

Confidential Informants and Information

Concepts and Issues Paper

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I. INTRODUCTION

A. Purpose of Document

This paper was designed to accompany the *Model Policy on Confidential Informants* established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their communities and their law enforcement agencies.

B. Background

Undercover tactics, including the use of confidential informants, are best viewed as a "necessary evil."¹ Confidential informants can provide investigators with specific information that is not available from other sources. At the same time, informants are often criminals. They can render a law enforcement investigation useless, destroy an agency's credibility, and endanger officers' lives if not properly managed.

II. Types of Information Sources

Although the focus of this document is on confidential informants (CIs), law enforcement administrators and investigators should be reminded of the other information sources available to them. In addition to official agency records (offense reports, fingerprint records, criminal history reports, crime analysis reports, and the like), there are many resources that should not be overlooked. While certain precautions should be taken, most of these sources do not involve the same risks, problems, and costs associated with CIs.

A. General Sources

Valuable information may be obtained from other investigators and officers in one's own or nearby law enforcement agency, other criminal justice officials, the department of motor vehicles, utility companies, banks, credit reporting agencies, and many others. Perhaps one of the best general sources of information and intelligence is the beat officer.

B. Citizen Sources

Victims, witnesses, and concerned citizens, including Neighborhood Watch members, comprise this category. Generally, these people are credible, and their information is useful. Citizen sources, however, are not without potential problems. A preexisting relationship with the suspect may damage the source's credibility. It may also give rise to actions and statements motivated by a desire for revenge or retribution.

In addition, citizens who are "frustrated cops" may present problems. Some may imagine themselves unofficial extensions of the law enforcement agency, or they may have vigilante attitudes or motives. While their information cannot be disregarded, caution should be used before it is acted upon. Investigators will need to determine the source's credibility and verify the information provided by testimony from others, from documentation, and from other investigative measures. A distinction must be drawn between anonymous tips from the public and those in which individuals identify themselves or provide information that has "predictive value" that can be authenticated by police officers.

This issue most often comes into play when officers need reasonable suspicion or probable cause to conduct a "stop and frisk" or seek a search or arrest warrant, respectively. Therefore, this issue is addressed in the *Model Policy* and *Concepts and Issues Paper on Arrests* published by the IACP National Law Enforcement Policy Center.

As a general principle, law enforcement agencies should encourage and support citizens reporting potentially useful information in a suspected crime. Further, citizens and citizen groups may be cultivated as information sources by providing them with instructive material on the relative importance of various types of information and the overall need for detail. Recognizing that citizens may place themselves at risk of retribution by providing information, caution and anonymity should be encouraged, and their confidentiality should be closely guarded.

C. Street Sources

In general, these are persons who come into frequent contact with law enforcement officers because of their occupations, activities, or place of residence. They include bar, restaurant, and hotel employees; prostitutes and pimps; newspaper vendors; cab drivers; and employees of late-night establishments, such as gas sta-

tions and convenience stores.

Street sources may accept money for information, but may be more interested in developing relationships with officers that will allow them to function with minimal law enforcement intervention. In addition to yielding information about crime and criminals, these sources may suggest persons who could be used as confidential informants.

Street sources can be valuable, but like confidential informants, they can pose dangers. They might deceive or mislead, entrap, or provide seemingly valuable information that takes many hours to prove or disprove. Their information must be investigated and corroborated.

D. Confidential informants

A confidential informant can be defined as an individual, who, in an arrangement with law enforcement authorities, agrees to serve in a clandestine capacity to gather information for those authorities on suspected criminal activity or known criminal operatives in exchange for compensation or consideration.

Even when CIs are not criminals, their requisite association with criminals demands utmost caution in using and rewarding them. The risks of using CIs should not be minimized, as experience has shown there are numerous risks in their use. To be of value as a CI, a person should have one or more of the following characteristics:

1. Knows, has been associated with, or has intimate knowledge of one or more active criminals.
2. Is associated with, or has intimate knowledge of, persons practicing a crime specialty such as bank robbery, drug sales, or perpetrating crimes in a specific geographic area.
3. Has an occupation or residence that lends itself to gathering information about criminals and their plans to commit crimes.
4. Has status in the criminal justice system, that is, is on pretrial release or bail; probation or parole; convicted pending sentencing; incarcerated; or other status. In many instances, this provides the person with requisite "credentials" showing that he or she can be trusted by persons engaged in criminal activity.
5. In addition, the CI should meet three criteria before performing work for the law enforcement agency. He or she should:
 - Be willing to work under the direction of an investigator and to perform certain lawful acts as directed. (The investigator assigned primary responsibility for the informant is generally referred to as the handler.)
 - Be willing to exchange information for monetary or other lawful consideration.
 - Be a private citizen and not a member of a law enforcement agency.

II. Risks Associated with Informants

Investigators must treat CIs courteously, develop a trust-based relationship, offer encouragement and praise, and make it clear that the agency has high expectations of them. Successfully directing and monitoring CIs also requires that officers never place their full trust or safety in informants' hands. Officers must have an acute awareness of potential problems such as those described below.

A. Lying

CIs may exaggerate or fabricate the criminal acts of targets. Some may report truthfully, but may lie about having used illegal methods to obtain the information. Their motives may range from wanting to receive high marks from officers to fancying themselves as "super sleuths."

B. Double-dealing

CIs can make deals with targets as easily as they can with the police, using both sides to their advantage. They may not be faithful to either side, yet remain trusted by both. CIs might provide criminal associates with information about the identity of undercover agents, including what cars they drive, hours they work, their tactics, and agency procedures. Further, they may be plants who continue their criminal activities and monitor police operations while eliminating competitors. Money may be the motive for addicts, gamblers, and alcoholics to get involved in double-dealing. Other CIs may do so to help cover their informant activities or ingratiate themselves with criminal associates.

