



IACP LAW ENFORCEMENT POLICY CENTER

Confidential Informants

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 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

A confidential informant (CI)¹ is defined as an individual requiring anonymity who provides useful information, directed assistance, or both, that enhances criminal investigations and furthers the mission of the agency, usually in exchange for financial or other consideration. Individuals who serve as witnesses or citizens who provide information regarding criminal activity are generally not considered CIs. This distinction is based in part on the fact that CI arrangements involve the development of a relationship between the individual and the agency that focuses on the trading of information for some form of payment, to include prosecutorial consideration.

Although CIs can provide investigators with specific information that is not available from other sources, it must be remembered that CIs are often criminals. Agencies must

keep in mind that CIs can render a significant negative impact on a law enforcement investigation, harm an agency's credibility, and endanger officers' lives if not properly managed.

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

- Knows, has been associated with, or has intimate knowledge of one or more active criminals.
- Is associated with, or has intimate knowledge of, individuals practicing a crime specialty, such as bank robbery or drug sales, or perpetrating crimes in a specific geographic area.
- Has an occupation or residence that lends itself to gathering information about criminals and their plans to commit crimes.
- Has status in the criminal justice system. This includes, but is not limited to, individuals who are on pretrial release or bail, probation or parole, convicted pending sentencing, or incarcerated. In many instances, this provides the CI with requisite "credentials" that show he or she can be trusted by individuals engaged in criminal activity.

In addition, the CI should meet three criteria before performing work for the law enforcement agency:

- Be willing to work under the direction of an officer and to perform certain acts as directed. In these situations, the officer assigned primary responsibility for the CI is generally referred to as the CI's "handler."
- Be willing to exchange information for monetary or other lawful consideration.
- Not be an employee of a law enforcement agency.

¹ The term "confidential informants" may have a negative connotation. Therefore, some agencies may elect to use the term "cooperating individuals."

II. CONCERNS

A. Potential Hazards Associated with CIs

Successfully directing and monitoring CIs requires that officers treat them courteously, offer encouragement and praise, make it clear that the agency has high expectations, and develop a trust-based relationship. However, officers must maintain an acute awareness of potential problems such as those described below:

Lying. CIs may exaggerate or fabricate the criminal acts of targets. Some may report truthfully, but lie about the fact that they used illegal methods to obtain the information.

Duplicity. CIs can make deals with targets as easily as they can with law enforcement, using both sides to their advantage. They might 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. Finally, CIs might sell the same information to two different agencies, causing the agencies to unwittingly conduct simultaneous investigations.

Fraud. CIs can find themselves in a position to steal large cash rolls, and might sell government property used in investigations or pledge it as collateral for loans.

Blackmail. Officers who become too involved with CIs might begin to sympathize with their problems and knowingly fail to adhere to agency policy. Eventually, the CI might obtain incriminating information concerning the officer that can then be used for the benefit of the CI.

B. What Motivates CIs?

Understanding what motivates the CI can be the key to retaining control over his or her activities. As a result, before enlisting the services of a CI, the handler must determine not only who the individual is, but also why he or she wants to become a CI. It is important that the handler accepts the CI's motivations and either work within that context or choose not to contract with the individual. Finally, 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.

Among the most significant motivators are money; revenge, spite, or retaliation based on perceived mistreatment by others; elimination of competition through diversion of suspicion; fear, to include the fear of current or former associates; self-aggrandizement and a desire to enhance sense of self-importance; prosecutorial or judicial leniency; and repentance or a desire to make amends for past wrongdoing.

C. CI Screening

Law enforcement agencies can reduce the risk of selecting unsuitable CIs by developing sound CI screening and management procedures. Before an officer may use a CI, he or she should complete an initial suitability report pertaining to the potential CI and submit it to the appropriate authority in the agency for review and approval. This report provides a relatively thorough review of the potential CI's risks and benefits to the agency. Continued supervision and evaluation is also necessary to prevent or mitigate inappropriate selection.

