- **Payments/Reimbursements**—The investigator must ensure that reports and reimbursement requests are prepared promptly and submitted on time. The supervisor must ensure that the investigator is accountable and consistent when dealing with the CI, especially regarding CI payments. Both the investigator and supervisor should sign reimbursement requests before they are submitted for other approvals and payment.
- **Alternate Contact Person**—The investigator and supervisor must agree on the designation of an alternate contact: a person who could act as a contact with the CI in the absence of the primary (controlling) investigator. The designation should be made by the supervisor with concurrence of the concerned parties. It is important to always remember that CIs work for the department, not any one investigator.
- **Quarterly Reporting**—This topic was covered in the previous descriptions of CEO and CO responsibilities. Information from investigators and supervisors is critical to a successful quarterly report process.
- **Postcase Screening**—When reviewing criminal cases as they are being closed or terminated, supervisors should always be on the lookout for potential informants.
- **Periodic Staff Inspection/Annual File Purge**—Although neither supervisors nor investigators play active roles in these activities, their cooperation is important.

## Confidential Informant

Although not specified in the responsibility matrix (Appendix B), the CI does have four important responsibilities: (1) carry out assignments as planned and agreed upon and in accord

with the agency regulations stated in the working agreement, (2) maintain all information about investigations and agency operations in strictest confidence, (3) be on time for meetings, and (4) tell the truth at all times.

## **ELEMENTS OF WRITTEN DIRECTIVE SYSTEM**

A written directive system can provide a consistent reference for every member concerned with employing and using CIs. This chapter and the one that follows suggest the preparation of four documents or information sources to assist with management of CIs:

- **Roles and Responsibilities Matrix**—The agency should prepare a roles and responsibilities matrix so that it can be used as a basis for other documents. It can also be used in the orientation and training program for agency members. A suggested matrix is included in Appendix B.
- **Confidential Informant Written Directive**—A suggested outline is included in Appendix C. The outline may be considered as a near-complete enumeration of topics to be included in a CI directive. Topics not deemed proper or necessary for inclusion in the directive should be added to the orientation and training programs.
- **CI's Portfolio Contents**—A suggested listing of files, documents, and data elements that should be assembled for each CI. This is discussed in Chapter 3.
- **CI Working Agreement**— This is included as an element of the portfolio. A suggested agreement is included in Appendix D.

Before preparing these documents, several important caveats should be noted:

- Information should be available to *all* members of the agency about employing CIs. At a minimum, a written directive should state that the agency has policies and procedures concerning CIs, and that a supervisor should be consulted for additional information.
- If it is deemed not to be in the agency's interest to include certain information in the written directives, it should be included instead in the orientation and training sessions for agency members. The content of the training should be documented.
- Legal counsel should be sought to assess potential liability in revealing particular information in a written directive available to agency members only, as opposed to including it in orientation and training sessions, which could be kept confidential or otherwise away from public view. In any event, full disclosure should be available in the written directive or in training sessions for agency personnel.



## CHAPTER 3

# RECRUITING AND CONTRACTING WITH CONFIDENTIAL INFORMANTS

Recruiting CIs involves several steps: determining need for a CI; locating a likely candidate; assessing the candidate's suitability as a CI; and preparing the necessary documentation that comprises the CI's file, also referred to as a portfolio.

### LOCATING A SUITABLE CI

A close observer of undercover operations advises that CIs "should be a tool of last resort, used with the utmost caution and only by agencies with the requisite skills, resources, and controls."<sup>3</sup>

CIs are particularly useful for investigating such consensual crimes as drug trafficking, gambling, loan sharking, and prostitution. Certain white-collar crimes (procurement fraud, price fixing, etc.) injure victims who are unaware of their victimization because of the hidden or complex nature of the crime. CIs are often needed to solve these crimes.

If a case requires an information source, the investigator should first explore non-CI sources like those described in the introduction. If none of those possibilities are appropriate, searching for a CI is warranted. In descending order of importance, CIs might be located among the target's criminal associates, family or friends, noncriminal business associates, and casual associates or acquaintances. A specific CI may be uncovered through such methods as the following:

- Reviewing information collected to date on the case
- Examining files of closed criminal cases to determine whether defendants or their associates bear a relationship (especially an antagonistic one) to the target of the current case. Some agencies, upon closing a case, routinely review it to identify potential CIs.
- Querying the agency's central index (if any) of past and present CIs
- Asking fellow investigators or patrol officers for suggestions, including sources in neighboring agencies
- Contacting the intelligence unit for leads
- Determining whether current arrestees, defendants, probationers, parolees, or even inmates might be worth approaching

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<sup>3</sup> Gary T. Marx, *Undercover: Police Surveillance in America*, Berkeley, California, University of California Press, 1988, p. xxiv.

Before a CI candidate is approached, the recruiter-investigator should receive supervisory authorization. This includes checking the undesirable informant file and determining that the candidate is not now working for another investigator or agency (see Chapter 5). It may also involve a criminal history check (if not at this stage, then certainly later) and other assessments. Once authorized, the investigator should approach the candidate and, depending on circumstances, either directly or circumspectly solicit cooperation. The investigator's ability to determine and play upon the candidate's motives will influence the approach.

Until the candidate agrees to cooperate, and until background checks and other documentation on the potential CI are complete, the recruiter should tell the candidate as little as possible about the target, the specifics of the candidate's responsibilities, or any other aspect of the proposed operation that, if leaked to the target, would alert him or her to the investigation.

Before and after initial contact with the candidate, the investigator should try to assess the following characteristics:

- Motivation to cooperate (money, revenge, fear, leniency, etc.)
- Personal problems
- Financial problems
- Idiosyncrasies
- Likes and dislikes
- Personal history, education, and family background
- Reasonableness of the benefits the potential CI expects for cooperating (money, leniency, etc.)
- Reliability and truthfulness
- Seriousness of past criminal history or current involvement in criminal justice proceedings (indicted, probationer, parolee, etc.)
- Likelihood that the candidate is a plant
- Conformance to instructions and control in past investigations, if any

## **CI DOCUMENTATION AND FILES**

Documentation and files on CIs may be divided into three categories: (1) basic information files for documents, similar to those collected before hiring a sworn employee; (2) operational files for reports of ongoing operations and copies of payments; and (3) financial information in a central accounts-payable file that is secured from casual view.



## Basic Information Files

Assembling basic information involves collecting information in official records and supplementing it as required. If the CI is a juvenile, certain items may not be included because of state statute, local ordinance, or agency policy. Official records include the following:

- Federal, state, and local criminal history records
- Offense and arrest reports
- Field interrogation reports or other documented contacts with the agency or other agencies
- Fingerprints
- Photographs
- Records from other criminal justice agencies
- Employment records
- Education records
- Motor vehicle records

Other information about the CI, listed below, should be cross-checked with the official records for agreement on dates and events.

- Age, true name, alias, code name or number, and signature specimens of true name and alias(es)
- Address and phone number
- Social security number (or numbers, if applicable)
- Physical description and distinguishing features (height, weight, hair and eye color, race, sex, scars, tattoos, etc.)
- Past and present occupations and employers
- Places of residence over the past ten years
- Marital status, spouse, ex-spouse(s), family members, relatives, and close friends
- Associates and places frequented
- Vehicles owned or driven and tag numbers of each
- Organizations (unions, clubs, etc.) to which the CI belongs
- Schools attended by the CI and his or her children
- Criminal history, without reference to official sources
- Special medical problems
- Special skills and avocations
- Current involvement, if any, with the criminal justice system

- Agency references (name, unit name, telephone number)
- Outside agency references (name, address, telephone number, relation to CI)
- Information attesting to the CI's reliability or lack thereof
- Name of the officer working with the CI

Several other documents should be added to the basic information file when the CI begins performing services for the agency:

- Signed copies of the CI's working agreement that spells out the responsibilities of the CI, dangers involved, compensation or other benefits, terms, conditions
- Instruction sheets of do's and don'ts (see Chapter 4). These sheets may be incorporated into the working agreement
- Waiver that releases the agency from liability resulting from CI actions
- Any other reports or documents that contain the CI's true name, including receipts and other records of payment, contact reports, evaluations, deactivation reports, etc.

Tight security of CI basic files is imperative. These files should be kept in locked cabinets in a separate and secure location, segregated from any other files and under the control of a supervisor. The file site should be locked at all times when unattended. Access to the files should be restricted to authorized personnel with a legitimate need for the information.

A CI's file should not be taken from the storage area except for review by authorized supervisory or command personnel and by the officer working the CI. If removed from the immediate area, the files should be returned by the end of the officer's shift. Sign-out logs should be maintained indicating the date, CI number, time in and out, and signature of the person reviewing the file.

All CI files should be audited semiannually to ensure that they are maintained properly and that security procedures are being followed.

## **Operational Files**

Assembly of the operational file should be a "day-one" effort. The file should contain all operational reports and other records that document the CI's and controlling officer's activities. The code name or number should be used as a reference to the CI. Typically, this file contains investigator contact reports, evaluation reports, payment record copies, and deactivation records. The operational file is necessary to assure department integrity and accountability, maintain continuity of the investigation, document CI credibility and reliability, evaluate performance,

support court testimony, document probable cause on which to base arrests, search warrants, and, in some instances, orders for electronic surveillance.

### **Financial Information Files**

An earlier monograph, *Managing Confidential Funds*, provides a detailed description of how to manage the CI payment process, together with associated forms and reports. That monograph, also published by the Institute for Law and Justice for the Bureau of Justice Assistance, is available from ILJ. Additional information on CI financial records is contained in Appendix A.



## CHAPTER 4

# CONTROLLING CONFIDENTIAL INFORMANT'S ACTIVITIES

Controlling the CI involves six major activities: orienting and training the CI, training the officer, directing and monitoring the CI's activities, interviewing and debriefing the CI, preparing the CI for a court appearance, and evaluating quarterly performance.

### TRAINING THE CI

To assume that the new informant is fully equipped to do the job is to risk the resources that the agency has invested in recruiting the CI. Failure to train CIs can also jeopardize intelligence-gathering efforts or entire investigations and can compromise the safety of both officers and CIs.

The type and duration of CI training depend on the nature of the informant's assignment and an assessment of the CI's current capabilities. The following questions will help tailor the training to a given CI:

- What is the CI expected to accomplish? How many assignments will the CI perform? What skills and knowledge are needed to perform successfully?
- How much time will the training take?
- Where will training be conducted and by whom? (Ideally, the officer who recruited and will ultimately control the informant should conduct, or at least participate in, the training.)
- What are the transportation requirements?
- What training aids should be available: camera, body transmitter, tape recorder, etc.?
- How much will the training cost?
- What type of test should be given to determine the informant's understanding of the areas covered by the training?
- What cover story should the CI have to account for his or her absence during training?
- What security arrangements should be in place during the training period?