C. Rip-offs

The CI is in a position to arrange rip-offs of large flash rolls. They have been known to sell government property used in investigations or to pledge it as collateral for loans. They may sell the same information to two different agencies, causing them to unwittingly conduct simultaneous investigations. A major violator arrested by one agency may sell information to another agency about a relatively minor operation and receive a lenient sentence for doing so.

D. Blackmail

Officers who get too close to informants may begin to sympathize with their problems and bend the rules. Eventually, the CI may obtain incriminating information concerning the officer, who then loses control and, in effect, is directed by the CI.

Developing a good understanding of an individual CI and his or her motivation for becoming a source can greatly help to avoid some of the risks involved in the CI's use. One must ask: what is motivating this individual to become a CI?

III. What Motivates Informants?

It is often said that law enforcement must retain the "upper hand" in dealing with informants, but accomplishing this is not a simple matter of exerting authority. Further, a written agreement, while necessary, may hardly be considered binding by an informant who has strong incentives to see that others—including law enforcement—are exploited.

Understanding what motivates the CI can be the key to retaining control over his or her activities. Before enlisting the services of a CI, the investigator must determine not only who the individual is, but also why he or she wants to become an informant. Further, these perceived motives must be monitored over time. A change of motivation may alert investigators to potential problems in the way the CI is operating or may signal the CI's desire to end the relationship with the agency.

There is considerable agreement among law enforcement professionals on the reasons individuals become informants. Among the most significant motivators are the following:

1. *Money.* One caution here is that when information is scarce, the CI may become "creative" to maintain the

flow of funds.

2. *Revenge, spite, or retaliation.* This can be based on perceived mistreatment by associates, jealousy, and interpersonal conflicts.
3. *Elimination of competition.* This is accomplished through diversion of suspicion.
4. *Fear.* A motivator that may include fear of current or former associates or fear of public safety officials, resulting in the desire for protection from law enforcement.
5. *Self-aggrandizement.* Some CIs seek to enhance their image or sense of self-importance. There will be obvious difficulties in ensuring that such persons keep their identities confidential.
6. *Prosecutorial or judicial leniency.* Serious problems can occur when an investigator makes promises of leniency that the agency is not authorized to keep.
7. *Repentance.* Some agencies choose to avoid persons who seemingly attempt to make amends for past wrongdoing because they doubt their sincerity or perceive them as emotionally unstable.

Finally, it is important that the investigator accept whatever the CI's motivations and either work within that context, or choose not to contract with the individual.

IV. Informant Screening

The law enforcement agency can reduce the risks associated with using CIs by developing sound informant screening and management procedures. The model policy recommends that before an officer may use an informant, the officer must complete an Initial Suitability Report pertaining to the potential CI and submit it to the appropriate investigative authority in the department for review and approval. This report provides a relatively thorough review of the potential CI's risks and benefits to the department.

One of the most significant problems that can confront an officer and his or her supervisor is selection of an unsuitable informant. Close initial screening of potential informants and continued supervision and evaluation can prevent or mitigate inappropriate selection. The model policy suggests the use of both initial and continuing suitability reports as one means to this end.

The initial suitability report should be completed and the individual approved by the departmental authority before he or she is used as an informant. The objective of the initial suitability report is twofold. First, it is designed to develop essential preliminary information on a potential informant to create a profile for the master file. Second, the report is intended to provide answers to certain basic questions that will provide a sufficient basis to intelligently judge an individual's utility and suitability as an informant. Determination of suitability can only be achieved if reporting officers are diligent in providing sufficient information and making informed judgments about the risks and benefits associated with each individual.

Officers may occasionally use street sources without going through this process and may even provide these sources with some nominal compensation or reward for assistance or information. This type of source is normally not a confidential informant in the true sense of the term or in the context of this discussion. It is generally not necessary for officers to complete suitability reports for such street sources unless and until the relationship evolves into a more permanent arrangement of expected information in exchange for compensation or consideration.

When an arrangement is established to use and cultivate a source for a protracted period in return for monetary or other consideration, a confidential informant relationship exists and steps must be taken to determine the individual's long-term suitability for such an arrangement.

The model policy provides a list of potential informational items that should be considered when completing an initial CI suitability report, including the individual's relationship with the target and the potential to gain useful information, probable motivation of the person, his or her prior criminal history, and whether the potential CI or his or her family or relatives would be at risk if the individual were to serve as a CI. Assessments tools such as these can be valuable, but only if officers take them seriously and provide sufficient information to make informed decisions. This is not always the case. Experience has shown that written initial suitability assessments do not consistently address specific risk assessment factors. To be of value, suitability statements must detail the specific benefits of using a confidential source despite identified risk factors. Written comprehensive suitability assessments are not only valuable for screening and management by the initial handler but they can also be of value to other officers who may want to use the informant. The suitability reports are also essential in determining the nature and scope of monitoring that is required of a particular source.

The model policy also recommends that each CI's suitability should be reviewed annually, at a minimum, and that all officer-CI contacts should be documented and included in the CI file. The use of continuing suitability reports and documentation of contacts with CIs help determine whether the risk of using a source has changed since the initial evaluation. Moreover, any information that would negatively affect a CI's suitability during the course of his or her use should be forwarded to the chief of detectives or other designated source for information and appropriate action. Regular review of informant files by supervisory officers and their periodic participation at CI debriefings are valuable checks on the worth of CIs and the manner in which they are being managed by officer-handlers.

In addition to routine suitability assessments of CIs, there are several categories of informants that require special evaluation and approval. These include the following four categories of individuals.

V. Special Informant Categories

A. Juvenile Informants

Juveniles are perhaps the most problematic of informants, requiring a great deal of deliberation prior to their use and supervision if they become CIs. When it becomes necessary to obtain information about activities involving juveniles, the difficulties and dangers involved in informant use are multiplied.

Juvenile gangs or peer groups tend to be difficult for law enforcement to penetrate. Juveniles are not necessarily eager to communicate with adults in general and particularly with law enforcement. Even if they do not fear physical retaliation, they face being ostracized by their peers.

