

**THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

**GUIDELINES FOR ESTABLISHING AGENCY POLICY ON
MANAGEMENT OF CONFIDENTIAL SOURCES
OF CRIMINAL INFORMATION**

A Policy Research Project
Submitted in Partial Fulfillment
of the Requirements for the Professional Designation
Graduate, Management Institute

by
Lt. Robert W. Duvall

TEXAS DEPARTMENT OF PUBLIC SAFETY
NARCOTICS SERVICE
Texarkana, Texas
December, 1997

592

TABLE OF CONTENTS

Section	Page
Abstract	
Introduction	1
Historical, Legal or Theoretical Context	2
Review of Literature or Practice	4
Discussion of Relevant Issues	6
Conclusions/Recommendations	12
Bibliography	14

ABSTRACT

Today's law enforcement organizations and their methods of criminal investigation are under a great deal of scrutiny from the courts, the media, and society as a whole. Because of this, and additionally because of the higher level of professionalism in law enforcement, increased demands are placed on the depth and thoroughness in criminal investigations, especially drug investigations. In response to this closer scrutiny criminal law enforcement units today must have a comprehensive set of guidelines for the recruitment, development and management of confidential sources of information. Conversely, an officer or agency that allows the improper use of confidential informants may well have an adverse effect on the outcome of an investigation, and on law enforcement as a whole. Inexperienced or ill-informed officers using confidential informants sometimes unknowingly and unintentionally find themselves in a situation that could compromise investigative goals and the law. The best way to guard against this improper use is for the criminal investigator to have a good understanding of the law as it applies to informant usage and for the agency to have intact a clear set of guidelines by which to govern informant usage. And again, generally speaking, higher demands are placed on criminal investigation units by court decisions concerning informant usage. This alone should suggest a heightened level of forethought about informant usage when it comes to building an informant management policy.

There are a number of elements that should be considered when developing guidelines for managing informants. Policy makers must take into account that scenarios and investigative goals can change and compound with informant usage. This is especially true in drug investigations. Because of this, guidelines should, as much as possible, allow

for flexibility and spontaneity on the part of the investigator and the agency utilizing the informant but, at the same time, not allow the loss of control over the informant and the investigation. Additionally, drug investigations, though appearing to be simple in the beginning can rapidly become complex and resource demanding investigations. The drug unit that has a clear, understandable, yet flexible, informant management policy established will give the knowledgeable investigator a tool which allows the agency to bring an investigation to its optimum potential.

Introduction

Currently, most of today's major law enforcement agencies have an established written policy which govern the development and utilization of confidential sources of information by their investigators. This is to suggest that, while these existing policies have probably worked well to serve as a guide to managing informants in the past, there may be a need for law enforcement policy makers to evaluate their current policies. Upon evaluation, policy makers may find that their guidelines concerning management of confidential informants and the verification of informant information may need to be reexamined and written to better conform with the advance in today's investigative methods.

In light of investigative trends, especially in drug enforcement, and in respect to court decisions, agency guidelines on managing informants must strive to safeguard a high degree of conformance, control, and accountability in the use of those informants by the agency and its investigators. Managers can do much to insure this conformance and integrity in the system by working to develop a comprehensive set of guidelines.

The purpose of this project is to present research and collective measures and then provide this information to law enforcement policy makers for consideration as they construct policy concerning the management of confidential informants. Those measures should encompass addressing the pitfalls of informant handling, the assessment of the validity of informant information, classification or categorization of sources of information and checks and balances to insure accountability in maintaining expenses associated with managing confidential sources of information. There are, perhaps, innumerable situations and scenarios that can possibly arise out of handling informants, especially in complex

drug investigations. These informants and situations usually require many controls. The comprehensive policy on informant management helps the department to set an essential standard of importance for the correct use of informant handling by investigators. This project will suggest guidelines that are applicable and, to some extent, comprehensive in their approach.