The potential CI's initial suitability report should be completed and approved by the appropriate agency authority before the individual is used as a CI. The objective of the initial suitability report is twofold: (1) it develops essential preliminary information on a potential CI to create a profile for the master file; and (2) it documents answers to certain basic questions that will provide a sufficient basis to intelligently judge an individual's utility and suitability as a CI. Determination of suitability can be achieved only if reporting officers are diligent in providing sufficient information and making informed judgments about the risks and benefits associated with each individual.

When completing an initial suitability report, potential items that should be considered include the individual's relationship with the target; the potential for gaining useful information; probable motivation of the individual; his or her prior criminal history; and whether the individual or his or her family or relatives would be at risk if the individual were to serve as a CI. In addition, the report should document the following information, where applicable:

- Age, sex, and residence
- Employment status or occupation
- Affiliation with legitimate businesses and illegal or suspicious enterprises
- Extent to which potential information, associations, or other assistance could benefit a present or future investigation
- Risk of adversely affecting an existing or future investigation
- Extent to which provided information can be corroborated
- Prior record as a witness
- Criminal history, to include whether he or she is the subject of a pending investigation, is under arrest, or has been charged with a crime
- Risk to the public or as a flight risk
- Substance abuse concerns
- Relationship to anyone in law enforcement
- Any prior or current service as a CI with this or another law enforcement organization

To be of value, initial suitability reports must detail the specific benefits of using a potential CI, as well as identified risk factors. Written comprehensive suitability assessments are not only valuable for screening and management by the initial handler, but can also be of value to other officers who may want to use the CI. The initial suitability reports are also essential to determine the nature and scope of monitoring required for a particular CI.

Each CI's suitability should be reviewed annually, at a minimum, and all handler-CI contacts should be documented and included in the CI file. The use of continuing suitability reports and documentation of CI contacts help determine whether the risk of using a CI 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 appropriate authorized personnel. Regular review of CI 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 their handlers.

D. Special CI Categories

There are several categories of CIs that require special evaluation and approval. In each of these cases, the agency's chief executive officer or his or her designee and the office of the prosecutor or state's attorney should be consulted prior to the use of these individuals as CIs.

Juveniles. Juveniles require a great deal of deliberation prior to their use. Juveniles may be less steadfast in motivation, less able to avoid detection, and less able to withstand pressure once suspected by the individuals upon whom they have been sent to inform. As a result, juvenile CIs run a higher risk of being exposed, potentially placing them in physical danger. This danger is directly proportional to (1) the seriousness of the criminal activity; and (2) the relative youth of the CI. 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 student sent to inform upon drug dealers. However, even an apparently minor case may involve considerable physical risk to a juvenile CI.

Perhaps the best-known case involving a juvenile CI is that of 17-year-old Chad MacDonald. In 1998, police in California arrested MacDonald on drug charges. He agreed to act as a CI, wearing a recording device during at least one drug buy and providing police with information about local drug trafficking. A short time later, he was found dead in an alley, apparently tortured and strangled, and 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 law enforcement

as a CI, and the family brought a civil action against the jurisdictions involved. The incident resulted in the passage of "Chad's Law," a California state law that prohibits the use of individuals 12 years old or younger as CIs. It also prohibits the use of individuals 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.

Considering the significance of these issues, officers have a responsibility to make sound judgments when considering the use of juvenile CIs. In some cases, the parent or guardian may authorize the juvenile's use as a CI without fully understanding the risks inherent in CI operations. When this happens, the parent or guardian's authorization to use the child as a CI cannot be relied upon by law enforcement as the basis for informed consent. As a result, parental permission—even when required by policy, practice, or law—does not always provide law enforcement officers with sufficient justification, and should not be used as the sole condition, for using juveniles as CIs.

Some law enforcement agencies have chosen to ban the use of juveniles as CIs entirely, while others subject such decisions to more rigid command scrutiny. Therefore, it is suggested that, unless an officer is guided by state or federal law, or agency policy, he or she must be able to clearly define a compelling public interest that will be served before a juvenile may even be considered for such a role. Compelling public interest, for the purposes of this discussion, includes situations where the failure to use a juvenile CI would result or likely result in loss of life, serious injury, or have some serious negative consequence for persons, property, or public safety and therefore demand action. Furthermore, that justification should be reviewed, an approval obtained by the agency's chief executive or his or her designee, and written authorization must be obtained from the juvenile's parents or guardians.