Juveniles who volunteer information or who, during normal interrogation, provide information to the police are not the primary concern. While they may place themselves in precarious or even dangerous situations by providing such information, it is the traditional form of confidential informant that can and has been the most troublesome and controversial.

One option that has been employed in the past is to place young (or young-looking) police officers, often fresh from their basic recruit training, in high schools and other juvenile groups in undercover roles. However, this technique is limited by the small number of suitable officers available, the need for such officers in other duties, and, of course, the difficulty of successfully “planting” a stranger in a segment of society that is difficult to penetrate by outsiders. Therefore, not surprisingly, some officers attempt to recruit informants from among the juvenile population itself.

Juveniles, like adult informants may be of several types. Perhaps most common is a juvenile who has been apprehended for an offense and who offers, or accepts an offer, to act as an informant in exchange for prosecutorial consideration.

The use of a juvenile informant presents several special risks. First and foremost is the physical risk to the juvenile. Any police informant runs some degree of risk of exposure, the exact degree of danger depending upon many factors, such as the type of crime and the experience of the informant. With juvenile informants, such risks may be greatly magnified. A juvenile is often more vulnerable to detection and retaliation than an adult informant. The danger is directly proportional to (1) the seriousness of the criminal activity and (2) the relative youth of the informant. For example, a street-wise 17-year-old recruited to inform about unlawful tobacco use in a high school is probably going to be in less physical danger than a 12-year-old elementary school student sent to inform upon drug dealers. However, even an apparently minor case may involve considerable physical risk to a juvenile informant.

A secondary risk is the possibility that a juvenile informant will compromise an investigation. A juvenile may be less steadfast in motivation, less able to avoid detection, and less able to withstand pressure once suspected by the persons upon whom he or she has been sent to inform. Identification of the informant by the suspects not only poses a severe risk to the safety of the informant, but also ends that informant’s usefulness and can result in the collapse of the entire police investigation.

Finally, there is the risk to the officer and the department from public outcry and even civil liability if the use of the juvenile informant results in his or her injury or death. Unfortunately, there have been a number of instances nationwide in which this precise situation occurred.

Perhaps the best-known case in which a juvenile police informant came to harm involved a 17-year-old named Chad MacDonald. In 1998, police in California arrested MacDonald on drug charges. He agreed to act as an informant for police, wearing a recording device during at least one drug buy and providing police with other information about local drug trafficking. A short time later he was found dead in an alley, apparently tortured and strangled. His girlfriend was found raped and shot to death in a canyon. MacDonald’s death was believed to have been the result of his association with the police as an informant, and the family brought a civil action against the jurisdictions involved. The incident resulted in the passage of California legislation severely limiting the use of juveniles as informants.

Known as “Chad’s Law” the California code prohibits the use of persons twelve years old or younger as informants. It also prohibits the use of persons under the age of 18 unless a court order is obtained, with the exception of their use in enforcement of statutes prohibiting the purchase of alcohol or tobacco by juveniles. The incidence of civil suits and court decisions unfavorable to law enforcement is increasing. In addition, many law enforce-

ment agencies are promulgating departmental policies governing use of juvenile informants.

Considering the significance of these issues, officers have an unavoidable responsibility to make sound judgments. Even well-intentioned officers with zeal to pursue criminal activity may take chances with the well-being of youths that the officer is not fully aware of and that the department might not sanction if so advised. This is often the case when officers strike informal deals with youthful suspects who are looking for a way to avoid prosecution. Such deals may also be a proposition that a parent may feel compelled to accept to protect the youth (and possibly the parents) from the social stigma of an arrest and potential juvenile prosecution. In other cases, some parents or guardians may not be adequately informed to understand the risks inherent in informant operations. Therefore, their authorization to use their child in such capacities cannot always be relied upon by police as the basis for informed consent. Parental permission, even when required by policy, practice, or law, does not always provide police officers with sufficient justification, and should not be used as the sole condition, for using juveniles as informants.

Some police departments have chosen to ban the use of juveniles as informants entirely, while others subject such decisions to more rigid command scrutiny or have no clear policy on this issue. The model policy takes the position that unless an officer is guided by state or federal law, or departmental policy, he or she must be able to clearly define a compelling public interest that will be served before a youth may even be considered for such a role. Furthermore, that justification should be reviewed and an approval obtained by the department’s chief executive or his or her designee. For example, a compelling public interest might be demonstrated in situations where failure to enlist a juvenile as a confidential informant would result or be reasonably likely to result in loss of life; serious injury; or have such serious consequences to persons, property, or public safety as to demand such action.

B. Individuals Obligated by Legal Privilege of Confidentiality

The most common examples of persons in these occupational classes are members of the news media, clergy, attorneys, and medical doctors. However, state laws vary on the classes of occupations afforded privileges of confidentiality. Such privileges may extend in various ways to licensed mental health counselors, clinical social workers, and alcohol and drug abuse counselors, among others. In these and other realms, gray areas may exist. This is particularly the case with regard to various types of pastoral counselors and school guidance counselors.

Additionally, there are a number of federal and state regulations that require physicians, clinicians, and others who are normally afforded confidentiality to report certain acts (for example, child abuse) or the discretion to report certain conditions (for example, reporting a positive HIV test result to a parent or legal guardian). Federal regulations and state laws also govern confidentiality of medical information and mandate disclosure and reporting under certain circumstances. [45 Code of Federal Regulations § 164.512(a-b)]

As such, a decision to accept or solicit information from sources such as these can be a complicated legal matter and inclusion of persons in these classes should be weighed by competent legal authority.

C. Government Officials

This category of individuals includes persons in high-level

and sensitive local, state, and federal governmental positions or their associates who have access to privileged information.