Historical, Legal and Theoretical Context

Black's Law Dictionary defines an informant as, "A person who informs or prefers an accusation on another". In the law enforcement context, the definition could be more broadly defined. The use of the confidential informant is an indispensable resource in criminal law enforcement. Management of informants has always been shaped by two broad determining factors; 1) the demand of the investigation and, 2) statutory law and the courts. Drug investigations, in particular, lend much experience in managing informants. Informants in the drug enforcement environment get into many situations that require the use of preempted boundaries, most of which should be already established in policy. These established guidelines not only set out rules governing informant handling but may also serve to establish a playing field by which the experienced investigator may use to maintain control of the investigation.

Many court decisions over the past 40 years have dealt with managing informants and entrapment, but there are a few primary decisions which policy makers and investigators alike should be aware of when building policy. For example, some court decisions for evaluation should include: *Roviaro v. U.S.*, *McCray v. Illinois*, *U.S. v.*

Twigg, Hoffa v. U.S., Aguilar v. Texas, Beck v. Ohio, Florida v. Glosson, James v. Texas, Enriques v. Texas, U.S. v. Henthorn, Spinelli v. U.S. and Illinois v. Gates.

From as far back as 1957, in Roviato v. U.S., and then 10 years later in McCray v. Illinois (1967), the Supreme Court dealt with identifying informants as witnesses in court. In 1973 in James v. Texas and again in Enriques v. Texas the Court of Criminal Appeals of Texas dealt more definitively with the use of informants and their testimony as material witnesses, even when police can testify to all of the required elements in a criminal case. In the case of Hoffa v. U.S., the court dealt with determining the veracity of an informant's testimony. In 1978, Twigg v. U.S., the Supreme Court heavily scrutinized the overreaching involvement in a crime (manufacturing of methamphetamine) by the police and their utilization of an informant (1983 Illinois v. Gates). In Florida v. Glosson (1985), though not effecting Texas, held that an agreement to pay an informant a contingent fee conditional on his cooperation and testimony in criminal presentations violated constitutional due process.

In Spinelli v. U.S., the Supreme Court overturned a conviction for racketeering, but the technique for corroboration of informant information was established. Under this concept the court suggested that facts, when combined in sufficient number, could establish probable cause. Thus, a traditional investigative technique such as surveillance, coupled with informant information, could be of value in obtaining warrants. In 1983, Illinois v. Gates had a profound impact on the use of informants when the court ruled that the standard to be used in determining probable cause exists in the totality of circumstances. In U.S. v. Cuellar (1997), the U.S. Court of Appeals for the Ninth Circuit ruled that a defendant's due process rights were not violated by the contingency aspects

of the informer's fee arrangements. The court said that the government is not precluded from using informants before or during a trial simply because an informant may have a motive to falsify testimony to entrap innocent persons. That court referred back to *Hoffa v. U.S.* to deal with determining veracity in informant testimony.

These past court cases have sent clear signals that peace officers have to face the possibility that informants may have to be identified and/or testify in cases they assist in. Informant management guidelines must make it clear that the informant is warned of the possibility of having to testify. These court decisions show that the court, as it has in the past, will closely scrutinize police controls and supervision of informants, the depth of police involvement in a crime by informants, and the benefits gained by the informant.

Review of Literature or Practice

Research is showing trends that law enforcement agencies are looking more and more to informant utilization where the opportunities arise in criminal investigations. A report written by Dr. Michael F. Brown states, "...an interest in the use of informants has emerged, for example, one of the major conclusions from one recent extensive study of investigations suggested a need for both patrol and investigators to make greater use of informants (Eck, 1983). Considering the renewed interest in informants...." Additionally, with increased agency use of informants there must be a heightened awareness by law enforcement policy makers concerning 4th amendment issues and investigators that supervise informants must have a good working understanding of 4th amendment issues. Brown goes on to state, "The concept of probable cause is at the heart of American law

enforcement. It is essential that all law enforcement officers understand what it is and, of equal importance, they must understand how it may be developed for lawful arrests or searches. A particular importance is *the hearsay method* for establishing probable cause, because this is the method most commonly used by officers.” Again, these 4th Amendment rules must be in the policy makers' frame work when sitting down to work out an effective policy on informant management.

