

CI Report Appendix

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NEW JERSEY PROSECUTOR'S MANUAL

Volume I Administrative Topics

Preface

The New Jersey Prosecutor's Manual is intended as a guide to the prosecutorial community. It will contribute to the dissemination of noteworthy programs and practices and enhance the knowledge and proficiency of prosecutors throughout the state. The manual is a sourcebook for an efficient and professional development of the Prosecutors' Offices in the state. It is not a collection of guidelines or directives. Rather, the sections herein contain discussions of existing law by law enforcement personnel who are knowledgeable in a particular area, for the use of their colleagues. Procedures or practices recommended by the authors of individual sections are not intended to be construed as newly issued mandatory procedures or directives. It does not create any rights or promises. Nor does it vest enforcement rights in any person claiming non-compliance or deviation from the recommended policies and practices.

This Manual replaces the 1997 New Jersey Prosecutor's Manual. New features for this manual include:

- a detailed table of contents, containing up to 5 levels of subheadings in order to make it easier to find information on a specific topic;
- a uniform format which will enhance usability;
- a two volume format which places topics primarily of interest to managers in Volume I and topics of general interest in Volume II; and
- an introductory table for each section which lists the author, a contact person for further discussions, and the date of last revision for the section.

21 Investigations

21.8 Policy On the Use of Informants

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21.8.1 Introduction and Purpose

Contemporary law enforcement cannot effectively function without the continuous flow of information from the public as well as from members of the criminal milieu. Much of this information is provided by persons whose identities must remain confidential. Methods and guidelines for the receipt, analysis, and/or ultimate utilization of such information in criminal investigations must be carefully structured in order to ensure that resulting prosecutions are ethically and legally sustainable.

Persons who aid law enforcement while remaining confidential, whether or not they are paid informants, are not employees of law enforcement agencies. Nevertheless, they have a unique relationship to the agency for which they supply information. In situations where law enforcement encourages or directs the activities of that person, a special responsibility exists with that agency to utilize that relationship within a legally acceptable framework.

It is therefore necessary to formulate guidelines to establish uniform standards for informants and for law enforcement personnel when an informant relationship exists. These guidelines, hereinafter set forth, are intended to establish a **minimum** standard of conduct for all law enforcement personnel. Nothing herein shall be deemed to preclude a law enforcement agency from adopting supplemental and more detailed procedures as may be necessary to control the use of informants within that agency. In fact, the establishment of detailed procedures to carry out the responsibilities of this policy statement should be encouraged.

21.8.2 Definition of Informant

For the purpose of these guidelines, an Informant is defined as an individual who furnishes information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative charged with the duty of enforcing such laws; and that said individual's identity is to remain confidential. *Evidence Rule 516*. Importantly, this latter definition includes persons who may: (a) themselves be criminals, (b) be only associated with criminals, or (c) be members of the legitimate public who have reported useful information of criminal activities.

21.8.3 Confidentiality of Informants

Law enforcement personnel are encouraged to establish relationships with informants for the purpose of furthering the law enforcement goals with which the law enforcement agency is charged. In order that the special relationship be maintained, confidentiality is often essential. Frequently, the contact between the informant and law enforcement is through an individual officer with whom the informant has established a special trust. While this personal rapport is desirable, law enforcement personnel must understand that the responsibility for the control and use of the informant is an agency function and not a personal function of the officer. Therefore, for purposes of security, continuity of relationship, and the maintenance of agency integrity, the identity of all informants used by an agency should be made known to an appropriate supervising officer of that agency designated for that purpose, and the relationship should be documented in the agency's confidential records established for that purpose. Quite obviously, access to such information must be strictly supervised.

21.8.4 Evaluation of Informants

No person shall be utilized as an informant unless the agency believes that such person is able to furnish reliable enforcement information or other lawful services to a law enforcement agency. In considering the use of an informant, the following factors should be weighed:

1. The risk that use of an informant in a particular investigation or the conduct of particular informant may, contrary to instructions, violate individual rights, intrude upon privileged communications, unlawfully inhibit the free association of individuals or the expression of ideas, or compromise in any way the investigation or subsequent prosecution.
2. The nature and seriousness of the matter under investigation, and the likelihood that information which an informant could provide is not readily available through other sources or by more direct means.