Persons in these types of positions are more likely to come forward with information than to be recruited as confidential informants. They are generally referred to as whistleblowers. Police dealings with these individuals generally require a great deal of caution and inquiry as to the person's background and potential motives. There is a general image of whistleblowers as champions of the common good and protectors of the public interest, driven by self sacrifice or moral indignation. However, whistleblowers are often driven by lesser motives. They may have an axe to grind against one or more people within the government or the governmental entity as a whole. Police agencies and their employees, as part of the same governmental structure, must also be wary of whistleblowers who may simply be using police authority to further political motivations and agendas.

Persons in these positions may also be reaching out to police authorities because of a real or imagined inability to deal with problems internally and see the police (or sometimes the press) as the only alternative. At the same time, the issues that concern them may not rise to the level of criminal offenses. In many cases, they are ethical matters or allegations concerning breaches of administrative or civil law. Matters relating to patronage, cronyism, trading of influence, conflicts of interest, and the like are not within the investigative responsibilities of local law enforcement. Bribery, graft, embezzlement, and kickbacks, while criminal offenses, are normally investigated by state or federal regulatory authorities or by the Federal Bureau of Investigation.

Allegations brought forward by governmental employees should be referred to the local prosecutor and subsequently to the state attorney general through the chief of police for action rather than being investigated by local police agencies.

D. Wards of the Corrections Authority

This includes persons who are in the custody of local or state departments of corrections or under their supervision in the community through probation, parole, supervised release, or other programs. It may also include persons who are current or former participants in the federal witness security program.

Persons serving sentences have been used in many cases to gather information on targeted individuals in local jails and correctional institutions. While their credibility is often questioned in court proceedings, they can, and often do, provide information that can benefit investigations whether or not their testimony is required in open court. The motives of these individuals must always be considered as they invariably offer to serve as confidential sources in return for reduced sentences or similar rewards. As such, their use is dependent on approval of the correctional authority as well as the office of the prosecutor or state's attorney.

VI. Final Determination on Informant Use

When all the available information on a potential CI has been assembled, a determination must be made concerning the costs and benefits of that person's usage. The following are additional issues that should be considered when making this decision.

A. The Criminal Enterprise to be Targeted

- How serious are the crimes involved? Are they misdemeanors or felonies? If felonies, what type?

- Are the crimes or those participating in them violent or likely to become violent? Clearly, certain types of crimes, and certain types of perpetrators, pose a greater threat to an informant.
- To what extent does the criminal enterprise pose a threat to the community? Certain criminal enterprises have been in existence throughout history and, although they must be combated, temporary interference may not justify risking an informant's life.
- How urgent is the specific case? Is the particular criminal enterprise against which action is being considered one that must be terminated immediately (for example, a proposed imminent terrorist attack)? Or is it one that can be allowed to continue for a time in order to develop further leads as to perpetrators and related enterprises without endangering the safety of the community, (for example, a petty theft ring)?
- What is the likelihood of death or injury to citizens, police, or others if information about the criminal enterprise is not obtained quickly?
- Perhaps the most important inquiry about the criminal enterprise in question is this: Is the enterprise of such a nature that it may be combated by means other than the use of informants? Some types of criminal activity can only be thwarted through information obtained from the inside, but other situations may lend themselves to the use of other methods, for example, external electronic surveillance. Thus, the degree of necessity of the use of informants should be a major consideration in the decision as to whether or not informants should be used.

B. The Risk to the Informant

- What are the extent, imminence, and severity of the risk to the informant if his or her undercover role is discovered? Would discovery result in serious injury or death, or have some lesser result? For example, would discovery merely cause the informant to be excluded from further participation in the activity? Or would the informant be subject to physical abuse, including possible torture and murder?
- What is the informant being asked to do? For example, is the informant only being asked to observe passively and report, or is the informant being asked to take an active role, for example, wearing a recording device or transmitter? The more active the role, the greater the threat of discovery and its related consequences.
- What safeguards are in place to prevent the informant's role from being discovered? Is knowledge of the operation and of the informant's identity properly restricted in the department to those with a need and a right to know? If there are written records of the informant's identity, are these properly restricted from unnecessary access or circulation? Are statements to the media properly circumscribed to avoid revelation of the possibility that information has been or will be received from the inside?
- Have secure methods of communication with the informant been established? One of the most common causes of discovery by criminals is observation of contact between an informant and police.
- If the informant is to be left inside after providing infor-

mation, is the information that was provided being protected from revelation to unnecessary persons? Further, if action is taken based upon that information, is there a plausible alternative basis for that action that will conceal from the criminals the fact that there has been a leak?

- Will police be able to extract the informant from danger in the event of discovery? Do the police have the capability to determine that the informant is suspected or discovered? If so, what plans are in place to extract the informant before being harmed?

C. The Nature of the Informant

One of the most critical issues in determining whether or not to use an informant is the type and nature of the informant to be used. For example:

- How old is the informant? The younger the informant, the greater his or her vulnerability, the greater the risk of failure, and, sadly, the greater the culpability of the police if the informant comes to harm.
- Regardless of age, is the informant mature and intelligent enough to understand the risks involved? No informant should be sent into harm's way without a full understanding of the dangers associated with the mission.
- What is the informant's level of experience and ability, that is, is this informant sufficiently acquainted with the criminal enterprise and those engaging in it to deal with contingencies that may arise while cooperating with police? For example, will this informant be able to conceal his or her actual status from criminal associates? Will he or she be quick-witted enough to deflect suspicion if it arises? And, in a worst-case scenario, will the informant be able to resist physical duress until he or she can be extracted from danger?
- Is the informant offering services to the police voluntarily, or is the informant under some form of compulsion? As noted earlier, some individuals volunteer information, and even offer to act as informants on a continuing basis. Others act as informants in the hope of avoiding prosecution or reducing punishment. Police must judge not only the type but also the level of motivation of the informant. A weakly motivated informant is highly vulnerable, with possibly catastrophic consequences both to the informant and to the investigation.