Criminal investigations today, in many respects, are more demanding and complex. They require in depth and thorough investigative efforts that are to be well documented. An informant management policy should have the flexibility to allow for the changing circumstances of a complex investigation and at the same time carry a strong degree of control and accountability. Authorities in the field, are also suggesting that policy writers take a heightened alertness for unethical behavior that potentially develops from working informants. James Gilbert, in his research comments, “Possibly no other specific area of criminal investigation has the greater potential and proven record of unethical police behavior than the drug investigation.” Though many agencies rely heavily on their particular code or cannon of ethics the informant handling guidelines should also contain ethical perimeters. The Texas Department of Public Safety Narcotics Service has some of this language in it's Criminal Law Enforcement Manual stating, “Many times cooperating individuals concoct elaborate plots to trap an officer who has, for some reason, incurred their displeasure. . . .Narcotics Service employees will not knowingly permit any illegal act by cooperating individuals. . . .It is the policy of this service that the relationships between personnel and cooperating individuals be of a completely ethical and professional nature.

Social contact will be strictly avoidedAny off-duty fraternizing with a cooperating individual or friends of a cooperating individualare forbidden.”

The civil and vicarious liability climate in today's society also flags as an additional mandate for policy makers to implement a comprehensive informant management policy. One authority, Robert J. Grant, suggests that today's law enforcement agencies must have in effect policies which addresses what we do as a specialty. It is imperative, regardless of rank on an assignment, that there must be an awareness of the impact of civil liability *especially where policy should address* especially in the specialized functions of law enforcement. According to Grant, law enforcement managers and supervisors have to exercise a higher level of discernment and involvement with the line function. This discerning management extends itself in the written policy of an agency. Grant believes this is especially true for narcotics units and suggested that the trends in serious vicarious liability suits are coming more frequently out of the drug enforcement arena.

Discussion of Relevant Issues

The written law enforcement policy governing the use of confidential informants should first establish itself with a purpose and objective statement that clearly communicates the departments position concerning the use of informants. An example might be: The use of a confidential informant(s) is a proven valuable tool that a criminal investigator may use in criminal investigations. Investigators are encouraged, in the course of investigative work, to recruit and utilize informants where opportunities present themselves in criminal investigations. Informant utilization must be implemented under

parameters established by law and in such a way as to bring an investigation to its' full potential. Following the purpose statement should come a departmental definition of informant(s) and a clarification of terminology to be used, for example:

The term informant(s) is defined and refers to the following:

1. Confidential Informant: A person who, under the direction of an investigator of this department and with or without the expectation of compensation, furnishes information on drug trafficking or other criminal activity or performs a lawful service for this agency in its investigative pursuits.

2. Defendant/Informant: As above but subject to arrest and prosecution for a felony offense; or a defendant in a pending felony, State or Federal, case who expects judicial consideration in those pending charges or cases. This includes a person who is identified or targeted by an active investigation, yet not formally under arrest.

3. Restricted-Use Informant:

a. Persons less than 18 years of age and only with written consent of a parent or legal guardian.

b. Persons on State or Federal parole or probation.

c. Persons such as a defendant/informant who, for whatever circumstances, may potentially be flight risks or;

d. Persons who have provided any level of sensitive intelligence information which, at that point in time, has yet to be corroborated or confirmed.

e. Persons who are the opposite sex of the controlling investigator.

f. Persons who have a reputation or criminal history of prostitution, or deviate background or nature of sexual perversion.

g. Persons who have a reputation or criminal history as a thief or con artist.

There is a distinction between a confidential informant and a cooperating individual. The term informant, as defined above, should not be used in its application to cooperating individuals. A cooperating individual is a person or organization that is not necessarily under the control of a specific investigator but who voluntarily provides information without becoming a party to the investigation. An example would be a person or business who furnishes records or information, or an employee of an organization who, through the routine course of his activities, obtains information that is of merit to the investigation, or a concerned citizen who witnesses an event of interest that is of merit to the investigation. Additionally, derogatory and belittling remarks such as 'snitch', 'informant', etc. must not be made by investigators too, or in the presence of the informant or cooperating individual.