At a minimum, CIs need training on their objectives, methods to achieve them, compensation procedures, communication with and reports to the control officer, cover stories, security and confidentiality precautions, and legal constraints. In addition, CIs should indicate an understanding of their written working agreements. These agreements may be modified to fit the

special needs of a particular investigation or CI. They typically include statements to the effect that the CI

- Is not an employee of the agency and will not identify himself or herself as such.
- Is not to violate any laws while associated with the agency. (The CI signs a waiver releasing the agency from liability resulting from his or her illegal actions.) If exceptional circumstances are anticipated, the agency should specify precisely what conditions might justify law violations. This should be discussed in advance with the prosecutor or police legal advisor.
- Will not provoke, encourage, or plan an unlawful act.
- Does not have police arrest powers and is not authorized to carry firearms or conduct searches and seizures.
- Will not use association with the agency to resolve personal problems or obtain personal favors.
- Will not disclose association with the agency to anyone unless so authorized by the agency, and will not carry documents or anything else that would disclose that association.
- Is not, and will not become, a CI for any other officer(s) in the agency unless specifically authorized.
- Is not, and will not become, a CI for another agency while operating as a CI for this agency unless specifically authorized.
- Has advised the agency of all past criminal history information.
- Has become a CI voluntarily and can be terminated with or without cause, at the discretion of the agency.
- Will operate vehicles in accordance with the law.
- Will follow the instructions of assigned officers(s), will report as directed, and will be evaluated periodically.
- Understands that he or she is subject to arrest and prosecution if caught engaging in unauthorized illegal activity.
- Realizes that failure to report observations accurately and truthfully will result in cancellation of any promised benefits.
- Will never disclose information pertaining to the management, operations, policies, procedures, investigations, facilities, equipment, and personnel of the agency.

## TRAINING THE OFFICER

All officers who work with CIs should receive training, whether they are assigned to investigative, patrol, or intelligence units. Without professional training, officers may view CIs in narrow terms and fail to use them to full potential. Common mistakes include failing to give the CI a good cover, using risky procedures to communicate with them, failing to evaluate whether they can do what is asked, and giving little consideration to security and confidentiality measures that would help assure the CI's long-term value. To combat today's often violent and sophisticated drug-trafficking organizations and other criminal groups, nothing less than a professional effort is required in the use of CIs.

Frequently, the best starting point for officer training is the agency's written directives. These directives and the training should cover the following topics:

- Managerial, administrative, and operational responsibilities
- Recruitment
- Controlling and monitoring CIs
- Compensation
- Confidentiality and protection
- Evaluation
- Termination of CIs

Points to emphasize include the following:

- Maintain only a professional relationship with CIs.
- Refrain from engaging in any business or personal financial dealing with CIs.
- Neither give to, nor receive from CIs, gifts, gratuities, or loans (except under extraordinary circumstances and only where authorized by supervisors).
- Introduce or expose CIs to only the minimum necessary number of agency officers, facilities, and procedures.
- Adhere to agency policy on meeting with CIs alone or with another officer. Some agencies may wish to mandate that two officers meet with CIs, while other agencies might decide to permit an officer to meet the CI alone, unless the CI is a juvenile; on parole/probation; mentally or emotionally unstable; an abuser of alcohol or a controlled substance; member of the opposite sex; suspected of trying to set up the control officer; or has a reputation for perjury, bribery, or related offenses.
- Avoid romantic involvement with the CI.
- Follow appropriate procedures before using a juvenile, parolee, probationer, or prison inmate as a CI (see Chapter 6).
- Reveal information about CIs on a need-to-know basis only and protect the confidentiality of the CI at all times (see Chapter 5.)
- Evaluate CI performance quarterly.

- Keep CIs apart.
- Refrain from making promises or inducements that cannot or might not be delivered.
- Demonstrate that the officer is in charge and is the one who makes the decisions, not the CI.
- Evaluate information provided by the CI for credibility and reliability.
- Vary meeting locations.
- Keep supervisors informed about CI contacts and activities in accordance with agency policy.
- Maintain appropriate records on CI background information, activities, problems, and payments.

## DIRECTING AND MONITORING THE CI

In large part, effectiveness in directing and monitoring CIs depends on how closely the officer's perception of the basic nature of CIs reflects reality. A misperception of that reality can lead to many unnecessary problems. The next section explores the basic assumptions that officers should make about CIs.

### Assumptions to Make About CIs

Officers should treat CIs courteously, encourage them, develop their trust, and praise them as appropriate. But officers should also remember that the problems informants create, though not insurmountable, are a constant challenge. CIs tend to slip in and out of illegal transactions; today's informant is frequently tomorrow's defendant.<sup>4</sup> Gary Marx expands these themes in his book on police surveillance:

More involved in crime an informant is, the more useful he is likely to be, yet the more difficult he may be to control, the weightier the ethical issues, and the greater the potential damage to public image.<sup>5</sup>

Another expert on developing and handling informants makes this observation:

. . . once having dealt with an informant, most police officers do not want to put themselves through that punishment again. Informants are problems; they are a constant source of irritation to the police officer who has cultivated them. They are like 'babies' in constant

<sup>4</sup> International Association of Chiefs of Police, *Law Enforcement Policy on the Management of Criminal Intelligence*, Gaithersburg, Maryland 1985, p. 18.

<sup>5</sup> Gary T. Marx, *Undercover: Police Surveillance in America* (Berkeley: University of California Press, 1988), pp. 158, 202.



need of attention and, I might add, supervision. They will get into trouble if you are not watching, and they will do 'bad things' if they are starved for your attention. In short, the informant is a 'necessary evil' that the police are dependent upon for information and, at times, evidence.<sup>6</sup>

Officers should anticipate the following potential problems with CIs and direct and monitor them accordingly:

- **Lying**—Some CIs may exaggerate or fabricate the criminal acts of targets. Others may report truthfully, but may lie about using illegal methods to gain information. Their motives may range from wanting to receive high marks and compensation from officers to wanting to be self-styled super sleuths.
- **Double-dealing**—CIs can make deals with targets as easily as they can with law enforcement agencies. Some will try to use both sides to their advantage. Such informants are faithful to neither side, but may be trusted by both. CIs can report competitors' illegal acts and, at the same time, leak information to criminal associates. They may reveal the identity of undercover agents, the cars they drive, their work hours, and their tactics and procedures. CIs may be plants who continue their criminal activities while they monitor agency operations and eliminate competitors through investigations spurred by their information. Drug addicts, gamblers, and alcoholics are likely double-dealers, sustaining their dependencies with the money received from those who purchase their information. Some CIs may play both sides of the fence to help cover their informant activities or to ingratiate themselves with criminal associates.
- **Rip-offs**—The CI is in a position to arrange rip-offs of large flash rolls. Informants have been known to sell government property used in investigations or to pledge it as collateral for loans. CIs have also sold the same information to two different agencies, resulting in both agencies unwittingly conducting simultaneous investigations. One arrested major violator offered information to another agency on a relatively minor criminal operation; to the anger of the agency that arrested him, he received a lenient sentence for cooperating with the other agency.
- **Blackmail**—Getting too close to an informer and his or her problems may lead officers to sympathize with the CI and even to bend rules a bit. Eventually, the CI gets something on the officer, who loses control and, in effect, is directed by the CI.

The lesson is clear: although officers should tell informants that the agency has high expectations of them, they should also anticipate the worst and direct and monitor CIs accordingly.

## Critical Aspects of Directing and Monitoring CIs

Knowledge of CIs' motives, interests, and personal problems offers the best clues for directing and monitoring them. For example, CIs who are heavily in debt and like to gamble raise obvious red flags. They have an above-average potential for double-dealing, rip-offs, and the like.

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<sup>6</sup> A speech by Frederick T. Martens (now Executive Director, Pennsylvania Crime Commission), "The Organized Crime Informant," pp. 1, 2, 23.

In contrast, the nonaddict drug dealer who has been arrested and faces a substantial sentence is often a good risk; he or she has a strong reason for following the control officer's instructions.

A CI's motives need not be pure, but the officer must understand them to reduce the chances of serious problems developing. CIs motivated by revenge or jealousy may be so consumed by those emotions that they are tempted to use illegal methods to obtain the desired information. Realizing that possibility, the control officer can periodically emphasize that if the informant breaks the law, the case will not be prosecutable and the CI will not have the satisfaction of seeing the target convicted and punished.

Furthermore, by knowing the CI's motive and alluding to it periodically, the officer can more effectively assure the CI that he or she is doing the right thing by cooperating with the agency.

Armed with knowledge of the CI's motives, the officer's next step is to ensure that the informant knows exactly what is expected, what procedures are permitted, and what activities are not allowed. The CI must thoroughly understand his or her objective and the permissible means to achieve it.

At the outset, the CI must be made to understand that the officer directs and controls the investigation, not the informant. This does not preclude asking CIs for suggestions or showing appreciation for quality information. But self-serving attempts by the CI to change the focus of the investigation should be firmly and promptly rejected. The officer should be particularly suspicious if the CI wants to deflect the investigation from working up through the criminal organization to working down through it.

CIs should be told that if they are found to have violated criminal law to obtain information they will be arrested, and any promised benefits will be withheld. Because emergencies or special circumstances may arise that require CIs to violate the law, the officer should spell out clearly what constitutes such emergencies or circumstances. For example, criminal activity by the CI might be allowed to prevent loss of life, to forestall imminent loss of essential evidence, or to preclude the commission of a more serious crime.

If a reasonable possibility exists that the CI will have to testify in court, or if the CI's identity as an informant may otherwise have to be revealed, the officer should so advise the CI at the outset. If the CI finds such a possibility unacceptable, the officer needs to know this as soon as possible.

Whenever feasible, the officer should instruct the CI to move slowly at first and within relatively narrow limits. Asking the CI to obtain answers to only one or two relatively simple, low-risk questions is often a good way to break in the relationship, from both the CI's and the

officer's perspective. Posing a question to which the officer already knows the answer is one way to quickly assess the CI's reliability.

The officer should not let an informant participate in planning an operation, other than by providing information. The CI should not be regarded as part of the law enforcement team. Because CIs often tend to overlook or downplay negative aspects of an operation (they do not want their information to appear less desirable), officers must probe accordingly.

CI safety must always be a priority for the officer. This involves both taking strict measures to protect the CI's identity and acquiring information that can help locate the CI should he or she drop from sight. Such information should have been collected during recruitment and includes known associates, places frequented, vehicles available to the CI, and photos of the informant. Also needed are the names of persons familiar with the CI's activities, including investigators, prosecutors, and family members.

Ideally, the officer who recruited the informant should be assigned to direct and monitor the CI. Whether that officer should work the CI alone or should do so as part of a two-officer team, is a matter that is subject to debate. Those who favor the one-officer approach cite these advantages: CIs who are particularly sensitive about confidentiality will be more likely to cooperate, the potential for personality conflicts is reduced, pitfalls can be more quickly identified and avoided, and more cooperation can be achieved. The two-officer approach has these advantages: a more objective relationship with the CI is maintained, set-ups are more easily avoided, a built-in backup officer is present to maintain continuity of contact, and a better assessment of CI performance results.

Regardless of the approach used, control officers should be required to keep their supervisors apprised of CI activities. Because they are not involved in the day-to-day direction of CIs, supervisors are in a position to offer control officers objective advice and cautions.

## **INTERVIEWING AND DEBRIEFING CIs**

Periodic scheduled contacts with CIs are required not only to obtain their information, but also to arrange methods for communicating; handling emergencies; and monitoring, motivating, and evaluating CIs. Contacts may be by telephone, letter, or personal meeting. In the absence of emergencies or unusual circumstances, personal meetings with the CI are generally considered the most appropriate and productive debriefing method. Direct observation of the CI's appearance, reactions, gestures, facial expressions, etc., are valuable supplements to the informant's words. Further, the control officer is better able to motivate and direct the CI through face-to-face meetings. Personal contact, therefore, should be used whenever feasible.