Individuals Obligated by Legal Privilege of Confidentiality. The most common examples of individuals 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 in 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 grant them 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. As a result, a decision to accept or solicit information from sources such as these can be a complicated legal matter.

Government Officials. This category includes individuals in high-level and sensitive local, state, and federal governmental positions who have access to privileged information.

Individuals in these types of positions may come forward with information, rather than being recruited as CIs and are generally referred to as “whistleblowers.” Law enforcement dealings with these individuals require a great deal of caution and inquiry into the person’s background and potential motives, as he or she may harbor a grievance against one or more individuals within the government or the governmental entity as a whole. Law enforcement agencies and their employees must also be wary of whistleblowers who may simply be using law enforcement authority to further political motivations and agendas.

Individuals in these positions may be reaching out to law enforcement authorities because of a real or imagined inability to address internal problems at their agency and view law enforcement as the only alternative. However, the issues in question might not rise to the level of criminal offenses. In many cases—such as those involving patronage, cronyism, influence trading, or conflicts of interest—they are ethical matters or allegations concerning breaches of administrative or civil law. In other cases—such as those involving bribery, graft, embezzlement, and kickbacks—the criminal offense involved may fall within the purview of state or federal regulatory authorities or the Federal Bureau of Investigation. As a result, allegations brought forward by governmental employees should be referred to the local prosecutor and subsequently to the state’s attorney general through the chief law enforcement executive or his or her designee.

Wards of the Corrections Authority. This category includes individuals 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 individuals who are current or former participants in the federal witness security program.

Individuals who are serving sentences have been used in many cases to gather information on targeted subjects 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 CIs in return for reduced sentences or similar rewards. As such,

their use is dependent on approval of the correctional authority.

E. Final Determination on CI Use

When all the available information on a potential CI has been assembled, a determination must be made concerning the risks and benefits of utilizing the CI during specific investigative operations. The following are items that should be considered when making this decision.

- **The criminal enterprise to be targeted**
 - *How serious are the crimes involved?*
 - *Are the crimes or those participating in them violent or likely to become violent?* Certain types of crimes and perpetrators pose a greater threat to a CI.
 - *How urgent is the specific case?* Is the particular criminal enterprise against which action is being considered one that must be terminated immediately, such as a proposed imminent terrorist attack? Or is it one that can be allowed to continue for a time in order to develop further leads without endangering the safety of the community, such as a petty theft ring?
 - *Is the enterprise of such a nature that it may be combatted by means other than the use of CIs?* Some types of criminal activity can be addressed only through information obtained from the inside, but other situations may lend themselves to the use of other methods, such as external electronic surveillance. Thus, the degree of necessity of the use of CIs should be a major consideration in the decision as to whether or not they should be used.
- **The risk to the CI**
 - *What are the extent, imminence, and severity of the risk to the CI if his or her undercover role is discovered?* Would discovery result in serious injury or death? For example, would discovery merely cause the CI to be excluded from further participation in the activity? Or would the CI be subject to physical abuse, including possible torture and murder?
 - *What is the CI being asked to do?* For example, is the CI being asked to observe passively and report, or to take an active role, such as wearing a recording device or transmitter? The more active the role, the greater the threat of discovery and related consequences.
 - *What safeguards are in place to prevent the CI’s role from being discovered?* Is knowledge of the operation and of the CI’s identity properly restricted in the agency to those with a need and a right to know? If there are written

records of the CI's identity, are they properly restricted from unnecessary access or circulation? Are statements to the media worded in such a way that the CI's role is not apparent?

- *Have secure methods of communication with the CI been established?* One cause of discovery by criminals is observation of contact between a CI and law enforcement.
- *If the CI is to remain embedded in the criminal enterprise after providing information, is the information that was provided being protected from revelation to unnecessary individuals?* 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 a CI has been utilized?
- *Will law enforcement be able to extract the CI from danger in the event of discovery?* Does law enforcement have the capability to determine that the CI is suspected or discovered? If so, what plans are in place to extract the CI before being harmed?