The policy should go on to set general guidelines such as the following:

1. Informants are the assets of the department and not a specific investigator. At the discretion of management the department may reassign the informant to another investigator or office, or even another agency.

2. Contacts with informants will be of a strictly professional nature. Under no circumstances will social or business contacts be allowed. These types of contact are *expressly prohibited*.

3. Contacts with informants will be made in such a way as to limit, as much as possible, the informant's learning of department facilities, operations, methods, activities,

technical equipment and personnel and kept to the minimum necessary to their successful utilization.

4. Where practical, two investigators, or an investigator with a law enforcement officer will be present at all contacts with the informant. This is a mandatory requirement where the informant is of the opposite sex as the controlling investigator, with juveniles and other restricted use informants. Rare exceptions may be granted by the field supervisor.
5. The use of an informant will be only to the extent necessary to accomplish investigative goals. Investigators will use the informant in such a way as to minimize the informant's participation and capacity as a witness.
6. All funds paid to an informant will be receipted and accounted for in appropriate supportive reports.
7. All initial establishments will include an interview by a supervisor. All information and utilization of restricted use informants must receive review and approval by a first-line supervisor.
8. Informants will be advised, before utilization, in a written and signed admonishment that:
 - a. They shall not violate any criminal law in furtherance of gathering information or services to this department and that any suspected violation will be seriously handled.
 - b. They have no official status, implied or otherwise, as a law enforcement officer of this or any other law enforcement agency.

c. The information they provide, potentially, may be used in court, and that although this agency will do all possible to protect their confidentiality, this cannot be guaranteed.

d. That it is a criminal offense to provide false information to a police officer.

e. The informant will not possess or have access to firearm or weapon during his active participation with this department.

f. The informant understands that he is subject to search before and after any transaction in which he has participated.

g. That the informant will be bound to keep all information between this department and himself, concerning any investigation strictly confidential.

Prior to the establishment of an informant, and prior to the supervisor granting approval to the establishment and utilization of an informant, a debriefing of the informant must be accomplished. During the debriefing a line of inquiry will be developed in such a way that as much knowledge as possible of criminals and criminal activity, both drug and non-drug can be retrieved. This information, where there is a measure of accuracy, should be detailed in a general file or investigative file report. Where the information cannot be confirmed or corroborated, or there is reason to doubt it's accuracy at that time, that information may be generally mentioned, at the investigator's discretion, in the first establishment report or as an attachment to the establishment report and remain in an informant file. Before acting on any informant information, investigators will take steps to corroborate information. The investigator, when debriefing a criminal informant, must understand that informants are well known to diminish or inflate what they know about

criminal activity. Where there are doubts about veracity of an informant, the investigator should take additional correlative measures. Additionally, the investigator, where practical, should utilize a polygraph examination prior to acting on the information that is seriously in question or in allegations concerning police or public official corruption. This is strongly encouraged where heavy departmental resources are about to be used in response to informant information.

Lastly, the guidelines should set out the parameters for a formal establishment report to be produced on the informant:

Investigators will document the confidential informant or cooperating individual in a formal establishment report under the following circumstances:

1. The person receives a reward, reimbursement, fee, travel assistance, relocation or any other income from Imprest or departmental funds.
2. The person receives relaxed prosecution or dismissal of pending felony charges in return for a defined assistance.
3. A person who is on State or Federal parole or probation and all restricted-use informants as previously defined.
4. A person, not in the above categories, but to be used to a significant extent in the course of an investigation.

The establishment report should contain, as a minimum, the following:

1. Full background and identification information of the person
 - a. Physical description, numerical identifiers (driver's license, social security number, DPS or State ID number, FBI number and other numbers)
 - b. Address(s), occupation or trade and employment information.

c. Personal history information, parents, immediate family members, education, and military etc.

d. Current color photographs, fingerprints. Exception: Persons who have credible reputations and fall under the definition of cooperating individual as previously defined.