The control officer must ensure that the CI knows how meetings and interviews will be arranged. The officer should not mention the CI's true name during any communications. For security reasons, the officer should not reveal the specific time and location of a meeting until the latest time practicable. The CI can be told to "hold next Thursday open," but not be given the details about the meeting until that day. This gives the CI time to prepare a cover story for absence from usual activities on that day, yet preserves the secrecy of the precise time, place, and purpose of the meeting.

The officer, not the CI, should be the one to select the interview time and site. The arrangement should meet as many of these criteria as possible:

- Avoids raising suspicions that the individual is a CI. Meetings at the agency, or at a bar or restaurant frequently patronized by agency personnel, might compromise the CI's identity.
- Permits arrival and departure by more than one route
- Allows limited observation of the site but good observation from the site
- Is a location different from the sites of prior meetings
- Is familiar to the officer but not to the CI
- Is close enough so that the CI is not required to be absent from normal routines for a suspiciously long period
- Is consistent with the CI's personality, socioeconomic status, and attire. For example, business executives often prefer to meet in a museum, restaurant, or other place consistent with their appearance.

The officer should take notes at the meeting, if feasible, and should try to stimulate a free-flowing report from the CI. Later, the officer will review details and ask the CI increasingly specific questions. During the meeting (or phone conversation if that is how they must "meet"), the officer should do the following:

- Stay to the point, but do not hurry the conversation.
- Sympathize about personal difficulties that the CI may be experiencing.
- Encourage whatever motivates the informant to cooperate.
- Maintain control of the interview, but do not deflate the CI's ego unnecessarily.
- Establish rapport, but do not become a friend.
- Display a businesslike demeanor, but in the context of a congenial, relaxed atmosphere.

- Avoid belittling worthless information or revealing that the CI's information differs from what is already known. Keep in mind that the CI may be trying to find out how much the agency knows about certain activities.
- Check the CI's reliability by asking for information already known by the agency.
- Avoid phrasing questions in a way that reveals agency knowledge of a particular activity.
- Play the role of father confessor, psychologist, or drill sergeant, if necessary.
- Refrain from using police jargon. The CI may use these terms later and arouse suspicions.
- Avoid embarrassing, offending, or arguing with the CI.
- At the conclusion of the interview, express appreciation for the information received.

The information furnished by CIs "is normally considered raw material which must be checked out."<sup>7</sup> As noted earlier, one way to corroborate CI-supplied information is to ask the CI questions to which the answer is already known. It may also be necessary to compare the CI's reports with existing intelligence, conduct an independent investigation, or authorize surveillance of the CI.

After each contact with a CI, the control officer should prepare a contact report. These reports provide an accurate chronology of informant development and operational progress, and they supply the records that are necessary for the continuity of the operation. They are also vital for effective CI handling and evaluation. CI contact reports should include the following:

- Date of report and name of reporting officer
- CI alias or code and an indication of the CI's previous reliability
- Date, time, and place of the contact, along with a description of security precautions used and problems encountered, if any
- Reason for the contact
- Information received from the CI, including new investigative leads
- A preliminary assessment of the accuracy of the information
- New personal data about the CI
- Instructions to the CI regarding additional information needed, new areas to probe, etc.
- Training given to the CI, such as security precautions and contact procedures

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<sup>7</sup> Broward County, Florida, Sheriff's Office, *Organized Crime Division's SOP Manual*, Fort Lauderdale, Florida, 1987, Section 4.01.

- Condition of the CI: his or her motivation, health, mood, problems, etc.
- Financial transactions, such as payments for information, expenses, and evidence
- Commitments made to the CI

## **PREPARING THE CI FOR A COURT APPEARANCE**

In the majority of cases involving CIs, every effort is made to keep them out of the courtroom (see Chapter 6). However, when the CI must appear as a witness, the control officer should ensure that the CI is well prepared. The CI and officer should review a set of general questions, which are relevant to all cases, and, if appropriate, a second set of questions related to the controlled purchase or sale of drugs.

Among the general questions that CIs can expect to be asked in court are the following:

- Does the CI have any charges against him or her? If so, what charges, how long pending, and in what court or courts?
- What consideration was given the CI on pending charges in exchange for information supplied or to be supplied?
- Was the CI paid or provided anything? If yes, explain in detail, including how and over how long a period.
- Is the CI a drug addict? A former addict? Was the CI ever charged with or convicted of a drug offense?
- To whom did the CI supply the information? What was the information?
- Were any notes taken of the conversations between the CI and control officer? Are the notes available? Were they dated when written? Were they signed by the officer? Are the notes available for introduction at trial?
- Did the informant know the defendant? What was and is their relationship?
- Is the CI employed at the present time? If yes, provide details. If no, provide details about current or future agency liabilities to the informant, if any.
- Has the informant participated in other activities for law enforcement agencies in this locale or elsewhere? If yes, explain.
- Is the CI clear about names, places, dates, conversations, his or her activities, law enforcement actions taken, and the chronological sequence of the major events leading to trial?
- What corroboration of the CI's information is available?

If a controlled sale or purchase of drugs was involved, these additional questions should be addressed:

- Did the CI meet the defendant before the purchase or sale? When? Where?
- Was the CI searched before and after the transaction? By whom? Was it documented?
- Was the transaction under continued surveillance?
- Was everything documented that was said between the CI and the defendant, and between any others who participated in the purchase or sale?
- Did the investigator witness the purchase or sale?
- Did the investigator have a right to be where he or she was when making the observation?
- How many transactions by the defendant did the investigator witness in addition to those involving the informant? Was the date, time, and place of each transaction documented?
- Were arrests made immediately? If not, why not?
- If an arrest was made, was a detailed inventory made of everything seized, including money that may have changed hands? Was the money marked or photocopied prior to the incident? Is this detailed in the agency's records and in the report of the incident?
- Was the transaction corroborated by a post-transaction taped phone call from CI to defendant in which the CI made reference to the transaction (e.g., complains about something, praises the quality of the drugs, etc.)?

## **QUARTERLY PERFORMANCE EVALUATION**

Many agencies separately evaluate the CI and the CI's information. A CI may deliver consistently accurate information, for example, yet handle money or evidence irresponsibly, endanger the life of the control officer, miss meetings, or engage in continuous criminal activity. In such cases, the control officer must decide whether the quality of the information offsets the unreliability of the CI.

In the reverse situation, a CI may follow instructions to the letter but fail to provide relevant or sufficiently accurate information. Again, the control officer must decide whether to continue to allocate time, effort, and money to such CIs in the hope that they will eventually upgrade the quality of their information.

Quarterly performance evaluations of CIs and their information are facilitated by a review of the contact reports discussed earlier. Some agencies use a six-category rating system for CIs and the information they provide. These agencies evaluate CIs as reliable, usually reliable, fairly reliable, not usually reliable, unreliable, or reliability unknown. Information is rated as confirmed, probably true, possibly true, doubtful, improbable, or truth cannot be judged.





## CHAPTER 5

# MAINTAINING AND TERMINATING A CONFIDENTIAL INFORMANT

This chapter covers four principal areas: compensating the informant, sharing the CI, protecting the confidentiality of the relationship between CI and agency, and terminating the services of CIs.

### COMPENSATING THE CI

Before using CIs, agencies should establish criteria governing the amounts CIs will be paid for information and expenses, including evidence purchases.<sup>8</sup> Agencies may base payments on such factors as the importance of the targeted individual, organization, or operation; the type and quantity of drugs or other contraband to be seized; the significance of the CI's contribution; and the target's clientele (e.g., juveniles). Some agencies specify that payments to CIs will not be authorized unless the information is unavailable through normal investigative procedures and is crucial to bringing the investigation to a successful conclusion.

Of course, the CI's payment may be other than financial, such as reduced charges, dropped charges, a lenient sentence, or a preferred correctional site. In any event, the control officer should never make promises to a CI that cannot be kept or that are outside the officer's authority to offer. Regarding nonfinancial payments, the most the officer can usually promise is that certain nonbinding recommendations will be made to the prosecutor and court.

When CIs are paid for information, evidence, or expenses, certain procedures should be followed so that responsibility and accountability are fixed for proper handling and use of the funds. As the SOP of one agency states, "The use of official funds creates operational, supervisory, and administrative situations with a potential for adverse consequences. Experience has demonstrated that careful and precise documentation of expense funds diminishes these problems."<sup>9</sup>

For each CI-related payment, the control officer must receive authorization from the appropriate individual within the agency. Depending on the amount requested, that individual may be the officer's immediate supervisor, unit or division commander, or agency CEO. The

<sup>8</sup> The information in this section (and throughout this publication) is consistent with the mandatory procedures for confidential funds developed by the Office of Justice Programs (OJP), U.S. Department of Justice, for agencies that receive OJP grants containing confidential funds. Those procedures are detailed in OJP M 7100.1D (May 15, 1990); excerpts are included in Appendix A of this publication.

<sup>9</sup> Broward County, Florida, Sheriff's Office, *Organized Crime Division's SOP Manual*, Fort Lauderdale, Florida, 1987, Section 4.01.

authorization should, at a minimum, specify the type of expense (information, evidence, services, etc.), amount, and CI's code name or number.

The control officer should sign a receipt for the cash advance, pay the CI (witnessed by another officer), and obtain a signed receipt from the CI, who should use the code name on file at the agency. The CI's signed receipt, along with a memorandum describing the information, evidence, or expense reimbursed, should be given to a designated supervisor. The supervisor should evaluate the expense in relation to what was received and certify that payment was made to the CI.<sup>10</sup>

## SHARING THE CI

Most agencies would agree that CIs are not for the exclusive use of any one officer. Unless CIs are "owned" by the agency as a whole, the potential for abuse is too great. For example, individual control officers may not sufficiently discourage their CIs from committing crimes while gathering evidence. In addition, the agency may be denied information that a CI can provide other investigators about other cases.

The concept of CI-sharing, however, may not be popular with the investigator who has recruited and developed the informant. The officer may regard the CI as an important asset to his or her career. Moreover, CIs may fear their identities will become known if they are shared throughout the department.

A CI-sharing system that seems to satisfy these competing interests involves maintaining a central CI index at the commanding officer level. That index cross-references code names of CIs with names of officers handling them and contains a generic description of the type of information each CI may be able to obtain. If, for example, officer A needs certain information and does not have a CI who can provide it, A submits an information request to the commander. The commander reviews the CI index and determines that officer B works a CI who might be able to provide the information requested. The commander puts A in touch with B. Officer B then has three options: (1) try to obtain the requested information personally from the CI; (2) put A in direct contact with the CI; or (3) deny access to the CI, at least temporarily, if special circumstances so dictate.

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<sup>10</sup> Details on how to manage the CI payment process, along with associated reports, audits, and forms, are found in *Managing Confidential Funds*, prepared by the Bureau of Justice Assistance, U.S. Department of Justice, and available from the Institute for Law and Justice (1018 Duke Street, Alexandria, Virginia 22314).

## ENSURING CONFIDENTIALITY

Many ways to protect an informant's identity were discussed earlier. These include using CI code names, taking precautions when meeting with CIs, securing and limiting access to CI files, and avoiding certain CI behavior (e.g., entrapment) that might require revealing the CI's identity in court to prevent dismissal of a case.

Measures to assure CI confidentiality are essential. Nonetheless, CI identities must be known to management. Designated superior officers must know CIs' identities and backgrounds to properly evaluate the information they provide. Based on these evaluations, informed decisions can be made about establishing priorities and allocating resources among various investigators. Superior officers also require knowledge of CI identities when deciding whether to ask prosecutors to reward CIs through lesser charges. In addition, they need to know CI identities to ensure accountability in disbursement of CI funds, to assist an investigation if an officer who works a CI is killed, and to handle inquiries about a specific individual used as a CI.