- **The nature of the CI**

- *How reliable is the CI?* Does he or she consistently provide accurate information or have unusual access to an important target? 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 a unique way of gaining access to the proposed 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 chief executive or his or her designee after determining that the potential outcome is worth the extraordinary risks involved.
- *How old is the CI?* The younger the CI, the greater his or her vulnerability, the greater the risk of failure, and, the greater the culpability of law enforcement if the CI comes to harm.
- *Regardless of age, is the CI mature and intelligent enough to understand and consent to the risks involved?* Prior to their selection, the agency should ensure that the CI has a full understanding of the dangers associated with his or her assignment. Individuals with intellectual or developmental disabilities or with

diminished mental capacity generally should not be used as CIs.

- *In the case of juvenile CIs, 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. Law enforcement should note that, even where parents have consented, if the juvenile CI is harmed, the parents may later claim that they did not understand the full implications of the consent.
- *What is the CI's level of experience and ability—is the CI sufficiently acquainted with the criminal enterprise and those engaging in it to handle contingencies that may arise while cooperating with law enforcement?* For example, will the CI 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?
- *Is the CI offering services to law enforcement voluntarily or is he or she under some form of compulsion?* As noted earlier, some individuals volunteer information and even offer to act as CIs on a continuing basis. Others act as CIs in the hope of avoiding prosecution or reducing punishment. Law enforcement must judge not only the type but also the level of motivation of the CI.

F. Managing the CI

It is incumbent on law enforcement agencies to institute the necessary controls, protect and support its CI handlers, and understand the legal limitations involved in using CIs. Even these generally accepted rules can be problematic in terms of implementation. The following are several issues related to the management of CIs that must be considered.

Development of Agency Policies and Procedures.

After an agency decides to use CIs, the first item to address is the issuance of written directives that set forth policies and procedures. Next, the agency must define the roles and responsibilities of all individuals in the chain of command, from the chief executive to the handler. For instance, the chief executive or his or her designee should select an individual to have responsibility over the following:

- Development and maintenance of master CI files
- Creation of an indexing system
- Access to CI files, to include the approval of requests from sworn personnel to review an individual's CI file.

Training. Law enforcement personnel who will be interacting with CIs should be provided an orientation and training in the appropriate techniques for working with CIs. Training should include a thorough briefing on agency policies, procedures, and required documentation, as well as explicit instructions on recruiting CIs; directing and monitoring CI activities; interviewing and debriefing CIs; preparing CIs for court; evaluating CI performance; and other relevant topics.

Similarly, CIs should also receive orientation and training that outlines what is expected of them, including an explicit list of acceptable and unacceptable behaviors. Training for CIs should address the CI's specific objectives, compensation procedures, communication with and reports to the handler, cover stories, security, legal constraints, and other topics.

Written Agreements. Agencies should ensure that every CI signs a written agreement drafted by the agency, in consultation with legal counsel.² The handler should thoroughly review each provision of the agreement with the CI, placing particular emphasis on the following points:

- CIs have no law enforcement powers and are not permitted to carry weapons while performing activities as CIs.
- CIs will be arrested if found engaging in any illegal activity beyond what is authorized by the agency and conducted while under the supervision of a handler and will receive no special legal considerations.
- CIs shall not take, and the agency will not condone, any actions that may be considered entrapment.

The first point, that CIs are not law enforcement employees, should be reinforced by several specific items in the CI agreement. For example, the agreement should affirm the CI's status as an independent contractor and acknowledge that, as such, he or she is not entitled to workers' or unemployment compensation. The agreement should also prohibit the CI from using the agency as an employment or credit reference without prior approval.

Regarding the third point, 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. Furthermore, to prove that entrapment did not occur, the CI may have to testify, thereby revealing his or her identity. In addition, certain illegal actions on the part of a CI might 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.