2. Criminal history record, criminal background, and criminal associations.

3. Motivation.

4. Utilization and objectives

5. Expected expenses and what forms of payment were discussed with the person.

6. Admonishment, witnessed and attached.

7. Supervisors approval and comments.

Conclusional Recommendation

Law enforcement policy makers must work to develop the informant management policy that communicates the importance of effective informant management by its' investigators and conforms with the course of the law. The policy must have clearly defined controls and levels of accountability while at the same time allowing for investigative demands.

In today's litigious climate, an established informant management policy will not only help establish controls and ground rules by which to work by but may offer, to some extent, a measure of protection for the investigator and the agency. Informant handling, especially in the drug enforcement arena, poses a serious hazard when the information is

not verified. It is essential that verification, to some extent, be accomplished before the information is to be acted on. Finally, law enforcement agencies must have a written establishment report documenting the informant. In conclusion, the policy should be legal, applicable, and easily understood in purpose and objective. The comprehensive written informant management policy, once implemented, can serve a department very well for a number of years and in the long run may eliminate embarrassing hardships in the future.

BIBLIOGRAPHY

- Aguilar v. Texas, Supreme Court of the United States, 378 US 108, 1964
- Brown, Michael F., "Journal of Police Science and Administration", Vol. 13. No. 3, 1985, 251-254.
- Brown, Michael F., "Police Sciences Administration".
- Confrontation of Witnesses-Constitutional Right, Supreme Ct. Cases, 23L.Ed 2d853&12.
- Eck, John E., "Solving crime: The investigation of burglary and robbery", Washington, DC: Police Executive Research Forum.
- Enriques v. Texas, Court of Criminal Appeals of Texas, No.46692, November 1973
- Entrapment-Contingent Fee,57, ALR 4th,643, 6
- Entrapment-State Cases, 62 ALR 3d, 110
- Eisenhauer v. Texas, Court of Criminal Appeals of Texas, No. 889-83, October 1984
- Grant, Robert S. Phd., Law Enforcement Management Institute of Texas, Module II, lecture on Civil Liability, 9/20/97.
- Gilbert, James N., "Critical Issues in Criminal Investigation", 2nd Edition, Michael J. Palmiotto, Ch. 2, "Investigative Ethics", 8, 10, 13.
- Glosson v. Florida, Supreme Court of Florida, No. 64688, January 1985
- Henry Campbell Black, "Blacks Law Dictionary", (St. Paul, Minn.: West Publishing Co., 1968) 919.
- Henthorn v. U.S., United States Courts of Appeals, Fifth Circuit, No. 86-2278, April 1987
- Hoffa v. U.S., Supreme Court of the United States, 385, US 293, 1966
- Illinois v. Gates, Supreme Court of the United States, 76 L.Ed.2d 527, 1983
- James v. Texas, Court of Criminal Appeals of Texas, No. 45412, March 1973

McCray v. Illinois, Supreme Court of the United States, 386 US 300, 1967

Roviaro v. U.S., Supreme Court of the United States, 353 US 53, 1957

Schumacher, Jack H., "Attitudinal Comparison of Narcotics Officers and Prospective Jurors", Thesis, HV8079, N3 S34.

Spinelli v. Texas, Supreme Court of the United States, 393 US 410, 1969

Texas Department of Public Safety, "Criminal Law Enforcement Manual", 6-3, 6-4.

Texas Department of Public Safety, "General Manual", 05.12.00; 06.10.00

Thomas, Adolph, "4th Amendment and More Training Manual", Texas Department of Public Safety Training

United States Drug Enforcement Administration, "Agent Manual", 1988

U.S. v. Twigg, United States of Appeals, Third Circuit, 588 F.2d 373 Nos. 78-1348, 1978

Wilson, O. W. , "Police Administration", New York: McGraw-Hill, 1972

Zeichner, Irving B., "Inside Justice", Law & Order Magazine for Police Management. Vol. 45, No. 4, April 1997