D. Consent

- In the case of juveniles, are parents or guardians aware of the proposed activity, and do they consent to it? Some parents will not consent, and such a refusal may require termination of any consideration of the use of that juvenile. Police should note that, even where parents have consented, if the juvenile is harmed, the parents may later claim that they did not understand the full implications of the consent. This contention is virtually universal in instances where a lawsuit is filed.
- Does the informant consent to undertake the risks? There are two issues of great importance here: (1) have the risks been adequately described, and (2) is the informant mature and intelligent enough to understand the risks described?
- Have these consents been documented? Officers may be

reluctant to seek written consent, fearing a refusal or hesitancy to create a paper trail that may have later adverse results. However, an undocumented consent is open to later denial, with subsequent repercussions in the event of a civil suit.

E. Value of the Operation if Successful

- What will be the gain to the community if the informant's efforts are successful? How important is it to society that the criminal activity be thwarted?
- Will the benefits justify the risks taken by the informant and the possibility of harm or death? Departments should consider very carefully the moral implications of their decision when making their risk-benefit analysis of the situation.

F. Consequences of Failure

What will be the consequences of failure of the operation to the informant? To the department? If the use of an informant results in death or injury, the department will at the very least become the focus of widespread media and community criticism, and civil action is likely. Further, not only this operation but other, future operations may be compromised.

G. Balance of Risks and Benefits

Is the degree of risk worth the potential benefit? This question must be carefully considered, and the answer weighed with cool professional judgment. Anyone who sends an informant into danger bears a heavy burden of responsibility. Therefore, no effort must be spared to create and enforce policies that provide an acceptable balance between the needs and risks involved.

VI. Managing the Informant

Informant management is discussed throughout this document with respect to completion of suitability reports, informant vetting, establishment of confidential informant files, and supervisory oversight. In addition, there are several principles of handling informants and directing their activities that should be mentioned as they are common problem areas in dealing with informants.

With the priority status currently given to drug-related crimes, the use of confidential informants will continue to be an important investigative resource. If the practice is accepted as a necessary evil, then it is incumbent on law enforcement agencies to institute the necessary controls, protect and support its investigators, and understand the legal limitations involved in using informants. Even these generally accepted rules can be problematic in terms of implementation. For example, when using informants in drug investigations, it is often very difficult for police to completely prohibit all levels of criminal involvement by informants. The informant agreement provided in the model policy explicitly states that unlawful behavior perpetrated by confidential sources is prohibited. The willingness of police and prosecutors to turn a blind eye to certain forms or levels of criminality in order to gain criminal intelligence from informants or use them in controlled buys or other capacities is an issue that has been widely debated. It is an issue that all law enforcement agencies must address directly if they are to employ informants in drug or other investigations.

Prosecutors face analogous situations when determining whether the costs of mitigating sentences for offenders is worth

the benefits of information they are willing to provide towards the arrest and prosecution of other criminal offenders. The difference is that prosecutor's have the legal authority to make such decisions while law enforcement does not.

A. Who "Owns" the Informant?

Investigators may be reluctant to establish or to fully update department files on informants they use. They may fear that potential informants will not participate if they know records of their activities will be on file. They may not believe departmental security procedures will be effective in protecting informants' identities and may fear that incompetent or corrupt law enforcement personnel will gain access to their informants' names.² Another concern is that a supervisor or another investigator will destroy a trust relationship built with a considerable investment of effort and time.

The IACP model policy, however, is based on the view that the department, rather than the individual investigator, must ultimately control use of informants. CIs are assets of the police agency, not the individual police handler. As the discussions on CI characteristics and motives suggest, CIs present significant risks to the integrity of investigations and to officer safety. The department as a whole has an interest in seeing that important CI information is available to all personnel with a need and right to know. The agency is also responsible for ensuring that buy money is used appropriately and accounted for properly.³

B. Fishing Expeditions

CIs should not normally be used to gather information on persons without a reasonable basis to believe that the person is involved in criminal activity. Investigations that are not based on reasonable suspicion are a poor use of confidential informants who should be used in targeted criminality. They are also largely unfocused, give CIs undue discretion, and can promote an entrepreneurial cop-like self-image among informants and informant freelancing that may result in creating rather than preventing crime or arresting perpetrators.

C. Political Information

The emphasis in the use of CIs must be on criminal investigations. Attempts to gather information on individuals for purely partisan reasons are unacceptable. These actions are specifically prohibited in the model policy due to significant historical precedent. Dossiers have been kept on important people in the political arena or others deemed "enemies" by federal, state, and local politicians through the investigative and intelligence resources of police agencies. Such activities were perhaps most common during the upheaval of the 1960s and 1970s, when leaders and participants of reform and political activists' movements were the targets of investigations intended to discredit them and their causes, often through leaks to the press, intimidation, and other means. While these types of activities are far less common today, periods of heightened domestic and political unrest, either nationally or locally, can create the same type of pressure-filled environment as they have in the past.

D. Defining and Maintaining Proper CI-Handler Roles

A common concern in dealings with CIs in general and the handler in particular is maintenance of professional distance between the CI and the officer. When dealing with a CI on a routine basis it is not uncommon for either one or both to develop informal, personal relationships. The CI may begin to identify too

closely with the public safety role of the officer and come to view him- or herself as an authority figure. The officer may also become too familiar with and involved in an informant's personal life.

The model policy recognizes that the cooperative agreement between police and informants can sometime blur the line of authority between handlers and CIs who are working toward a common objective or in a shared mission. Increased informality can breed casualness and a relaxation of the formal bounds that must exist between the police and the CI. In this environment, an informal social relationship may be established in which officers feel comfortable in conveying information that goes beyond that which is necessary for the job at hand. CIs might use such information to compromise their handler or other officers.

As such, the model policy admonishes officers to not reveal confidential or sensitive information about police operations, plans, or activities unless it is absolutely necessary for the operational purposes of the informant. In order to maintain defined roles, officers are also cautioned not to establish social relationships or become personally involved with a CI beyond that which is required in the performance of duty. Finally, when meeting with informants, officers should be required to do so with another officer present whenever it is reasonably possible.