Criminal Involvement by the CI. It is often very difficult for law enforcement to completely prohibit all levels of criminal involvement by CIs, particularly in drug investigations. The willingness of law enforcement and prosecutors to allow certain forms or levels of criminality in order to gain criminal intelligence from CIs or use them in controlled buys or other roles is an issue that has been widely debated. Each agency must address this directly in its policy if they are to employ CIs in drug or other investigations. However, it should be made clear that CIs are prohibited from committing crimes beyond those that are authorized by the law enforcement agency and while under the supervision of a handler. The CI will receive no special consideration regarding crimes outside of this limited exception.

Who Controls the CI? CIs should be viewed as assets of the law enforcement agency, not the individual handler. As such, the agency must ultimately control the use of CIs. This includes documenting the CI's identity, reviewing contacts between the CI and his or her handler, assessing the CI's reliability and usefulness, ensuring that confidential funds are used appropriately and accounted for properly,³ and ensuring that important CI information is available to all personnel who have a need and right to know.

Limitations on Targets of CI Investigations. CIs should not be used to gather information purely of a political nature or on individuals without a reasonable basis to believe that the person is involved in criminal activity.

Defining and Maintaining Proper CI-Handler Roles. The cooperative relationship between law enforcement and CIs can at times 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 handler and the CI.

As such, handlers should not establish social relationships or become personally involved with a CI beyond that which is required in the performance of duty. Handlers should also not reveal confidential or sensitive information about law enforcement operations, plans, or activities unless it is absolutely necessary for the operational purposes of the CI.

Meetings with CIs. Whenever possible, the handler shall be accompanied by another officer when meeting with a CI. Some disagree with the last item requiring accompaniment to CI meetings. Those who favor a one-

² See Appendix A for a sample agreement.

³ See International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy and Concepts & Issues Paper on Confidential Fund*, Alexandria, VA..

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.

While exceptions may be necessary, the more significant advantages of the two-officer approach include maintenance of a more objective relationship with the CI; a greater chance of avoiding setups; and a more accurate assessment of the CI's performance.

Two-officer meetings are essential when the CI and handler are of the opposite sex, when the CI is a juvenile, and when the CI presents other exceptional risks. The latter may include situations where the CI is suspected of trying to set up the handler; 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.

CIs Operating Outside the Jurisdiction of the Agency.

On occasion, it may be necessary for a CI to gather intelligence or meet with subjects of an investigation in settings outside of the jurisdiction of the handling agency. Whether the CI is operating in a neighboring agency's jurisdiction, in a different state, or even in a foreign country, the handler should take care to ensure that the actions, safety, and identity of the CI can be protected; information gathered can later be admitted in court; and the CI, as well as the handler, will not face adverse consequences for actions that may be appropriate in one jurisdiction, but questionable or, worse, illegal, in the jurisdiction where the CI was operating. Therefore, CIs should obtain permission to conduct these activities in advance.

In most instances, the handler should consult and coordinate with appropriate counterparts in agencies that have jurisdiction in the area where the CI will operate before the CI travels to or takes any action in that outside area. Coordinating activities ahead of time can provide a measure of safety for the CI, will help ensure that planned tactics and actions are legal in that jurisdiction, and should allow for the development of action plans and contingencies. In situations where the handler is not aware of the CIs activities outside the jurisdiction, the appropriate agency should be notified as soon as possible after the activity occurs.

In rare instances, a compelling reason may exist for not contacting counterparts that have jurisdiction in the area where the CI will operate. In such cases, senior leadership in the handling agency should be advised and the reason for not sharing information should be documented. All operational and personal risks should be evaluated and

mitigated to the highest degree possible. If a decision is made not to coordinate with or notify counterparts, extra precautions should be taken to ensure the CI's actions on the behalf of law enforcement are not detected, the CI's safety is not unduly put at risk, and contingency plans are developed.

