
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 1064 **Hearing Date:** May 20, 2020
Author: Skinner
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Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Prisons: Confidential Informants*

HISTORY

Source: American Friends Service Committee

Prior Legislation: SB 687 (Leno), Ch. 153, Stats. 2011

Support: American Civil Liberties Union; California Attorneys for Criminal Justice; California Coalition for Women Prisoners; California Families Against Solitary Confinement; California Innocence Project; California Public Defenders Association; Center for Constitutional Rights; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Haiti Action Committee; Initiate Justice; Innocence Project; Insight Garden Program; International Longshore and Warehouse Union; Legal Services for Prisoners with Children; Loyola Law School Project for the Innocent; Northern California Innocence Project; Prison Activist Resource Center; Prison Law Office; Prisoner Hunger Strike Solidarity Coalition; Re:Store Justice; San Francisco Bay Area News and Letters Committees; Smart Justice California; Starting Over, Inc.; UnCommon Law

Opposition: California District Attorneys Association

PURPOSE

The purpose of this bill is to: (1) prohibit the use of uncorroborated information from in-custody confidential informants by the California Department of Corrections and Rehabilitation (CDCR) when making decisions and findings related to rules violations; (2) prohibit the Board of Parole Hearings (BPH) from making a decision or finding based on an allegation not found to be true following a disciplinary hearing subject to specified notice and due process requirements; and (3) require summary notice of specified information to be provided to an inmate if information from an in-custody confidential informant may be used by CDCR or BPH to make a decision or finding 10 days prior to the proceeding.

Existing law establishes a system of state prisons under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR). (Pen. Code, § 2000 et seq.)

Existing law authorizes CDCR to develop and amend regulations and rules for the administration of the state's prisons. (Pen. Code, § 5058.)

Existing law establishes the Board of Parole Hearings (BPH) and delineates its duties, including conducting parole consideration hearings. (Pen. Code, §§ 5075, 5075.1.)

Existing law provides that inmate misconduct shall be handled by verbal counseling, counseling only rules violation reports, or rules violation reports. (Cal. Code. Regs, tit. 15, § 3312, subd. (a).)

Existing law provides that when inmate misconduct is believed to be a violation of the law or is not minor in nature, it shall be reported on a Rules Violation Report (RVR). (Cal. Code. Regs, tit. 15, § 3312, subd. (a)(3).)

Existing law requires the RVR to contain the following: the charged inmate's name, number, release date, facility, housing assignment; violation date and time; whether or not the misconduct was related to Security Threat Group activity; circumstances surrounding the misconduct; the reporting employee's name and title; RVR log number; the violated CCR Title 15 rule number, specific act, level, division; whether or not the charge will be referred for prosecution; reviewing supervisor's name and title; and the classifying official's name and title. (*Id.*)

Existing law requires the RVR to include a section for the inmate to indicate whether or not they wish to postpone the RVR process if felony prosecution is likely and a section to indicate if they wish to request or waive an assignment of a Staff Assistant or Investigative Employee. Provides that a summary of disciplinary procedures and inmate rights is provided to the inmate explaining the administrative hearing time frames and the roles of both the staff assistant and the investigative employee. Provides that the referral for prosecution and the inmate's appeal rights are explained. (*Id.*)

Existing law provides the circumstances under which an RVR be classified as administrative. (Cal. Code Regs., tit. 15, § 3314.)

Existing law provides the circumstances under which an RVR be classified as serious. Establishes the structure of the investigation and hearing for a serious RVR. (Cal. Code Regs., tit. 15, § 3315.)

Existing law requires the following types of information to be classified as confidential:

- Information which, if known to the inmate, would endanger the safety of any person.
- Information which would jeopardize the security of the institution.
- Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate.
- Information provided and classified confidential by another governmental agency.
- A Security Threat Group debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the central file.

(Cal. Code Regs., tit. 15, § 3321, subd. (a).)

Existing law prohibits a decision from being based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker that the information is true. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(1).)

Existing law requires that any document containing information from a confidential source include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(2).)

Existing law requires that the documentation given to the inmate include:

- The fact that the information came from a confidential source.
- As much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and a statement of reason why the information or source is not disclosed.

(Cal. Code Regs., tit. 15, § 3321, subd. (b)(3).)

Existing law provides that a confidential source's reliability may be established by one or more of the following criteria:

- The confidential source has previously provided information which proved to be true.
- Other confidential source have independently provided the same information.
- The information provided by the confidential source is self-incriminating.
- Part of the information provided is corroborated through investigation or by information provided by non-confidential sources.
- The confidential source is the victim.
- This source successfully completed a polygraph examination.

(Cal. Code Regs., tit. 15, § 3321, subd. (c).)

Existing law prohibits a parole consideration decision from being based upon information that is not available to the inmate unless the information has been designated confidential under the rules of the department and is necessary to the decision. (Cal. Code Regs., tit. 15, § 2235.)