Conceivably, however, the rare situation will occur when a CI's identity must be almost totally confidential. This may be because of the highly critical nature of the investigation or because of extreme danger to the CI's life. In such cases, the commander of the section or division handling the CI-assisted investigation should be given the authority to deviate from normal CI policy. The commander would have the authority to retain information necessary to satisfy a judicial review but would determine the content and disposition of the CI's file until the case has been adjudicated.

Precisely because confidentiality is so important, it can become the Achilles heel of investigations. Because the CI follows certain procedures or takes certain actions during the investigative phase of the case, the trial judge may order disclosure of the CI's identity. When this happens, the agency has a choice: violate the confidentiality agreement with the CI, or maintain confidentiality and allow the case to be dismissed. Unless the CI agreed to disclose his or her identity at trial if necessary, the agency generally should not try to pressure the CI into doing so.

Case law has established the government's privilege not to disclose the CI's identity at trial, but the privilege is not absolute. It is limited. Disclosure or nondisclosure of identity pivots on the circumstances of the particular case. On the one hand, courts realize that disclosure may result in retaliation and harm to the CI and recognize the value of CIs to effective law enforcement. On the other, the courts must ensure that defendants receive fair trials.

When the court determines that the CI's identity is relevant, helpful, or otherwise desirable to show the innocence of the defendant, the government can no longer successfully assert its

nondisclosure privilege. Below are some of the circumstances that expose the agency and CI to such a ruling:

- The sole government participation in the offense was that of the CI.
- The CI witnessed the drug transaction, for example, or witnessed or participated in negotiations related to the transaction.
- The CI was an active participant in events leading up to the offense.<sup>11</sup>

In the context of a drug investigation, how could the agency use a CI in a way that the court would not call for disclosure of identity? According to an experienced prosecutor, agencies should consider the following:

First, you use the informant only for an introduction. You tell the informant to introduce us and get the hell out of there. Do whatever you can to get him or her out. If we start negotiating, tell him to get up and go to the bathroom. . . . Get rid of the informant.

You also try to extend the period between introduction and sale. After the introduction, get the informant out of there. Have your undercover officer develop the relationship; then execute the transaction. Don't let the informant get involved in the negotiations or the transactions. You don't even want the informant to be present at the negotiation.

. . . Another way to avoid disclosure . . . is to make the informant's testimony cumulative. If you somehow get the defendant to bring a friend along or a co-defendant so that the informant's testimony, if the informant has to be present, would be cumulative to what those other persons would say, you don't have to disclose the informant's identity.<sup>12</sup>

When reasonable doubt exists about the possible usefulness to the defense of a CI's testimony, some jurisdictions conduct *in camera* hearings. The trial judge questions the CI in private to determine the nature of the CI's possible testimony.<sup>13</sup> A more detailed discussion of the law related to the use of CIs is found in Chapter 6.

## TERMINATING CI SERVICES

An agency may terminate or deactivate CIs for a number of reasons:

- The investigation has ended, and the CI will not be immediately redirected to another target.
- The CI requests deactivation.

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<sup>11</sup> Philip Weiner, "Legal Issues in Major Conspiracy Investigations," Organized Crime Narcotics Enforcement Symposium, Conshohocken, Pennsylvania, Pennsylvania Crime Commission, 1989, pp. 212, 228. Mr. Weiner is assistant district attorney, Bristol County, Massachusetts.

<sup>12</sup> Weiner, pp. 233-234.

<sup>13</sup> Larry E. Rissler, "The Informer's Identity at Trial," *FBI Law Enforcement Bulletin*, February 1975, p. 24.

- The CI surfaces to testify.
- The CI would be in imminent danger if he or she continued as an informant.
- The agency designates the CI as undesirable. An informant may be considered undesirable because he or she
  - is inept
  - submits false information
  - reveals the existence of the investigation
  - endangers the life of the control officer
  - plays one agency against another
  - uses his or her association with the agency to resolve personal problems or to further criminal objectives
  - commits an unauthorized criminal act

The names of undesirable CIs should be placed in the "undesirable informant file," which should be checked by officers before using persons as CIs.

Personal contact is the best way to terminate or deactivate a CI. At termination, the control officer debriefs the CI for target-related information that may have been overlooked; elicits a critique of the operation from the CI's perspective; obtains from the CI the names of persons who know of or may suspect the CI's role in the investigation; and emphasizes what the CI can and cannot do with his or her knowledge of the investigation, the control officer, and the agency. At the debriefing, the control officer also outlines procedures the CI should follow if he or she feels threatened in the future as a result of associating with the agency. This discussion should also include measures the agency is prepared to take, such as relocating the CI.

The future protection and support of highly critical CIs in major cases is something the agency should discuss at the beginning of the investigation. Although expensive for state and local agencies, CI protection, and possible relocation, are sometimes important inducements for full cooperation.

Regardless of the reason for the termination, the CI should be deactivated in a way that minimizes possible irritation with the agency. Files of deactivated informants should be sealed and stored in a secure location.



## CHAPTER 6

### WORKING WITHIN LEGAL CONSTRAINTS

Literally hundreds of reported court decisions treat issues arising from the use of confidential informants.<sup>14</sup> One commentator suggests that "a *majority* of the appellate decisions involving a probable cause issue are concerned with information obtained from informants."<sup>15</sup> The Supreme Court of the United States has decided several cases involving informants, a few of which we will discuss in this chapter, establishing basic criteria under the United States Constitution that are binding on state courts. But the states are free to establish more stringent criteria, so agencies should seek the guidance of their local prosecutors in the law applicable to their use of informants.

Every control officer must be aware of the kinds of legal issues arising from the use of confidential informants:

- Constraints applicable to certain types of CIs
- Use of informants' information to provide probable cause for searches and seizures
- The prosecution's privilege against producing informants at criminal trials
- Entrapment defenses arising from the conduct of informants

### JUVENILES, PROBATIONERS, OR PAROLEES

Whenever a juvenile is used as a CI, agencies should obtain a completed consent form signed by the juvenile's parent or legal guardian. If the juvenile is a ward of the court or has charges pending, permission of the court is also required. In addition, most agencies require the concurrence of the commanding or supervisory officer.

If an agency wants to use a probationer as a CI, permission to do so should be obtained from the probation officer. If the probationer's capacity as a CI would violate any of the probation conditions imposed by the court, the agency must petition the court to alter those conditions.

A similar procedure is followed if the agency wants to use a parolee as a CI. The agency must seek permission of the parole agency. If conditions of parole would be violated, the parole board must grant permission as well.

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<sup>14</sup> See Annotation: Accused's Rights to, and Prosecution's Privilege Against, Disclosure of Identity of Informer, 76 A.L.R.2d 262.

<sup>15</sup> Wayne LaFave, *Search and Seizure*, Vol I., p. 612 (emphasis in original). LaFave's discussion of "Information from an Informant" is 100 pages long.

## PROBABLE CAUSE FOR SEARCHES AND SEIZURES

There are two stages in criminal cases at which informants' work for law enforcement officers may be called into question. The first is the probable cause determination. The second is the criminal trial itself. At both of them, an essential question is whether the informants themselves must be identified or must appear for the courts to perform their functions in accordance with constitutional principles.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Arrest and search warrants must be issued by a judicial officer, who determines whether there is probable cause from evidence produced, usually in the form of an affidavit, by the law enforcement officer seeking the warrant. The affidavit may refer to evidence provided by an informant.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.<sup>16</sup>

If an officer proceeds without a warrant under one of the exceptions to the warrant requirement, he or she must still have probable cause for a search or seizure. Whether probable cause existed before the search or seizure is then determined after the fact, ordinarily in a suppression hearing. The probable cause question remains essentially the same, but the burden on the law enforcement officer is greater because of the absence of a warrant. That is, the failure to obtain the warrant beforehand raises the question of whether the officer in fact had probable cause beforehand. When the probable cause rests on statements attributed to an informant, the very existence of the informant may be questioned.

*Illinois v. Gates*<sup>17</sup> re-established a "totality of circumstances" analysis for the probable cause determination, explicitly repudiating a two-pronged test that had been developed from two

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<sup>16</sup> *Illinois v. Gates*, 462 U.S. 213, 238-239, (1983) (citation omitted).

<sup>17</sup> *Ibid.*



earlier cases, *Aguilar v. Texas*<sup>18</sup> and *Spinelli v. United States*.<sup>19</sup> The Supreme Court's repudiation of the *Aguilar-Spinelli* test rested in large part on increasingly rigid and technical interpretations that lower courts had given the test.<sup>20</sup> Nevertheless, the *Aguilar-Spinelli* test is instructive for our purposes here because it shows what kind of factual bases enable a judicial officer to decide whether there is probable cause.

In *Aguilar*, two officers had obtained a search warrant on the basis of an affidavit that stated the following:

Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law.<sup>21</sup>

The Supreme Court pointed out that the conclusion that *Aguilar* possessed narcotics was not that of the officer swearing out the affidavit, but of the unidentified informant. Nor did the affidavit show that the unidentified informant spoke from personal knowledge. The Court concluded:

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," . . . or, as in this case, an unidentified informant.<sup>22</sup>

This passage contains the elements of what came to be known as the "two-pronged" test of *Aguilar*. The first is the "basis of knowledge" prong. That is, how did the informant know what he claimed to know? The second prong is the "veracity" prong. That is, what reason does the

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<sup>18</sup> 387 U.S. 108 (1964).

<sup>19</sup> 393 U.S. 410 (1969).

<sup>20</sup> "Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." 462 U.S. at 234-235 (footnote omitted).

<sup>21</sup> 378 U.S. at 169.

<sup>22</sup> 378 U.S. at 114-115 (citations and footnotes omitted).

law enforcement officer have to believe that the informant is telling the truth? The "veracity" prong was later said to have two "spurs," a "credibility" spur and a "reliability" spur.

*Spinelli* involved an affidavit in which FBI agents stated that they had observed Spinelli, a person "known to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers," travel from Illinois into St. Louis, Missouri, on five different days. On four of these days, he went to a particular apartment house in St. Louis, and on one of these days he was seen entering a specific apartment. FBI agents learned from the telephone company that there were two telephones in that apartment. A critical part of the affidavit was a statement that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones" known to be in the apartment.

Focusing on the informant's tip because probable cause could not have been established without it, the Supreme Court held that it did not meet the *Aguilar* requirements. Although the affiant said his informant was reliable, he did not give the magistrate any reason to support this conclusion. Nor did he state any of the circumstances by which the informant knew anything about Spinelli or his activities.

In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activities in sufficient detail that the magistrate know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.<sup>23</sup>

The Court then cited *Draper v. United States*<sup>24</sup> as illustrative of the kind of detail that would be necessary to corroborate an informant's tip. Without stating how he knew these things, the informant in *Draper* provided police with great and accurate detail about a trip Draper was taking from Denver to Chicago and back, stating that he would be on one of two trains and describing "with minute particularity" how Draper would be dressed and how he would walk. "A magistrate, confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."<sup>25</sup> The corroboration discussed in *Spinelli* could apparently go to bolster the idea either that the informant had some basis for his knowledge or that the informant's story was credible. The two-pronged *Aguilar* test was becoming more complicated, but not a great deal clearer.