Communication Plans. Handlers need to develop a communication plan and strategy tailored to the specific CI being handled. The strategies and tools adopted by the handler should not draw unnecessary attention to the CI or contacts with handlers and should fit in with the environment and persona of the CI. In addition, the communication plan should be easy to understand and implement, and should ensure intelligence is reported in a secure manner. Poorly developed or hastily crafted communication strategies and practices can expose sensitive investigations, potentially compromise undercover operations, and place a CI at great personal risk. This is particularly true when operating against a sophisticated target or group.

Although in-person contacts with CIs are necessary, there are advantages to limiting meetings between CIs and handlers to avoid having the relationship inadvertently discovered. Thus, handlers should employ available tools (e.g., smartphones, email accounts) that will support the timely and secure bidirectional communication of information. The selection of tools should be based on the type of information being reported, the severity of the crimes being investigated, and the level of sophistication of the CI and any potential adversaries. Handlers should also be sensitive to vulnerabilities and risks inherent in all commercially available communication services. Prior to selecting and equipping a CI and handlers with communication tools, it is suggested that a subject-matter expert or technically trained investigator be consulted.

Supervisory Responsibilities. Proper supervision of handlers and CI management, as well as thorough reporting of all contacts with the CI, is essential. An alert, well-trained supervisor may recognize problems with a CI's behavior that the handler does not, may be able to determine that a handler is identifying too closely with the CI or a criminal lifestyle, or if a handler is under excessive stress because of his or her association with the CI. In these situations, the supervisor should intervene as soon as possible in an attempt to prevent any potential conflict.

A key component of successful CI management is the periodic evaluation of CI activities and their results by supervisors. At a minimum, annual reevaluations of CI performance and suitability should be conducted. Other reporting requirements should be established by individual agencies, such as weekly supervisor/handler briefings, quarterly reports, or semiannual inspections. Agencies should ensure that their existing reporting requirements

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

G. Establishing and Defending Probable Cause

It is essential that law enforcement officers understand how 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*, the United States Supreme Court created a two-part test for establishing reliability in a case where information received from a CI was the basis for probable cause for a warrant.⁴ This required (1) establishing the credibility of the CI; and (2) establishing the reliability of the CI's information.

Later, *Illinois v. Gates*, which expressly overruled the *Aguilar* test, established the "totality of the circumstances" test to determine whether probable cause exists.⁵ 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 eliminate the need to demonstrate past reliability. Thus, under *Gates*, courts will look to the strength of corroboration to satisfy probable cause absent a showing of the CI's credibility or basis of knowledge.

The issue of probable cause is intertwined with an agency's concerns over the protection of the CI's identity. 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 legal counsel well versed in applicable federal and state law.

At trial, however, agencies may find that disclosing the identity of their CI is the only way to obtain a finding of probable cause. The need for disclosure will depend on the circumstances of each case. The courts will attempt

to strike a balance between the need to protect the CI—as well as protect the law enforcement agency's need for CIs in general—and the defendant's Sixth Amendment right to confront witnesses. Some jurisdictions may attempt to solve this dilemma by conducting in-camera hearings, where the trial judge questions the CI in private about the nature of the CI's possible testimony.

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 will be 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 disclosing 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.

To avoid the necessity of disclosing the identity of CIs at trial, law enforcement agencies should consider using CIs in ways that will minimize the link between the CI's identity and probable cause. In drug cases, for example, methods would include the following:

- Using the CI only for introductions and having an undercover officer develop the relationship with the target and execute the transaction.
- 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 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 will need to ensure the CI is well prepared. Accurate agency 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 agency's relationship and transactions with the CI; and, in drug cases, a host of additional questions regarding drug transactions and their documentation.

⁴ *Aguilar v. Texas*, 378 U.S. 108 (1964).

⁵ *Illinois v. Gates*, 462 U.S. 213 (1983).

H. CI File Management

After a background investigation has been conducted on a potential CI, and the supervisor or other authorized authority has approved the CI's use, the agency should open a file on the new CI. A CI file system has several uses:

- Providing a source of background information about the CI
- Maintaining a complete history of the information received from the CI
- Enabling review and evaluation by the appropriate supervisor of information provided by the CI
- Minimizing incidents that could be used to question the integrity of handlers or the reliability of the CI
- Helping to prevent unwanted duplicate uses of the same CI
- Documenting any specific authorizations and permissions that relate to the activities and/or handling of the CI

Key Elements of a CI File System. Master CI files should be established—one on CIs and one on unreliable informants—and an indexing system should be developed and maintained. These files should be established under the direction of a single individual, as previously determined by the agency chief executive. 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 CI control number.