3. The ability of the agency to control the informant's activities while he is acting on behalf of the agency and to ensure that his conduct will be consistent with applicable law and instructions.
4. The motivation of the informant.
5. The potential value of the information an informant may be able to furnish in return for a concession the government must make for his cooperation. As such, all agencies, including municipal police departments, are not to make any promises, express or implied, with regard to prosecutive consideration without first obtaining the express approval of the Prosecutor or his designee. Particular attention should be given to avoid any unauthorized promises relative to witness relocation and personal protection.
6. If the proposed informant is under 18 years of age, the risk and propriety of using an underage informant must be evaluated. In such a circumstance, the written consent of a parent or legal guardian must be obtained.¹ The Attorney General has issued *Law Enforcement Guidelines on the Use of Juveniles as Informants*, included as section 3 in the *New Jersey Law Enforcement Officer's Reference Manual: Handling Juvenile Offenders or Juveniles Involved in a Family Crisis*.
7. The informant's state or federal parole or probation status should be considered. Permission from parole and probation officers should be obtained to avoid his parole or probation being violated.
8. Whether an informant is currently under indictment and if so, the nature and gravity of the offense.
9. Whether the informant has been released on bail. If so, the nature and gravity of the criminal arrests and convictions should be carefully considered.
10. Whether an informant has a prior criminal record. If so, the nature and gravity of criminal arrests and convictions should be carefully considered.
11. Whether an informant is a fugitive from or an absent material witness to any criminal prosecution. Unless exigent circumstances so require, fugitives should not be used as informants. Arrangements should be made as soon as practicable for the imposition of bail. Thereafter, the informant may be utilized in his non-fugitive status.

¹See Section 21.9, *Informants – Juveniles*.

12. Whether the informant is currently or has in the past assisted another agency and the reliability of the information and the degree of cooperation he extended. Consideration should be given to contacting that agency to ensure that no duplication of effort occurs and to inquire into the informant's past reliability and truthfulness.

21.8.5 Verification of Informant

In all cases involving informants who are to receive monetary or other valuable compensation, or who are to receive some form of prosecutive consideration, and in all cases involving persons with criminal records or reputations for involvement or association with persons with criminal records, it shall be the responsibility of the law enforcement agency to assure that an appropriate background investigation of the informant is conducted in order to determine whether that agency will use or continue to use that informant.

21.8.6 Documentation of Information Received from Informant

Information received from informants should be documented on approved forms prescribed by the law enforcement agency and records of such information received shall be maintained in the manner prescribed by that agency.

21.8.7 Documentation of Contacts with Informants

In cases involving informants who are receiving monetary or other valuable compensation, or receiving prosecutive consideration, and involving persons with criminal records or reputations for involvement or association with persons with criminal records, law enforcement personnel shall document in writing any contact with the informant, whether or not that contact results in the receipt of information. The documentation shall be on forms prescribed by the law enforcement agency and filed with that agency in accordance with the prescribed procedures of that agency.

21.8.8 Payment to Informants

All payment of monies to informants shall be documented in accordance with the procedures established by that agency for that purpose. Records of payment of monies shall be maintained so that they conform to generally accepted accounting procedures which will allow for appropriate audit of expenditures while at the same time protecting the confidentiality of the informant.

21.8.9 Promises of Consideration

No law enforcement agency or law enforcement personnel shall make any promise, express or implied, of any prosecutive consideration to an informant without the express approval of the Prosecutor

or his designee. Again, particular attention should be given to avoid any unauthorized promises relative to witness relocation and personal protection.

21.8.10 Financial Relationships with Informant

An informant shall be under a continuing obligation to fully disclose to the agency any financial relationship which exists with any employee of that agency. Where an employee of an agency has a financial relationship with an informant and is aware of the use of that informant by the agency, said employee shall be under continuing obligation to fully disclose to the agency all details concerning that relationship. The agency shall consider the details of any such financial relationship existing between an informant and one of its employees in deciding whether to use or continue to use said informant, and in deciding which personnel of the agency shall be authorized to deal directly with the informant.