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<sup>23</sup> 393 U.S. at 416.

<sup>24</sup> 358 U.S. 307 (1959).

<sup>25</sup> 393 U.S. at 417.

*Illinois v. Gates* undertook to reduce the confusion by abandoning the *Aguilar-Spinelli* test, returning to a less rigid "totality of the circumstances" test. But nothing in *Illinois v. Gates* alters the general principle that the magistrate must be given something other than a law enforcement officer's conclusions from which to determine probable cause. In the passage from *Gates* quoted earlier, the Supreme Court specifically referred to the informant's "veracity" and "basis of knowledge" as things to be considered by the magistrate.

Because hardly anything was said about the informant in either the *Aguilar* or *Spinelli* affidavits, it is impossible to say whether they were confidential informants of the kind we are discussing in this monograph. *Illinois v. Gates* involved an anonymous informant, as did a recent case, *Alabama v. White*.<sup>26</sup> Corroboration of information given by anonymous informants is critical because there is no way to establish their personal credibility. In both *Gates* and *White*, officers corroborated several parts of the allegations made by the anonymous tipsters.

In contrast to *Aguilar* and *Spinelli*, *McCray v. Illinois*<sup>27</sup> gives an example of testimony providing support for the informant's credibility and reliability. An informant told two Chicago police officers that McCray was selling narcotics, that he had narcotics on his person, and that he could be found in a particular place. The informant pointed McCray out to the officers on the street and then left. The officers stopped McCray and searched him, finding heroin in a cigarette pack.

At a hearing to suppress this evidence, one officer testified that he had known the informant about a year, during which the informant had supplied him with information about narcotics activities "fifteen, sixteen times at least," and that the information had been accurate and had led to several arrests and convictions. On cross-examination, he gave the names of several people who had been convicted because of information obtained from the informant. The second officer testified that he had known the informant "nearly two years," that he had received information from the informant 20 or 25 times, and that the information had led to several convictions. The Supreme Court held that this testimony was sufficient to establish probable cause, and that it showed what the informant had actually said and why the officers thought the informant was credible. The Supreme Court also upheld the lower court's refusal to order that the informant's identity be disclosed. The issue at the suppression hearing was probable cause, not guilt or innocence. A different standard applies at trial, as discussed in the next section.

Despite all the discussion of the informant's knowledge, reliability, and credibility, it was the law enforcement officers rather than the informants who appeared at the probable cause hearings in all these cases. Therefore, the officer's as well the informant's credibility is often at

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<sup>26</sup> 110 S.Ct. 2412 (1990).

<sup>27</sup> 386 U.S. 300 (1967).

issue,<sup>28</sup> Four justices dissented in *McCray*, stating that the arrest without a warrant made the officers, not the magistrate, the arbiters of probable cause. The dissenters would have made the prosecution produce the informant. Justice Douglas' closing comments express a blunt skepticism about the informant:

There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police.<sup>29</sup>

Aware of these issues, a law enforcement officer dealing with a confidential informant can take steps to establish the credibility of that informant or the reliability of the informant's information while still protecting the informer's identity. We discussed some of these steps in Chapter 5. Careful documentation of the informer's previous work for the officer can support the officer's representation that the informant is reliable. That documentation should be maintained in the informant's operational file.

If the officer wants to keep from disclosing the informer's identity, then the information from the file must be sanitized in two ways. First, the informant's name should not be used. If the files have been set up as discussed in Chapter 3, then only a code number or name rather than the informant's true name will be in the operational file. Second, if communication of a particular piece of information will inevitably reveal who the informant is, then the case officer must generalize the information to protect the informer's identity.

## USE OF CONFIDENTIAL INFORMANTS AT TRIAL

Depending upon the role of an informant in the circumstances leading to prosecution, a prosecutor may have to choose between dropping the prosecution, disclosing the identity of the informant, or producing the informant at trial. The question is one of fundamental fairness in the trial itself.

The basic policy of the law is to encourage every citizen to provide evidence of wrongdoing known to the citizen. Part of the encouragement is to protect citizens by keeping their communication to law enforcement officers confidential. This is an evidentiary privilege, analogous to the privilege given to other confidential communications, such as those between doctor and patient, or lawyer and client. But it is not an absolute privilege and must give way when it would jeopardize a defendant's right to a fair trial.

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<sup>28</sup> LaFave discusses *McCray* in a context of police credibility and police perjury. *Search and Seizure*, pp. 697-710.

<sup>29</sup> 386 U.S. at 316.

At one extreme, if an informant did nothing more than provide law enforcement officers a lead from which they uncovered a crime or interrupted a crime in progress, the informant's identity or presence at trial is probably not required for a fair trial. At the other extreme, if the informant participated in a crime or was so deeply involved in the surrounding circumstances that his or her testimony would bear directly on the issue of guilt or innocence, then the informant should be called as a witness. If the prosecution is unwilling to produce the witness, the prosecution should be dismissed.

Two leading Supreme Court cases illustrate these opposite poles. In *Scher v. United States*,<sup>30</sup> federal officers received confidential information that at midnight a car, identified by make and license number, would transfer untaxed whiskey from a particular house in Cleveland. Officers posted nearby saw the described automobile stop in front of the house and remain there for an hour. Then a man got in the car, drove away, returned shortly before midnight, stopped at the rear of the house, and remained for half an hour. The officers heard what seemed to be heavy paper packages passing over wood. Doors slammed, and Scher drove the car away, apparently heavily loaded. The officers followed.

Scher turned into a garage behind his residence. As Scher was getting out of his car, one of the officers approached, identified himself, and stated that he had been informed that the car was hauling bootleg liquor. Scher replied, "just a little for a party." Asked whether the liquor was tax-paid, Scher replied that it was Canadian whiskey; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found 88 unstamped bottles of whiskey. He arrested Scher and seized both the liquor and the car. The officer had no search warrant.<sup>31</sup>

At trial, Scher's counsel attempted to question the arresting officers as to the source of the information that led them to watch Scher. The trial court sustained the government's objections to these questions, and the Supreme Court affirmed:

In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action did not depend on the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information. . . .

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<sup>30</sup> 305 U.S. 251 (1938).

<sup>31</sup> 305 U.S. at 253-254.

Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense, as for example, where this turns upon an officer's good faith. . . .<sup>32</sup>

After receiving the tip, the officers performed their own investigation. What they observed led to the search and arrest. The tipster did not participate in any way, and he was not a witness to anything involved in the prosecution. His testimony would have added nothing to either the prosecution or the defense.

At the other pole is *Roviaro v. United States*,<sup>33</sup> a heroin trafficking case. Roviaro was indicted on two federal drug counts, including selling heroin to "John Doe."

Two federal narcotics agents and two Chicago police officers met John Doe at an agreed location and searched him and his car. They found no drugs. One of the federal officers then concealed himself in the trunk of Doe's car, and Doe drove to meet Roviaro. The other officers followed. Roviaro arrived at the rendezvous point and got into the front seat of Doe's car. Doe drove off and, directed by Roviaro, proceeded by a circuitous route to another spot. Roviaro got out of Doe's car, walked to a nearby tree, picked up a package, returned to Doe's car, made a motion as if depositing a package in Doe's car, and then left. The officers immediately went to Doe's car and found a package containing heroin on the floor.

The officers arrested both Doe and Roviaro. At the police station, Doe denied that he knew or had ever seen Roviaro.

Before trial, Roviaro moved for a bill of particulars requesting the name, address, and occupation of "John Doe." The motion was denied. At trial, Roviaro's repeatedly asked John Doe's identity, but the court refused to order the government to disclose it. John Doe was never produced, identified, or otherwise made available.

The Supreme Court stated that the question before it was whether the trial court erred in allowing the government "to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged."<sup>34</sup> The Supreme Court reversed, holding that the refusal to identify or produce Doe deprived Roviaro of a fair trial.

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the

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<sup>32</sup> 305 U.S. at 254 (citations omitted).

<sup>33</sup> 353 U.S. 53 (1957).

<sup>34</sup> 353 U.S. at 55.

furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication. . . .

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.<sup>35</sup>

*Roviaro* leaves the decision on identifying the informant up to the prosecution. If a fair trial cannot be held without either identifying or producing the informant at trial, then the prosecutor must choose between producing the informant or dismissing the case. Control officers should take steps to minimize the occurrence of this prosecutorial dilemma. If a control officer wants to protect the identity of the informant, the officer should work to minimize the informant's participation in events that are going to be involved in the prosecution. In *Scher*, the informant did not participate in any of the circumstances on which *Scher's* prosecution rested. In *Roviaro*,

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<sup>35</sup> 353 U.S. at 59-62 (citations and footnotes omitted).

the informant participated in virtually every step of the transaction for which Roviario was prosecuted.

## ENTRAPMENT

Entrapment is a defense frequently used in narcotics cases, and informants are often involved in the circumstances leading to a claim of entrapment. We will discuss entrapment only briefly here because it is the subject of a companion monograph, *Entrapment Defense in Narcotics Cases: Guidelines for Law Enforcement*. That monograph, also published by the Institute for Law and Justice for the Bureau of Justice Assistance, is available from ILJ.

The United States Supreme Court has defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."<sup>36</sup> In essence, this definition emphasizes two factors: (1) the defendant's innocent state of mind prior to contact with police officers, and (2) the manner by which law enforcement officers may have induced the defendant's commission of a crime. For the most part, the Supreme Court's decisions have focused on the defendant's state of mind rather than on the propriety of the government's conduct. Thus, the Court has found entrapment only when police agents have induced innocent persons to violate the law.

It is important to understand that the leading entrapment cases decided by the Supreme Court of the United States are not based on the Constitution of the United States. Instead, they are based on federal statutes or on the Supreme Court's supervisory responsibility over the lower federal courts. For these reasons, state courts and legislatures have remained free to establish their own rules in this area. Consequently, entrapment rules often vary between the federal and state systems as well as between the states. Therefore, we emphasize the importance of discussing entrapment principles with local prosecutors to learn the rules governing in a given state.

However, one Supreme Court case, *United States v. Russell*,<sup>37</sup> contained a cautionary note for the law enforcement community. In *Russell*, an undercover officer supplied the defendant with a chemical ingredient necessary to the manufacture of methamphetamine. Because the evidence established that defendant had been predisposed to commit the offense, the Supreme Court sustained his conviction. However, Justice Rehnquist's majority opinion acknowledged that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking

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<sup>36</sup> *Sorrells v. United States*, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

<sup>37</sup> 411 U.S. 423 (1973).



judicial processes to obtain a conviction . . . ."<sup>38</sup> Though the Court viewed the *Russell* case as "distinctly not of that breed,"<sup>39</sup> its decision was the first to suggest that entrapment doctrine may be subject to constitutional constraints.

Although the Supreme Court has consistently endorsed an approach to entrapment that emphasizes the defendant's state of mind (the predisposition test), not all state jurisdictions have adopted this standard. Instead, many state courts or legislatures have chosen a test that principally considers the propriety of police conduct rather than the defendant's guilty state of mind. A few jurisdictions have adopted a standard that considers both the predisposition test and the propriety of police conduct.

Thus there are three prevailing entrapment standards:

- Subjective predisposition test
- Objective police conduct test
- Combined predisposition/police conduct test

Law enforcement officers must be familiar with the entrapment standard used within their jurisdiction. If doubt exists as to which standard applies, the prosecutor's office should be consulted.