Existing law requires that the reliability of confidential information to be used be established to the satisfaction of the hearing panel. Requires a finding of reliability to be documented by the hearing panel. Provides that a hearing may be continued to establish the reliability of the information or to request the department to designate the information as nonconfidential. (*Id.*)

Existing law requires the inmate to be notified of reports on which the panel relied if confidential information affected a decision. (*Id.*)

Existing law provides for the use of comprehensive risk assessments by the BPH hearing panel when making parole consideration decisions. Outlines the process by which an inmate or the inmate's attorney may object to a factual error believed to be contained in the risk assessment and the process by which BPH evaluates the allegation. (Cal. Code Regs., tit. 15, § 2240.)

This bill prohibits an employee of, or private entity under contract with, CDCR from finding any state prison inmate to be guilty of a rules violation, if the finding or decision is based on, or relies on, in whole or in part, any uncorroborated information from an in-custody confidential informant.

This bill prohibits an employee of, or private entity under contract with, BPH from making a finding or decision about any state prison inmate that is based on, or relies on, in whole or in part, allegations that have not been found true following a disciplinary hearing at which the subject was provided notice, an opportunity to confront nonconfidential witnesses before an impartial hearing body, a written statement of the evidence relied upon, a written statement of the reasons for the decision, and an opportunity for appeal.

This bill requires that an inmate and the inmate's attorney receive a summary notice of any information provided by an in-custody confidential informant at least 10 days prior to any proceeding regarding a rules violation. Applies the 10-day summary notice requirement to BPH findings and decisions described above, including any interview on which a risk rating is based.

This bill requires the summary notice to include all of the following:

- A detailed description of the information provided by the confidential informant.
- The date the information was provided to the department.
- The date of the events or actions referred to in the informant's report.
- The location where the information was provided by the informant.
- The name of the officer who obtained and recorded the informant's report.
- The source and nature of the informant's personal knowledge of the events or actions.
- The investigative steps taken by the receiving officer or other department official to confirm the facts reported and the informant's personal knowledge.
- The informant's previous record of confidential information, including instances of information not meeting standards of reliability.
- The evidence used to corroborate the information. Requires a summary notice, as described, to be provided if the information is corroborated by another in-custody confidential informant. Requires that if corroboration is provided by a nonconfidential informant, or by physical evidence, that information be fully disclosed in the notice.
- A signed statement by the decisionmaker that the decisionmaker has made a determination regarding the corroboration of the confidential information, as defined.

This bill defines a "state prisoner" as any person under the jurisdiction of the department who is not on parole.

This bill provides that confidential information is "corroborated" if information about the same person, act, time, and place has been separately and independently provided by another confidential informant, nonconfidential informant, or physical evidence. Provides that information is provided independently if the decisionmaker determines there has been no contact or communication between the in-custody confidential informant and the corroborating source, and there has been no prior knowledge of any supporting physical evidence.

This bill defines an “in-custody confidential informant” as a person in custody in any local, state, or federal jail, penal institution, or correctional institution, whose name and full statement has not been disclosed to the prisoner who is the subject of the decision by the department or board.

This bill requires the Office of the Inspector General (OIG) to conduct an audit of CDCR’s compliance with these requirements annually and to submit a report of its findings to the Legislature and to the Committees on Public Safety of the Senate and the Assembly. Requires that the OIG reports be submitted in compliance with Section 9795 of the Government Code.

COMMENTS

1. Need for This Bill

According to the author:

Incarcerated people are currently deprived of their due process rights when uncorroborated information about them is entered into their confidential prison files. This information – which they generally aren’t even aware has been added to their files – can work against them in parole hearings and other internal decisions about their treatment while incarcerated.

CDCR officials routinely gather information on incarcerated people from other in-custody sources. This information can influence internal decisions about custody levels, access to programs, and even consideration for parole.

This information collected is often inaccurate, outdated, or uncorroborated, lacking physical evidence or other sources proving the accusation. However, the same information is used as justification for action and discipline, even though the practice is absent any due process and contrary to the foundational doctrine of our justice system: innocent until proven guilty.

Informant testimony can serve as a valuable tool for law enforcement, but the use of uncorroborated information unreasonably results in misuse and unjust criminal justice outcomes.

...

SB 1064 protects the basic due process rights of incarcerated people in the collection and use of information from in-custody confidential informants. Specifically, the bill prevents CDCR and the Board of Parole Hearings (BPH) from making any findings or decisions that rely in whole or in part on allegations that are uncorroborated and come from an in-custody confidential informant. Information from a confidential informant can be used only if it is substantiated with evidence that supports the allegation. Additionally, if CDCR or BPH are going to meet and consider information regarding an incarcerated person, the person accused shall receive a summary notice of any information provided by an in-custody confidential informant that may be used in the decision making process.