21.8.11 Instructions to Informants

Whenever the activities of an informant are to any extent under the direction or control of a law enforcement agency, the agency shall issue to the informant the following instructions:

1. The informant has no police powers, is not an employee of the agency, and has no authority to bind or commit the agency in any manner.
2. The informant is not authorized to initiate any action in the capacity of informant without the prior knowledge and approval of the agency.
3. The informant is not authorized to initiate any plan to commit criminal acts, implant in the mind of an otherwise innocent person the disposition to commit a criminal offense, or use any unlawful investigation techniques (e.g., breaking and entering, unlawful electronic surveillance, opening or otherwise tampering with mail).
4. The informant is never to participate in any acts of violence and is not authorized to participate in criminal activities of persons under investigation, except insofar as the agency determines that such participation is necessary and appropriate to obtain information needed for purposes of prosecution.

21.8.12 Violations by Informants

1. Under no circumstances shall the agency take any action to conceal the commission of a crime by one of its informants.

2. Whenever the agency learns that an informant used in investigating criminal activity has violated the instructions set forth in Section 21.8.11 in furtherance of his assignment, the program supervisor shall be notified and the continuation of the informant scrutinized.
3. Whenever the agency has reliable information of the commission of a crime by an informant which is unconnected to his assignment, the appropriate law enforcement authority shall be advised in order that enforcement action may be taken. In exceptional circumstances in which notification to the appropriate law enforcement authority for enforcement purposes would jeopardize an ongoing investigation or endanger the life of an agent, the compelling need for immediate disclosure may cease to exist. In such cases the Prosecutor shall be immediately advised and full disclosure to the enforcing agency shall be made as soon as the compelling need for the restriction on dissemination of that information has expired. The agency shall preserve all evidence of the violation for possible future use by the appropriate prosecuting authority. Nothing herein shall prevent full and immediate disclosure to the appropriate law enforcement agency if, in the judgment of the prosecutor such action is necessary even though an investigation might thereby be jeopardized.
4. In determining the extent of disclosure to the appropriate law enforcement and prosecutive authorities of criminal activity by agency informants, the Prosecutor shall consider the following factors:
 - a. Whether the crime is completed, imminent or inchoate;
 - b. Seriousness of the crime in terms of danger to life and property;
 - c. Whether the crime is a violation of state or federal law, and the degree of the offense;
 - d. The degree of certainty of the information regarding the criminal activity;
 - e. Whether the appropriate authorities already know of the criminal activity and the informant's identity;
 - f. The danger to any police agent; and
 - g. The significance of the information the informant is providing, or will provide, and the effect on the agency's investigative activity of notification to the other law enforcement agency.
5. If the investigation unit supervising the informant desires to continue making use of an informant or defendant-informant after it has reason to believe that he has committed a serious criminal offense, the agency shall consult the Prosecutor or his designee for a determination whether continued use should be made of the individual by the agency.

6. Notwithstanding any provisions contained in this section, in the event an informant is found to be unreliable or dangerous such that his continued use would be detrimental, his utilization by the agency shall be terminated as soon as practicable with appropriate notification.

21.8.13 Disclosure of Informant's Identity

Law enforcement must be aware that involuntary disclosure of the identity of a confidential informant may occur. Initially, the privilege afforded a law enforcement agent to refuse to disclose the identity of his informant is clearly not absolute. If "(a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues[,] disclosure may be ordered. *Evidence Rule 516; N.J.S.A. 2A:84A-28*. As such, and where feasible, prior to the inception of an investigation, an evaluation of the likelihood of informant identity disclosure should be made. A primary factor to consider in this assessment should be the degree of personal participation by the informant in the criminal scheme. Less participation suggests less likelihood of mandated disclosure.

21.8.14 Definition of Confidential Cooperating Witness, (CCW)

A confidential cooperating witness (CCW), is defined as any person whose identity is shielded by the agency for some period of time in order to prevent widespread dissemination of his/her name, and who, under the direction of an investigator, with review by a prosecutor, covertly gathers information of an evidentiary nature. A CCW's identification will ultimately be disclosed during a criminal prosecution or civil litigation.

21.8.15 General Authority

A confidential informant/witness may be asked to provide information already in his/her possession, to provide information which comes to his/her attention, or to affirmatively seek out information concerning criminal conduct or other subjects of authorized investigative activity. A confidential informant/witness may also be asked to provide operational assistance to the agency, including furnishing resources or facilities. The agency may only use a confidential informant/witness in furtherance of its authorized investigative activities and law enforcement responsibilities.