The subjective predisposition test has been adopted by the United States Supreme Court. The rule is known as the "subjective" test because it focuses on the defendant's predisposition to commit the crime. Thus, if the police induce an otherwise predisposed defendant to violate the law, entrapment does not exist. The only exception to this rule would be the relatively rare situation in which outrageous police conduct violates due process.

In contrast to the subjective test, the objective standard focuses exclusively on whether police conduct created an undue risk of inducing innocent persons to commit criminal acts. Under this approach, entrapment exists if the police "employ methods of persuasion or inducement that create a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit it."<sup>40</sup> The standard is characterized as an objective test because it is concerned with whether an average law-abiding person would likely have responded to the proposed inducement by agreeing to violate the law.<sup>41</sup>

A few jurisdictions, rather than choosing between the subjective and objective approaches, have combined the two tests. Unfortunately, courts have not interpreted the combined standard uniformly. New Jersey, for example, requires defendants to establish (1) that the police conduct

<sup>38</sup> 411 U.S. at 431-32.

<sup>39</sup> *Ibid.* at 432.

<sup>40</sup> MODEL PENAL CODE § 2.13(1)(b)(A.L.I. 1985).

<sup>41</sup> MODEL PENAL CODE § 2.13(1)(b)(A.L.I. 1985); NATIONAL COMMISSION STUDY DRAFT OF A NEW FEDERAL CODE 702 (1970).

created a substantial risk that the crime would be committed by someone who was not otherwise predisposed to do so, and (2) that such misconduct actually caused the defendant himself to commit the crime (i.e., that the defendant was not otherwise predisposed to engage in such criminality).<sup>42</sup> By comparison, Florida and West Virginia require the prosecution initially to establish that the police employed reasonable procedures (i.e., that did not potentially induce crimes by innocent persons), and to still permit acquittal if the defendant himself was not predisposed to engage in the crime charged.<sup>43</sup>

As noted above, the Supreme Court has suggested that there may come a day when "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."<sup>44</sup> If cases in the lower courts are a guide, when that day arrives, a confidential informant is likely to be involved in the outrageous law enforcement conduct. Therefore, CIs should be briefed on what specific actions might be construed as entrapment.

The monograph on entrapment contains several examples of problems created by informants. They make plays on sympathy,<sup>45</sup> exploit social relationships,<sup>46</sup> repeatedly badger targets,<sup>47</sup> and use sex to induce targets into committing crimes.<sup>48</sup> Contingent fees paid to informants have been found suspect by the courts if the fees are very high and if payment depends on the conviction of a specific individual or on the successful forfeiture of property.<sup>49</sup> Courts fear that contingent fees may induce CIs to fabricate evidence or perjure themselves.

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<sup>42</sup> *State v. Rockholt*, 476 A.2d 1236, 1239, 52 A.L.R.4th 757 (N.J. 1984).

<sup>43</sup> *Cruz v. State*, 465 So.2d 516, 521 (Fla. 1985), cert. denied, 105 S.Ct. 3527; see also *State v. Hinkle*, 286 S.E.2d 699, 701 (W.Va. 1982).

<sup>44</sup> 411 U.S. at 431-32.

<sup>45</sup> See, e.g., *People v. Harding*, 413 N.W.2d 777, 784 (Mich.App. 1987) (a female police informant misleadingly told the defendant she would be killed unless the defendant engaged in an illegal drug sale and gave the informant the money); *State v. Taylor*, 599 P.2d 496, 503 (Utah 1979) (a female police informant's plea to a former lover to provide her with heroin constituted entrapment).

<sup>46</sup> See, e.g., *Pascu v. State*, 577 P.2d 1064, 1068 (Alaska 1978) (police informant's exploitation of defendant's friendship was a factor in determining that defendant was entrapped); *People v. Graczyk*, 402 N.W.2d 60, 61 (Mich.App. 1986) (court held it was improper for the police informant to use a longtime friendship with defendant to induce him into delivering illegal drugs).

<sup>47</sup> See, e.g., *Myers v. State*, 494 So.2d 517 (Fla.App. 1986) (police informant targeted defendant, initiated the transaction of illicit drugs, and pressured defendant into committing the crime through the use of repeated phone calls); *People v. Duis*, 265 N.W.2d 794, 796 (Mich.App. 1978) (police informant "continued to 'bug' defendant, who was not willing to accede to [the informant's] entreaties, until defendant agreed to sell the [illicit drugs]").

<sup>48</sup> *People v. Wisneski*, 292 N.W.2d 196, 198 (Mich.App. 1980) (physician's conviction for illegally prescribing drugs was reversed because the informant performed fellatio on him after his initial refusal to commit the crime).

<sup>49</sup> See, e.g., *State v. Glosson*, 462 So.2d 1082 (Fla. 1985) (police agent was promised 10 percent of all civil forfeitures if he would testify and cooperate in the successful prosecution of the defendant).

At the outset of an investigation, the agency should attempt to anticipate the need for a CI's participation in criminal activities. This involves assessing the possible impact on the case and on the agency. Is the targeted organization or individual so important that the CI cannot operate effectively without some involvement in criminal activity? What is the potential liability of the agency according to counsel? One prosecutor notes the likely impact of CI criminal activity on juries:

[J]urors, I think, are bothered when they see the government involved in committing a crime; so, from the stand-point of persuading juries, I would get people involved in committing crimes only if you were going after an organization or more serious type of case. I also think juries are going to be bothered if you have guys smoking or shooting dope on a regular basis. I think that you might get acquittals on those types of cases. Remember, juries will act on emotions and are bothered by such conduct.<sup>50</sup>

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<sup>50</sup> Weiner, p. 228.

## **APPENDIX A**

Excerpts from the Office of Justice Programs, U.S. Department of Justice, M 7100.1D (May 15, 1990) guidelines as they pertain to "Confidential Funds" and "Control and Use of Confidential Funds."

MAY 15, 1990

## CONTROL AND USE OF CONFIDENTIAL FUNDS

This guideline articulates procedures for the use and control of confidential funds by projects funded by the grantor agency (Office of Justice Programs) under the Crime Control and the Juvenile Justice Acts. The grantor agency includes the following:

1. Office of Justice Programs (OJP)
2. Bureau of Justice Assistance (BJA)
3. National Institute of Justice (NIJ)
4. Bureau of Justice Statistics (BJS)
5. Office of Juvenile Justice and Delinquency Prevention (OJJDP)
6. Office for Victims of Crime (OVC)

The provisions in this guideline apply to all grantor agency professional personnel and grantees/subgrantees involved in the administration of grants containing confidential funds.

### DEFINITIONS FOR TYPES OF SPECIAL LAW ENFORCEMENT OPERATIONS

1. Purchase of Services (P/S). This category includes travel or transportation of a nonfederal officer or an informant; the lease of an apartment, business front, luxury-type automobiles, aircraft or boat, or similar effects to create or establish the appearance of affluence; and/or meals, beverages, entertainment, and similar expenses (including buy money and flash rolls, etc.) for undercover purposes, within reasonable limits.
2. Purchase of Evidence (P/E). This category is for the purchase of evidence and/or contraband such as narcotics and dangerous drugs, firearms, stolen property, counterfeit tax stamps, etc., required to determine the existence of a crime or to establish the identity of a participant in a crime.
3. Purchase of Specific Information (P/I). This category includes the payment of monies to an informant for specific information. All other informant expenses would be classified under P/S and charged accordingly.

### POLICY

Confidential funds are those monies allocated to purchase of services, purchase of evidence and purchase of specific information. These funds should only be allocated:

1. When the particular merits of a program/investigation warrant the expenditure of these funds.
2. When requesting agencies are unable to obtain these funds from other sources.

Confidential funds are subject to prior approval. Such approval will be based on a finding that they are a reasonable and necessary element of project operations. In this regard the approving agency must also ensure that the controls over disbursement of confidential funds are adequate to safeguard against the misuse of such funds.

1. The Approving Authority for the Allocation of confidential funds is:
  - a. Grantor agency for block/formula grantees.
  - b. Grantor agency for categorical grantees (including RISS program projects).
  
2. The Prior Approval Authority for the disbursement and expenditure of confidential funds will be at the next higher level as follows:
  - a. Grantor agency for categorical grantees (including RISS program projects).
  - b. State agencies for block/formula subgrantees.

A signed certification that the project director has read, understands, and agrees to abide by the provisions of this Guideline is required from all projects that are involved with confidential funds from either Federal or matching funds. The signed certification must be approved at the time of grant application.

**FIGURE 1.**  
**SAMPLE CERTIFICATION**  
**CONFIDENTIAL FUNDS CERTIFICATION**

This is to certify that I have read, understand, and agree to abide by all of the conditions for confidential funds as set forth in the effective edition of OJP Guideline Manual 7100.1, Financial and Administrative Guide for Grants.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
Project Director

Grant No: \_\_\_\_\_

**PROCEDURES**

Each project and RISS member agency authorized to disburse confidential funds must develop and follow internal procedures which incorporate the following elements. Deviations from these elements must receive prior approval of the grantor agency.

1. Imprest Fund. The funds authorized will be established in an imprest fund which is controlled by a bonded cashier.
2. Advance of Funds. The supervisor of the unit to which the imprest fund is assigned must authorize all advances of funds for the purchase of information. Such authorization must specify the information to be received, the amount of expenditures, and assumed name of informant.
3. Informant Files. Informant files are confidential files of the true names, assumed names, and signature of all informants to whom payments of confidential expenditures have been made. To the extent possible, pictures and/or fingerprints of the informant payee should also be maintained. Refer to the "Documentation" paragraph on page six of this appendix for a list of required documents for the informant files. In the RISS program the informant files are to be maintained at the member agencies only. Project Headquarters may maintain case files.
4. Cash Receipts.
  - a. The cashier shall receive from the agent or officer authorized to make a confidential payment, receipt for cash advanced to him/her for such purposes.
  - b. The agent or officer shall receive from the informant payee a receipt for cash paid to him/her.

**FIGURE 2.**  
**SAMPLE RECEIPT OF INFORMANT PAYEE**  
**RECEIPT**

For and in consideration of the sale and delivery to the State, County, or City of \_\_\_\_\_ of information or evidence identified as follows:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

I hereby acknowledge receipt of \$(numerical & word amount entered by payee) paid to me by the State, County, or City of \_\_\_\_\_  
 Date: \_\_\_\_\_ Payee: \_\_\_\_\_

(Signature)

Case Agent/Officer: \_\_\_\_\_  
 (Signature)

Witness: \_\_\_\_\_  
 (Signature)

Case or Reference: \_\_\_\_\_

5. Receipt for Purchase of Information. An informant payee receipt shall identify the exact amount paid to and received by the informant payee on the date executed. Cumulative or anticipatory receipts are not permitted. Once the receipt has been completed no alteration is allowed. The agent shall prepare an informant payee receipt containing the following information:
  - a. The jurisdiction initiating the payment.
  - b. A description of the information/evidence received.
  - c. The amount of payment, both in numerical and word form.
  - d. The date on which the payment was made.
  - e. The signature of the informant payee.
  - f. The signature of the case agent or officer making payment.
  - g. The signature of at least one other officer witnessing the payment.
  - h. The signature of the first line supervisor authorizing and certifying the payment.
6. Review and Certification. The signed receipt from the informant payee with a memorandum detailing the information received shall be forwarded to the agent or officer in charge. The agent or officer in charge shall compare the signatures. He/she shall also evaluate the information received in relation to the expense incurred, and add his/her evaluation remarks to the report of the agent or officer who made the expenditure from the imprest fund. The certification will be witnessed by the agent or officer in charge on the basis of the report and informant payee's receipt.
7. Reporting of Funds. Each project shall prepare a reconciliation report on the imprest fund on a quarterly basis. Information to be included in the reconciliation report will be the assumed name of the informant payee, the amount received, the nature of the information given, and to what extent this information contributed to the investigation. Grantees shall retain the reconciliation report in their files and available for review. Subgrantees shall retain the reconciliation report in their files and available for review unless the State agency requests that the report be submitted to them on a quarterly basis.
8. Record and Audit Provisions. Each project and member agency must maintain specific records of each confidential fund transaction. At a minimum, these records must consist of all documentation concerning the request for funds, processing (to include the review and approval/disapproval), modifications, closure or impact material, and receipts and/or other documentation necessary to justify and track all expenditures. Refer to Documentation, Item 2 under Informant Files, for a list of documents which should be in the informant files. In projects where grant funds are used for confidential expenditures, it will be understood that all of the above records, except the true name of the informant, are subject to the record and audit provisions of grantor agency legislation.