Essentially, the master files on CIs are the operational or “working files.” Included in each individual's CI file are the signed CI agreement, briefs of information provided, and indications of the information's reliability. These individual files also contain the CI's name and other identifiers, for example, fingerprints, photographs, and criminal history record. The CI's status as active or inactive should be clearly indicated. If a CI is determined to be 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 should be coded with the CI's control number but not include the CI's name or photograph. They should, however, include details about the CI's appearance, age, marital status, special skills, current place of employment and residence, and other details.

Securing CI Files. Tight security of CI files is imperative for officer and CI safety and to ensure the integrity of the entire CI management system. CI files should be maintained in a secured area. Access should be restricted to the agency chief executive, the individual deemed to be in charge of the CI files, or their designees. A written request from other sworn personnel should be approved by the individual in charge of the CI files before

access to an individual's CI file is permitted. Of course, CI files should be closed to the public. Other precautions may include the following:

- Keeping the files segregated from any other files and under the control of a supervisor
- Requiring that all files be viewed in the same location
- 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

III. CONCLUSION

While the information obtained from CIs can be undeniably beneficial to law enforcement operations, their use comes with significant concerns. Therefore, 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.

Every effort has been made to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes.

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 court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered, and should therefore consult its legal advisor before implementing any policy.

This document is not intended to be a national standard.

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Appendix A
SAMPLE CONFIDENTIAL INFORMANT AGREEMENT

During my association with the {Agency} as a confidential informant (CI), I, the undersigned, do hereby agree to be bound by the following conditions and procedures while so associated:

1. I agree that I have no law enforcement power under the State of {State} or any local governmental subdivision and have no authority to carry a weapon while performing my activity as a CI.
2. I acknowledge that I am not authorized to engage in any criminal activity except as authorized by the {Agency} and under the supervision of the officer with whom I am associated, hereby referred to as my handler, and will not be granted immunity from prosecution for any additional crimes committed.
3. I acknowledge that I am associated with the {Agency} as a CI on a case or time basis as an independent contractor and that any payment I receive from the {Agency} will not be subject to federal or state income tax withholding or social security. All reporting of income is the responsibility of the CI.
4. I further acknowledge that as a CI and an independent contractor, I am not entitled to worker's compensation or unemployment compensation from the State of {State} and I shall not hold {County} liable for any injuries or damage incurred by reason of my association with the {Agency}.
5. As an independent contractor, I further acknowledge that I may not take or seek any independent action on behalf of the {Agency} or {Jurisdiction}, and that I may not represent myself as an employee of same, nor enter into any contract or obligation on their behalf, unless specifically authorized to do so.
6. I further agree not to divulge to any person, except my handler, my status as a CI for the {Agency} unless required to do so in court and shall not represent myself to others as an employee or representative of the {Agency}.
7. I further agree not to use the {Agency} or any of its officers as credit or employment references unless prior approval is obtained from my handler.
8. I further agree that my association with the {Agency} does not afford me any special privileges.
9. I further agree to be truthful and not withhold information when interacting with the {Agency} and will not commit perjury.
10. I further agree that after making a purchase of anything of evidentiary value, I will deliver such evidence to my handler as soon as possible.
11. I further agree to maintain a strict accounting of all funds provided to me by the {Agency} as part of my activity as a CI. I understand that misuse of funds could be grounds for criminal prosecution.
12. I further agree to notify my handler if I have or may gather information, collect anything of evidentiary value, or engage in meetings with an individual(s) under investigation in a location outside of the jurisdictional boundaries of the {Agency}.
13. I acknowledge that I have read and fully understand the provisions of this agreement.

Dated this _____ day of _____ 20_____.

Confidential Informant _____

Handler _____