There is another side to this issue as well. Police departments have an overriding interest in the mental health and safety of their investigators. An alert, well-trained supervisor may recognize problems with a CI's behavior that the investigator does not. The supervisor may determine that an investigator is identifying too closely with the CI or a criminal lifestyle or is under excessive stress because of an association with a CI. The potential for corruption is inherent in any law enforcement activity conducted in secret and the risks associated with uncontrolled officer-CI relationships have repeatedly proven to be dangerous. The department must also protect itself against the possibility that officers may explain corrupt activities by claiming their criminal associates were informants.

Supervision of handlers and proper reporting of all contacts with CIs are essential in each of the foregoing contexts. The exigencies of police work often set the stage for officers to make informal deals with offenders or suspects in order to gain rapid access to information that they feel is crucial to an investigation. Officers may not want to complete the more lengthy process of gaining approval for such actions that might result in the loss of the opportunity immediately presented. Such police relationships are commonplace. But such informal relationships, if maintained for protracted periods, carry risks for officers and their department if not ultimately reported to and vetted by a supervisor.

VII. Legal Use of Informant Information

It is essential that law enforcement officers understand how the concept of probable cause may be developed for lawful arrests and searches involving the use of CIs. While hearsay is admissible to establish probable cause, the legal determination of probable cause requires detailed knowledge of the objective information and the source of the information.

In *Aguilar v. Texas*, 378 U.S. 108 (1964), the U.S. Supreme Court created a two-part test for establishing reliability in a case where information received from a confidential informant was the basis for probable cause for a warrant. This required (1) establishing the credibility of the informant and (2) establishing the reliability

of the informant's information. The informant's credibility might be evidenced by his track record of providing information that led to a certain number of arrests and convictions. For a CI with no track record, credibility might be established by the CI's having admitted to a crime. Establishing the reliability of the CI's information could be accomplished by stating the CI had direct knowledge of the facts.

Later, *Illinois v. Gates*, 462 U.S. 213 (1983), which expressly overruled the *Aguilar* test, established the "totality of the circumstances" test to determine whether probable cause exists. In this case, an anonymous letter was considered adequate to establish probable cause. The letter contained no information that established the CI's credibility; rather, credibility was inferred from the level of detail the letter provided. *Gates* eliminated the requirement that both parts of the *Aguilar* test—reliability and basis of knowledge—be met for an affidavit based on a CI's hearsay. Currently, while a clear demonstration of the CI's reliability will reduce the need to show the CI's basis of knowledge, a detailed basis of knowledge might conversely obviate the need to demonstrate past reliability. Thus, under *Gates*, courts will look to the strength of corroboration to satisfy probable cause in the absence of a showing of the CI's veracity or basis of knowledge.

In the vast majority of cases that involve CIs, every effort is made to keep them out of the courtroom. However, when the CI must appear as a witness, the handler, that is, the CI's primary law enforcement contact, will need to ensure the CI is well prepared. Accurate department records are essential in preparing the CI for intense questioning in court. Questions must be anticipated about the CI's background, details of the CI's relationship with the defendant, specifics about the department's relationship and transactions with the CI, and, in drug cases, a host of additional questions regarding drug transactions and their documentation.

Law enforcement officers and prosecutors adamantly object to disclosure of the CI's identity at trial, but this position is not always upheld. Disclosure will depend on the circumstances of each case. The courts will attempt to strike a balance between the need to protect both the CI and the law enforcement agency's need for informants and the defendant's Sixth Amendment right to confront witnesses. When the court determines the CI's identity is essential to a finding of probable cause, his or her identity must be disclosed or the evidence suppressed. When ordered to produce a CI in a hearing or trial for questioning by defense counsel, the law enforcement agency and prosecutor's office must weigh the ramifications of disclosure of the CI's identity against the damage of terminating the charges and case. The following are some of the circumstances in which a court may rule that a CI's identity be disclosed:

- The sole government participation in the offense was that of the CI.
- The CI witnessed a drug transaction or participated in negotiations related to the transaction.
- The CI was an active participant in events leading up to the offense.

Law enforcement agencies should consider using CIs in ways that will not call for court disclosure of identity. In drug cases, for example, these include the following:

- Using the CI only for introductions and having the undercover officer develop the relationship with the target and execute the transaction.
- If the CI must be present, instructing the CI to leave as soon as possible after negotiations or transactions begin.

- Making the CI's testimony cumulative. If the target can be persuaded to bring a friend, the CI's testimony might be cumulative to what others present would say, and his or her identity may not need to be revealed.
- Prohibiting CI involvement in the planning functions of an operation beyond providing information.

In determining the usefulness of a CI's testimony to the defense, some jurisdictions conduct in-camera hearings, where the trial judge questions the CI in private about the nature of the CI's possible testimony.

In general, officers need not reveal a CI's identity on applications for arrest or search warrants, particularly when the "totality of the circumstances" attests to the presence of probable cause. Short of that, the judicial authority should be petitioned to seal the document from public record. Where documents, such as arrest reports are available to the public, they should scrupulously avoid providing details of a CI's involvement in the arrest. However, in this and all other legal matters, the agency should consult counsel well versed in applicable federal and state law.

As another means of protecting confidential sources, it should be impressed upon officers that upon leaving employment with the department, they have an obligation to maintain the confidentiality of CIs.

VIII. Pitfalls in Using CIs

There are essentially three types of pitfalls that can negate the possible benefits of using confidential informants. The first type concerns an agency's readiness to use CIs to full advantage. The second concerns the supervisor's readiness to direct, control, and evaluate CI-related activities. The third type concerns the investigator and whether he or she is prepared to assume the responsibilities of control officer.

A. Agency Pitfalls

After an agency decides to use CIs, the agency can fall into five major traps. The first is a failure to issue written directives that set forth policies and procedures. Agencies can avoid this pitfall by developing sound informant-control procedures based on those set forth in the model policy.