## INFORMANT FILES

1. Security. A separate file should be established for each informant for accounting purposes. Informant files should be kept in a separate and secure storage facility, segregated from any other files, and under the exclusive control of the office head or an employee designated by him. The facility should be locked at all times when unattended. Access to these files should be limited to those employees who have a necessary legitimate need. An informant file should not leave the immediate area except for review by a management official or the handling agent, and should be returned prior to the close of business hours. Sign-out logs should be kept indicating the date, informant number, time in and out, and the signature of the person reviewing the file.
2. Documentation. Each file should include the following information:
  - a. Informant Payment Record, kept on top of the file. This record provides a summary of informant payments.
  - b. Informant Establishment Record, including complete identifying and locating date, plus any other documents connected with the informant's establishment.
  - c. Current photograph and fingerprint card (or FBI/State Criminal Identification Number).
  - d. Agreement with Cooperating Individual.
  - e. Receipt for Purchase of Information.
  - f. Copies of all debriefing reports (except for the Headquarters case file).
  - g. Copies of case initiation reports bearing on the utilization of the informant (except for the Headquarters case file).
  - h. Copies of statements signed by the informant (unsigned copies will be placed in appropriate investigative files).
  - i. Any administrative correspondence pertaining to the informant, including documentation of any representations made on his behalf or any other nonmonetary considerations furnished.
  - j. Any deactivation report or declaration of an unsatisfactory informant.

## RISS PROGRAM PROCESSING PROCEDURES

1. Authorization of Disbursement. The project policy board establishes the maximum level the project director may authorize in disbursements to member agencies. The project director, or his designee, may authorize payment of funds to member agencies and their officers for the purchase of information and evidence up to this maximum level. The project director must refer all requests for amounts in excess of the maximum level to the project policy board for review and approval.

2. Request for Funds. Any member agency requesting funds from the project will do so in writing. The request must contain the amount needed, the purpose of the funds, and a statement that the funds requested are to be used in furtherance of the project's objectives. Additionally, the agency must provide a statement agreeing to establish control, accounting, and reporting procedures which closely resemble the procedures outlined in this appendix.
3. Processing the Request. The project director, or his designee when appropriate, will approve or disapprove the request. If approved, the request will be forwarded to the project cashier who will record the request and transmit the monies, along with a receipt form, to the member agency. Upon receipt of the monies, the member agency will immediately sign and return the receipt from to the cashier.
4. Records. For all transactions involving the purchase of information, each project must maintain on file, the assumed name, and signature of all informants to whom member agencies make payments from project funds.
5. Processing the Informant Payee Receipt. The original signed informant payee receipt, with a summary of the information received, will be forwarded to the project by the member agency. The project will then authenticate the receipt by comparing the signature of the informant payee on the receipt with the signature maintained by the project in a confidential file. If discrepancies exist, the project director, or his designee, will take immediate steps to notify the member agency and ascertain the reason(s) for the discrepancies. The member agency must forward written justification to address the discrepancies to the project. If satisfactory, the justification will be attached to the informant payee receipt.

## **INFORMANT MANAGEMENT AND UTILIZATION**

All persons who will be utilized as informants should be established as such. The specific procedures required in establishing a person as an informant may vary from jurisdiction to jurisdiction but, at a minimum, should include the following:

1. Assignment of an informant code name to protect the informant's identity.
2. An informant code book controlled by the office head or his/her designee containing:
  - a. Informant's code name.
  - b. Type of informant (i.e., informant, defendant/informant, restricted-use/informant).
  - c. Informant's true name.
  - d. Name of establishing law enforcement officer.
  - e. Date the establishment is approved.
  - f. Date of deactivation.
3. Establish each informant file in accordance with Documentation, Item 2, under Informant Files.

4. For each informant in an active status, the agent should review the informant file on a quarterly basis to assure it contains all relevant and current information. Where a MATERIAL fact that was earlier reported on the Establishment Record is no longer correct (e.g., a change in criminal status, means of locating him/her, etc.), a supplemental establishing report should be submitted with the correct entry.
5. All informants being established should be checked in all available criminal indices. If a verified FBI number is available, request a copy of the criminal records from the FBI. Where a verified FBI number is not available, the informant should be fingerprinted with a copy sent to the FBI and appropriate State authorities for analysis. The informant may be utilized on a provisional basis while awaiting a response from the FBI.

## PAYMENTS TO INFORMANTS

1. Any person who is to receive payments charged against PE/PI funds should be established as an informant. This includes persons who may otherwise be categorized as sources of information of informants under the control of another agency. The amount of payment should be commensurate with the value of services and/or information provided and should be based on the following factors:
  - a. The level of the targeted individual, organization or operation.
  - b. The amount of the actual or potential seizure.
  - c. The significance of the contribution made by the informant to the desired objectives.
2. There are various circumstances in which payments to informants may be made:
  - a. Payments for Information and/or Active Participation. When an informant assists in developing an investigation, either through supplying information or actively participating in it, he/she may be paid for his/her service either in a lump sum or in staggered payments. Payments for information leading to a seizure, with no defendants, should be held to a minimum.
  - b. Payment for Informant Protection. When an informant needs protection, law enforcement agencies may absorb the expenses of relocation. These expenses may include travel for the informant and his/her immediate family, movement and/or storage of household goods, and living expenses at the new location for a specific period of time (not to exceed 6 months). Payments for these expenses may be either lump sum or as they occur, and should not exceed the amounts authorized law enforcement employees for these activities.
  - c. Payments to informants of Another Agency. To use or pay another agency's informant, he/she should be established as an informant. These payments should not be a duplication of a payment from another agency; however, sharing a payment is acceptable.

3. Documentation of payments to informants is critical and should be accomplished on a receipt for purchase of information. Payment should be made and witnessed by two law enforcement officers and authorized payment amounts should be established and reviewed by at least the firstline supervisory level. In unusual circumstances, a non-officer employee or an officer of another law enforcement agency may serve as witness. In all instances, the original signed receipt must be submitted to the project director for review and recordkeeping.

## ACCOUNTING AND CONTROL PROCEDURES

Special accounting and control procedures should govern the use and handling of confidential expenditures, as described below:

1. It is important that expenditures which conceptually should be charged to PE/PI/PS are in fact so charged. It is only in this manner that these funds may be properly managed at all levels, and accurate forecasts of projected needs be made.
2. Each law enforcement entity should apportion its PE/PI/PS allowance throughout its jurisdiction and delegate authority to approve PE/PI/PS expenditures to those offices, as it deems appropriate.
3. Headquarters management should establish guidelines authorizing offices to spend up to a predetermined limit of their total allowance on any one buy or investigation.
4. In exercising his/her authority to approve these expenditures, the supervisor should consider: (1) the significance of the investigation; (2) the need for this expenditure to further that investigation; and (3) anticipated expenditures in other investigations. Funds for PE/PI/PS expenditures should be advanced to the officer for a specific purpose. If they are not expended for that purpose, they should be returned to the cashier. They should not be used for another purpose without first returning them and repeating the authorization and advance process based on the new purpose.
5. Funds for a PE/PI/PS expenditure should be advanced to the officer on a suitable receipt form. A receipt for purchase of information or a voucher for purchase of evidence should be completed to document funds used in the purchase of evidence or funds paid or advanced to an informant.
6. For security purposes there should be a 48-hour limit on the amount of time funds advanced for PE/PI/PS expenditure may be held outstanding. If it becomes apparent at any point within the 48-hour period that the expenditure will not materialize, then the funds should be returned to the advancing cashier as soon as possible. An extension to the 48-hour limit may be granted by the level of management that approved the advance. Factors to consider in granting such an extension are the amount of funds involved, the degree of security under which the funds are being held, how long an extension is required, and the significance of the expenditure. Such extensions should be limited to 48 hours. Beyond this, the funds should be returned and readvanced, if necessary. Regardless of circumstances, within 48 hours of the advance, the fund cashier should be presented with either the unexpended funds, and executed voucher for payment for information or purchase of evidence or written notification by management that an extension has been granted.

7. Purchase of Services expenditures, when not endangering the safety of the office or informant, need to be supported by canceled tickets, receipts lease agreements, etc. If not available, the office head, or his immediate subordinate, must certify that the expenditures were necessary and justify why supporting documents were not obtained.

## **APPENDIX B**

### **Roles and Responsibilities Matrix**

# Law Enforcement Responsibilities in the

Responsibility Area	Chief Executive Officer	Investigative Commander
General Authority	CEO-1: Authorize use of CIs by certain classes of employees and specific members of agency as recommended by the commanding officer (CO).	
Agency Directive	CEO-2: Approve CI written directive.	CO-1: Supervise preparation of CI written directive.
Orientation and Training for Investigators	CEO-3: Approve form and content of orientation and training curriculum for supervisors and investigators in their separate roles related to CI recruitment, selection, orientation and training, direction, and control.	CO-2: Ensure that all supervisors and investigators who are authorized to employ CIs are trained prior to their authorization to recruit.
Decision to Recruit		CO-3: Authorize CI recruitment after recommendation of investigative supervisor.
Recruitment and Selection		
Decision to Employ		CO-4: Authorize CI employment after recommendation of investigative supervisor.
Employment Forms/Files		CO-5: Maintain file of CI's aliases (code name or number) apart from the secure file to avoid employing the same person twice or a terminated CI.
Orientation and Training for Confidential Informants	CEO-4: Approve form and content of orientation and training curriculum for CIs once they are employed.	
Security and Confidentiality of Informant Information	CEO-5: Review security and confidentiality matters in conjunction with quarterly review of informant activities (See CEO-7).	CO-6: Ensure the confidentiality and security of CI identity information and the nature and scope of his or her activities.
Assignments and Contacts		
Periodic Briefings		

# Employment and Use of Confidential Informants

Investigative Supervisor	Investigator
<p><b>SUP-1:</b> Become fully conversant with agency rules and regulations, particularly CI directives; ensure that subordinates are fully apprised of same.</p> <p><b>SUP-2:</b> Ensure that all subordinates are fully oriented and trained.</p> <p><b>SUP-3:</b> Petition CO, in writing or orally, in regard to recruitment of a CI by a specific investigator.</p> <p><b>SUP-4:</b> Review recruitment and selection activities by daily contact with investigator.</p> <p><b>SUP-5:</b> Review all CI documentation and participate in final decision to employ.</p> <p><b>SUP-6:</b> Maintain secure file of all forms, records, and other documentation gathered during recruitment and selection phases.</p> <p><b>SUP-7:</b> Meet with investigator and CI regarding each person's role and responsibilities. Ensure that (1) written agreements and guidelines are read and understood, (2) signatures have been witnessed and forms returned to secure file, and (3) CI orientation and training is provided.</p> <p><b>SUP-8:</b> Ensure security and confidentiality of CI's identity and role in relation to agency investigations.</p> <p><b>SUP-9:</b> Monitor assignments and contacts daily with investigators to keep apprised of activities and prevent duplication of effort on unrelated investigations.</p> <p><b>SUP-10:</b> Conduct weekly briefing sessions to review relationship between investigator and CI to ensure it is (1) productive, (2) in accord with agency guidelines, and (3) meets professional and ethical standards.</p>	<p><b>INV-1:</b> Become fully conversant with agency rules and regulations, particularly CI directives.</p> <p><b>INV-2:</b> Receive orientation and training in CI recruitment, selection, employment, orientation and training, direction, and control.</p> <p><b>INV-3:</b> Discuss employing CI with supervisor; reach decision to recruit or not.</p> <p><b>INV-4:</b> Recruit and select CIs with advice from supervisor (dependant on investigator's experience and maturity).</p> <p><b>INV-5:</b> Participate in decision to employ.</p> <p><b>INV-6:</b> Complete all forms required when CI is employed; preserve confidentiality of all information about CI.</p> <p><b>INV-7:</b> Conduct orientation and training; ensure that all CI agreements are signed, witnessed, and returned to file.</p> <p><b>INV-8:</b> Ensure confidentiality of CI in all ways possible.</p> <p><b>INV-9:</b> Make assignments orally to CI; collect and preserve signed and dated notes of CI.</p> <p><b>INV-10:</b> Brief supervisor weekly on matters related to CI and provide written information for quarterly report.</p>



# Law Enforcement Responsibilities in the

Responsibility Area	Chief Executive Officer	Investigative Commander
<b>Payments/Reimbursements</b>	CEO-6: Authorize CI payments exceeding \$X for a single payment and payments of \$X in any one month or \$X in any one quarter.	CO-7: Authorize payments not exceeding \$X to any CI at any one time, and payments not exceeding \$X in any one month or \$X in any quarter.
<b>Alternative Contact Person</b>		
<b>Quarterly Reporting</b>	CEO-7: Receive and review quarterly report of CI use, results, and analysis of costs; confer with CO and subordinates, as appropriate, to review all aspects of program including security and confidentiality.	CO-8: Receive and review supervisors' quarterly reports of confidential informant use, results, and cost analysis; prepare a summary and submit to CEO.
<b>Post-case Screening</b>		
<b>Periodic Staff Inspection</b>	CEO-8: Require periodic (annual or semiannual) staff inspection of security and confidentiality of agency CI records, files, and other information collected or maintained by the agency.	CO-9: Cooperate with staff inspector on inspection team as required.
<b>Annual File Purge</b>	CEO-9: Require annual purge of CI records and files deemed inactive.	CO-10: Oversee annual purge of CI records and files meeting "inactive status"; ensure destruction by shredding or burning.

# Employment and Use of Confidential Informants (Continued)

Investigative Supervisor	Investigator
<p><b>SUP-11:</b> Ensure accountability and consistency of investigators' conduct when dealing with a CI especially with regard to disbursing monies for services rendered.</p>	<p><b>INV-11:</b> Ensure reports and reimbursement requests are prepared promptly and are up to date.</p>
<p><b>SUP-12:</b> Designate alternate investigative contact, with concurrence of primary investigator, to act as contact with CI in absence of primary investigator.</p>	<p><b>INV-12:</b> Brief alternate investigative contact regularly to ensure continuing contact between agency and CI.</p>
<p><b>SUP-13:</b> Incorporate monitoring activities into quarterly report for CO.</p>	<p><b>INV-13:</b> Contribute to quarterly report as requested.</p>
<p><b>SUP-14:</b> Perform post-case summary of cases looking for potential informants.</p>	

## **APPENDIX C**

**Outline of a Confidential Informant  
Written Directive (Partially Annotated)**

## 1.0 PURPOSE OF THE WRITTEN DIRECTIVE

For example:

To establish policies and procedures on the handling and use of confidential informants (CIs), related information, and monies expended.

For example:

To establish guidelines for the handling of confidential informants that will enable the agency to gain the maximum benefit from using confidential informants while at the same time maintaining the agency's integrity as well as the integrity of officers who use the services of confidential informants.

## 2.0 DEFINITIONS

For example:

"Informant" and other words or phrases that need definition.

## 3.0 POLICY CONSIDERATIONS

### 3.1 Overall Agency Policy Considerations

For example:

The agency's policies are designed to (1) protect the integrity of the agency and those officers who utilize CIs, (2) allow all agency officers access to information available from CIs concerning their investigations, (3) ensure CIs' confidentiality, (4) protect the relationship between individual officers and the CI, and (5) ensure consistency in agency officer conduct and accountability when dealing with and disbursing payments to CIs.

### 3.2 Agency Policy With Regard to CIs

For example:

CIs do not possess law enforcement powers—they do not have arrest powers, are not permitted to conduct searches and seizures, and may not carry a gun; (2) CIs who are arrested as a result of engaging in illegal activities will receive no special consideration—their CI status does not provide them with a legal umbrella; (3) special precautions should be taken when the CI is a juvenile, is at some stage of criminal justice processing (on bond, pretrial release, pre-or post-conviction, on probation, parole, etc.), or is a member of the opposite sex from the investigator; (4) CI contacts will involve at least two officers unless otherwise authorized by the commanding officer (CO); (5) at least two officers should be able to contact a CI unless otherwise authorized by the CO; (6) all CI assignments must be within bounds of legality with particular reference to statutes and case law pertaining to "entrapment"; (7) "leniency" as compensation for informants must be authorized by the CO plus prosecutor and/or judicial authority before an activity is planned; and (8) officers may not socialize with CIs when off duty or become personally involved with the CI to include accepting gratuity or engaging in any private business transaction with a CI.

### *3.3 CI Legal Status and Implications for the Agency and for the Investigator*

#### **For example:**

An exposition of the CI's legal status as an employee and/or as an independent contractor and what that means in terms of liability for the agency as well as the investigator.

#### **For example:**

An exposition of the CI working agreement—its form and content—and implications regarding limiting agency as well as personal liability.

## **4.0 CI INFORMATION AND ITS MANAGEMENT**

### *4.1 An Overview of CI Information*

#### **For example:**

The role and responsibilities matrix assumes three repositories of CI information: (1) basic (background) information about the CI (see Chapter 4 with special reference to the informant portfolio) filed in a secure location apart from a cross-reference index and apart from other files, (2) CI operational files in a secure location available to the investigator and his or her supervisor, and (3) CI payment records in a central accounting record—appropriately secured in terms of protecting CI identity if or as possible. (A copy of payment records should also be filed with the operational files.)

### *4.2 CI Informant Portfolio*

Forms, records, and files created in connection with the employment of a CI. The preparation and disposition of forms, records, and files should be specified as should their confidentiality and security. (See Chapter 4 for additional details.)

### *4.3 CI Operational Files*

Forms, logs, and records to record activities, payments, and accomplishments; filing procedures and locations to include confidentiality concerns; file and record auditing and purging. (See Chapter 4 for additional details.)

### *4.4 Interdivisional Coordination and/or Sharing of CIs*

A concern for larger agencies. CI-developed information and its documentation; a special file for problem or terminated CIs; and specific confidentiality concerns because of the agency's size and geographic scope.

**5.0 CI ADMINISTRATIVE AND MANAGEMENT GUIDELINES**

- 5.1 CI Recruitment/Selection/Orientation and Training. (See Chapter 4).*
- 5.2 CI Probationary Status. Assessing CI Credibility and Reliability.*
- 5.3 CI Payment Policies and Procedures.*
- 5.4 CI Evaluation Policies and Procedures.*
- 5.5 Problem CIs--Their Censuring and/or Termination.*

**6.0 CI OPERATIONAL GUIDELINES**

- 6.1 Types and Kinds of Assignments*
- 6.2 Accepted Practices*
- 6.3 Prohibited Practices.*
- 6.4 Officer and CI Safety Issues and Concerns*

## **APPENDIX D**

### **Informant Working Agreement**

## Informant Working Agreement

This is an agreement between the \_\_\_\_\_ (agency name)  
and \_\_\_\_\_ (informant name).

I, \_\_\_\_\_, understand that under this agreement, I am undertaking certain obligations, and I willingly accept and knowingly understand the following:

1. As part of this agreement, I accept the duty to cooperate fully in any law enforcement investigation concerning the activities of \_\_\_\_\_ if I am so directed by agents of the \_\_\_\_\_ (agency name).
2. I understand that in addition to telling officers what I know and in addition to participating in the investigations cited above, I will be required to testify truthfully in one or more of the following: the \_\_\_\_\_ County Grand Jury, the Federal Grand Jury, the Municipal Court, the Superior Court, and the Federal District Court. I agree to give such testimony.
3. I understand that, overriding all else, my most important obligation is to tell the truth and to tell only the truth. At all times, both during the investigation and while testifying in court, I am required to tell only the truth, no matter whether the questions are asked by law enforcement officers, prosecutors, defense attorneys, or judges.
4. I understand that any intentional deviation from the truth voids this agreement. In addition, I understand that if I lie under oath, I can and will be prosecuted for perjury.
5. I understand that should I disobey any law of the United States or the State of \_\_\_\_\_ (except minor traffic offenses), this agreement shall be null and void.
6. No immunity or promises of dismissal have been made to me and no offer or "deal" has been made regarding anything. I understand that I am not entitled to any immunity or promises of dismissal for any charge of perjury, false swearing, contempt, or subornation of perjury arising from actions under this agreement.
7. If I am put in danger because of activities under this agreement, I understand that I am entitled to have the \_\_\_\_\_ (agency name) undertake appropriate steps to protect me.
8. I hereby release and acquit the \_\_\_\_\_ (agency name), their officers, agents, and employees from any injury or liability which I may suffer or sustain in the future as a result of these investigations I am involved in.



9. I agree that any compensation paid me with respect to any services rendered by me in connection with any investigations shall be the full and complete payment for those services. I shall have no other or further claim against the \_\_\_\_\_ (agency name) in connection with such services.

All parties to this agreement acknowledge by their signatures they have read the agreement and understand its terms. That which is set forth above is the complete agreement between \_\_\_\_\_ and the \_\_\_\_\_ (agency name).

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

\_\_\_\_\_  
(SUPERVISOR)

\_\_\_\_\_  
(INFORMANT)

\_\_\_\_\_  
(OFFICER/WITNESS)

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ILJ can be contacted at 1018 Duke Street, Alexandria, Virginia 22314, 703-684-5300.

## ABOUT THE AUTHORS

**Hugh Nugent**, an ILJ Principal Associate, is an attorney who has spent over 30 years practicing law, teaching, consulting, and working in the field of law and criminal justice.

**Frank J. Leahy, Jr.**, is Assistant Director of the Commission on Accreditation for Law Enforcement Agencies. He was formerly finance director of the Chicago Police Department.

**Edward F. Connors**, President of ILJ, has nearly 20 years experience in law enforcement. He is currently the director of the Narcotics Control Technical Assistance Program for BJA.