The second pitfall is a failure to define roles and responsibilities of all persons in the chain of command, from the chief executive officer (CEO) to the investigator. The model policy addresses the need for clearly defined roles in several key areas:⁴

- Access to informant files shall be restricted to the CEO, the commander of criminal investigations, or their designees.
- The commander of criminal investigations should be responsible for developing and maintaining master informant files and an indexing system.
- The commander of criminal investigations should approve all requests from sworn personnel to review an individual's informant file.
- An authorized supervisor must approve any officer's use of a CI.
- Whenever possible, an officer shall be accompanied by another officer when meeting with a CI.

Some investigators can be expected to disagree with the last item requiring accompaniment to CI meetings. Ideally, the officer who recruited the informant should be the designated control officer and should be responsible for directing and monitoring the CI. Whether that officer should work with the CI alone, or

should do so as part of a two-officer team, has been a subject of debate.

Those who favor the one-officer approach cite these advantages: CIs who are particularly sensitive about confidentiality may be more likely to cooperate; the potential for personality conflicts is reduced; and more information or cooperation may be forthcoming. The model policy, while it acknowledges that exceptions may be necessary, reflects the more significant advantages of the two-officer approach: a more objective relationship with the CI can be maintained; setups are more easily avoided; and a better assessment of CI performance results. Two-officer meetings are essential when the CI and control officer are of the opposite sex, when the CI is a juvenile, and when the CI presents other exceptional risks (for example, is suspected of trying to set up the control officer; is emotionally unstable; is a substance abuser; is on probation or parole; or has a reputation for perjury, bribery, or related offenses). Agencies that permit an officer to meet with a CI alone should require a contact report immediately following each meeting.

The third agency pitfall is a failure to orient and train its personnel in techniques for working with CIs. The model policy does not specifically address the issue of personnel training for managing CIs, but it should be considered implicit in the document's general policy statement.

Too frequently, officers pay insufficient attention to giving CIs a good cover, use risky procedures to communicate with them, fail to evaluate whether the CI can do what is asked, and fail to take security and confidentiality measures that help ensure the long-term value of the CI. Investigators do not come with an innate ability to manage informants effectively without training. Failure to provide officer training may jeopardize investigative efforts and officer safety, as well as negate the time, effort, and resources invested in developing the CI. Training should include a thorough briefing on agency policies, procedures, and required documentation and explicit instruction on recruiting CIs, directing and monitoring CI activities, interviewing and debriefing informants, preparing informants for court, evaluating CI performance, and other relevant topics.⁵

The fourth and fifth agency pitfalls are failures to orient and train CIs in what is expected of them (including an explicit set of "dos and don'ts") and failure to execute a written agreement. These pitfalls are addressed in the model policy, which includes a sample informant agreement. The investigator should thoroughly review each provision of the agreement with the CI, placing particular emphasis on the following points:

- Informants have no law enforcement powers and are not permitted to carry weapons while performing activities as informants.
- Informants will be arrested if found engaging in any illegal activity and will receive no special legal considerations.
- Informants will not take, and the department will not condone, any actions that may be considered entrapment.

There are obvious risks to the agency's credibility, officer safety, the integrity of individual cases, and liability concerns when CIs misrepresent themselves as officers or commit crimes. The first point, that CIs are not law enforcement employees, should be reinforced by several specific items in the informant agreement. For example, in the sample agreement accompanying the model policy, the CI affirms his or her status as an independent contractor and acknowledges that as such he or she is not entitled

to Workers' or Unemployment Compensation. The agreement also prohibits the CI from using the agency as an employment or credit reference without prior approval.

Entrapment is a frequently used defense in drug cases. Entrapment occurs when the government plans the offense and induces someone to commit it—someone who would not have otherwise done so except for the government's persuasion, fraud, or trickery. If a CI entraps or appears to entrap a defendant, the court may throw out all or part of the case. Further, to prove that entrapment did not occur, the CI may have to testify, thereby revealing his or her identity.

Certain illegal actions on the part of an informant may raise the defense of "outrageous conduct," which is related to entrapment. The defense may assert that the government's conduct was so outrageous or shocking to fundamental fairness that due process would bar a conviction. For example, the CI may become over-involved in the criminal activity of the target. In one case, a CI persuaded the defendant to purchase her narcotics by using sexual intimacy. The model policy and sample informant agreement list the main items that should be covered in informant agreements. Of course, additional requirements can be added to meet the special needs of a particular investigation or informant. In addition, a more explicit list of "dos and don'ts" should be prepared and reviewed with the CI, and can be incorporated by reference in the agreement. Finally, training for CIs should address the CI's specific objectives, compensation procedures, communication with and reports to the control officer, cover stories, security, legal constraints, and other topics.

B. Supervisory Pitfalls

Pitfalls in four main areas could cause problems for supervisors. These include

1. Poor selection of an informant or poor selection of an informant to work with a given investigator;
2. Failure to provide adequate direction and control regarding investigator-CI interactions;
3. Failure to take reasonable precautions in cases involving "special CIs"; or
4. Failure to periodically evaluate activities and results.

Avoiding the first two pitfalls on informant selection and control entails (1) ensuring that supervisors receive the training needed to execute their responsibilities effectively and (2) establishing procedures that require a supervisor to provide initial approval before an officer uses an individual as a CI.

"Special CIs" include those of the opposite sex of the investigator, juveniles, and CIs who are in or out of custody pending a prosecutorial or judicial outcome. Precautions regarding opposite-sex CIs are implicit in the model policy's prohibitions against knowingly maintaining social relationships or becoming personally involved with CIs. Similarly, a series of special permissions will be required before probationers and parolees can be used. Some states prohibit use of these individuals as CIs. (For additional discussion on this topic, please refer to section V. A. above.) Supervisors should be trained in these requirements and should be responsible for ensuring that their investigators are compliant.

The fourth pitfall for supervisors concerns a failure to periodically evaluate activities and results. The model policy recommends, at a minimum, annual reevaluations of CI performance and suitability. Other reporting requirements should be established by individual agencies, such as weekly supervisor/investigator briefings, quarterly reports, or semiannual inspections. Departments should ensure that their existing reporting require-

ments and inspection policies are adequate to cover the sensitive area of managing CIs, and that adjustments are made as necessary.⁶

B. Investigator Pitfalls

In general, pitfalls for investigators tend to fall into five categories:

1. Failure to maintain a professional relationship with the CI.
2. Gullibility, failure to fully question the CI about his or her activities and not seeking corroboration from other sources.
3. Making promises that the agency cannot keep regarding large money payments or favorable prosecutorial or judicial outcomes.
4. Lack of sufficient attention to handling money and property, especially controlled substances.
5. Failure to adequately document CI activities.

Problems in the first three areas were discussed earlier and underscore the critical need for professional training and sound, written informant control procedures. The fourth area is addressed in separate model policies on managing confidential funds and on evidence processing. The management of informant funds is an issue of particular importance that is addressed in detail in the *IACP Model Policy on Confidential Funds*. To address the fifth area—documenting CI activities—the model policy on confidential informants includes considerable detail on establishing an informant file system, as discussed below.

IX. CI Information and Its Management

The model policy summarizes the four uses for an informant file system.

1. Provides a source of background information about the informant.
2. Provides a complete history of the information received from the informant.
3. Enables review and evaluation by the appropriate supervisor of information given by the informant.
4. Minimizes incidents that could be used to question the integrity of investigators or the reliability of the CI.

A. Key Elements of an Informant File System

Master informant files should be established—one on confidential informants and one on unreliable informants—and an indexing system should be developed and maintained. These files should be established under the direction of the commander of criminal investigations. Within the master files, a separate folder should be maintained on each CI used by officers. Each of these individual files should be coded with an assigned informant control number.

Essentially, the master files on confidential informants are the operational or “working files.” Included in each CI’s file are the signed informant agreement, briefs of information provided, and indications of the information’s reliability. These individual files also contain the informant’s name and other identifiers (for example, fingerprints, photograph, criminal history record). The CI’s status as active or inactive should be clearly indicated. If a CI is determined unreliable, that CI’s folder should be placed in the master file on unreliable informants. For the indexing system, a summary should be prepared to correspond to each CI file. These summaries are coded with the informant’s control number, but

do not include the informant’s name or photograph. They do include details about the CI’s appearance, age, marital status, special skills, current place of employment and residence, and other details.

Before a potential CI is approached, the supervisor should provide authorization, which should entail a determination that the candidate is not working for another investigator and has not been deemed unreliable. A CI file should be opened only after the officer has conducted a background investigation and an authorized supervisor has approved the CI.

B. Using Unreliable Informants

Some CIs may be extremely reliable (for example, they always follow procedures, keep appointments, handle money responsibly), but seldom produce information that is relevant or sufficiently accurate. Others may be considered unreliable (for example, they endanger an officer or engage in criminal activity), but deliver consistently accurate information or have unusual access to an important target. Thus, in certain exceptional situations, it may be productive to use a CI who has been deemed unreliable. The decision to use an unreliable CI should be made only by the CEO or designee after determining that the potential outcome is worth the extraordinary risks involved.

C. Securing CI files

Tight security of CI files is imperative for officer and CI safety and to ensure the integrity of the entire informant management system. As stated in the model policy, CI files should be maintained in a secured area within the criminal investigations section. Access should be restricted to the CEO, commander of criminal investigations, or their designees. A written request from other sworn personnel should be approved by the commander of criminal investigations before access to an individual informant’s file is permitted. Of course, informant files should be closed to the public. Other precautions may include the following:

- Keeping the files in locked cabinets segregated from any other files and under the control of a supervisor.
- Requiring that all files removed from the storage area be viewed in the same location and be returned as soon as possible
- Screening requests for access to CI files based on a need to know.
- Requiring that records are kept of all access to CI files
- Auditing the files (for example, semi-annually) to ensure they are maintained properly and that security procedures are being followed.

X. Conclusion

One expert on managing informants has observed that “all the intelligence analysis in the world cannot overcome the value of a highly placed informant,” and that the informant is the “bread and butter of the ‘working cop.’” At the same time, he notes that “once having dealt with an informant, most law enforcement officers do not want to put themselves through that punishment again ... they will get you into trouble if you are not watching.” The nature of this trouble may include officer corruption; agency liability; mental and physical harm to officers, including death; loss of agency credibility; unfavorable court decisions; and wasted time, effort, and money. CIs should not be used unless (1) all other information sources have been thoroughly explored and found lacking; (2) the potential gains clearly outweigh the certain

risks involved; and (3) the agency has developed and is committed to following sound, written policies and procedures to govern their use and control.

Endnotes

¹Gary T. Marx, *Undercover: Police Surveillance in America*, The Twentieth Century Fund, University of California Press, 1988, p. xix.

²Brown, P. 252.

³This issue is addressed in a separate *IACP Model Policy on Managing Confidential Funds*.

⁴Depending on their size and needs, some departments may wish to include more extensive designations of roles and responsibilities within their written procedures; or they may find it beneficial to develop a detailed roles and responsibilities matrix. For more information, see U. S. Department of Justice, Bureau of Justice Assistance, *Managing Confidential Informants*, by Hugh Nugent; Frank J. Leahy Jr; and Edward F. Connors, for the Institute for Law and Justice (1991).

⁵See *Managing Confidential Informants*, Institute for Law and Justice, 1991, for a complete discussion of training topics and a model training curriculum.

⁶See, for example, *Managing Confidential Informants*.

⁷"The Organized Crime Informant," a speech by Frederick T. Martens, pp. 1, 2, and 23.

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Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

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