2. Existing Process for Disciplinary Actions

Regulations establish the protocols for the imposition of disciplinary actions by CDCR. CDCR regulations require misconduct that is not minor in nature to be reported as a Rules Violation Report (RVR). (Cal. Code of Regs, tit. 15, § 3312.) The RVR is required to include specified information, including the circumstances surrounding the misconduct and whether or not the charge will be referred for prosecution. (*Id.*) A summary of disciplinary procedures and the inmate's rights is to be provided to the inmate explaining the administrative hearing time frames as well as the roles of both the staff assistant and the investigative employee. (*Id.*) Finally, the referral for prosecution and the inmate's appeal rights are to be explained to the inmate. (*Id.*)

Department regulations further establish the structure of the investigation and hearing for a serious RVR. (Cal. Code Regs., tit. 15, § 3315.) Specifically, the regulations provide the circumstances under which a CDCR employee must be assigned to assist an inmate in investigating matters pertaining to a disciplinary action, the right of an inmate to request witnesses for the disciplinary hearing and the reasons for which the request for a specific witness may be denied, the various dispositions that may result upon completion of the fact-finding portion of the disciplinary hearing as well as the penalties that may be imposed if the inmate is found guilty, among other things. (*Id.*)

3. Confidential Information

CDCR regulations require the following types of information to be classified as confidential:

- Information which, if known to the inmate, would endanger the safety of any person.
- Information which would jeopardize the security of the institution.
- Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate.
- Information provided and classified confidential by another governmental agency.
- A Security Threat Group debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the central file.

(Cal. Code Regs., tit. 15, § 3321, subd. (a).)

A decision is prohibited from being based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker that the information is true. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(1).) Any document containing information from a confidential source is required to include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(2).) The documentation given to the inmate must include the fact that the information came from a confidential source and as much of the information as can be disclosed without identifying its source, including an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(3).)

A confidential source's reliability may be established by one or more of the following criteria:

- The confidential source has previously provided information which proved to be true.
- Other confidential source have independently provided the same information.
- The information provided by the confidential source is self-incriminating.
- Part of the information provided is corroborated through investigation or by information provided by non-confidential sources.
- The confidential source is the victim.
- This source successfully completed a polygraph examination.

(Cal. Code Regs., tit. 15, § 3321, subd. (c).)

4. Board of Parole Hearings

Some state prison inmates must be approved for release by the Board of Parole Hearings (BPH). These inmates must appear before a panel of BPH Commissioners at a parole suitability hearing during which time a variety of topics are discussed, including the inmate's commitment offense, rehabilitative efforts, disciplinary history and misconduct, psychological evaluations that include risk ratings correlated with likelihood of future violence, and parole plans, among other things. The BPH panel has access to an inmate's entire central file, including the inmate's confidential file. An inmate and the inmate's attorney have the right to review the inmate's central file, except for the confidential file, prior to the inmate's parole suitability hearing. The ultimate determination that the panel must make is whether the person poses "an unreasonable risk of danger to society if released from prison." (Cal. Code of Regs., tit. 15, §§ 2281, subd. (a), 2404, subd. (a).)

Regulations provide that the BPH panel may consider all relevant and reliable information when making a parole suitability determination. (Cal. Code of Regs., tit. 15, §§ 2281, subd. (b), 2404, subd. (b).) BPH is prohibited from basing a parole suitability decision upon information that is not available to the inmate unless the information has been designated confidential under the rules of the department and is necessary to the decision. (Cal. Code Regs., tit. 15, § 2235.) The reliability of confidential information to be used is required to be established to the satisfaction of the hearing panel, and a finding of reliability must be documented by the hearing panel. (*Id.*) Regulations provide that a hearing may be continued to establish the reliability of the information or to request the department to designate the information as nonconfidential. (*Id.*) The inmate is required to be notified of reports on which the panel relied if confidential information affected a decision. (*Id.*)

Regulations provide for the use of comprehensive risk assessments by the BPH hearing panel when making parole suitability determinations and outline the process by which an inmate or the inmate's attorney may object to a factual error believed to be contained in the risk assessment as well as the process by which BPH evaluates the allegation. (Cal. Code Regs., tit. 15, § 2240.)

5. Effect of This Bill

This bill prohibits CDCR from finding an inmate to be guilty of an RVR, if the finding or decision is based on, or relies on, in whole or in part, any uncorroborated information from an in-custody confidential informant. This bill additionally prohibits BPH from making a finding or

decision about any inmate that is based on, or relies on, in whole or in part, allegations that have not been found true following a disciplinary hearing at which the subject was provided notice, an opportunity to confront nonconfidential witnesses before an impartial hearing body, a written statement of the evidence relied upon, a written statement of the reasons for the decision, and an opportunity for appeal.

This bill further requires that an inmate and the inmate's attorney receive a summary notice of any information provided by an in-custody confidential informant at least 10 days prior to any RVR hearing, and applies the 10-day summary notice requirement to BPH findings and decisions, including any interview on which a risk rating is based (e.g., a comprehensive risk assessment interview). This bill requires the summary notice to include all of the following:

- A detailed description of the information provided by the confidential informant.
- The date the information was provided to the department.
- The date of the events or actions referred to in the informant's report.
- The location where the information was provided by the informant.
- The name of the officer who obtained and recorded the informant's report.
- The source and nature of the informant's personal knowledge of the events or actions.
- The investigative steps taken by the receiving officer or other department official to confirm the facts reported and the informant's personal knowledge.
- The informant's previous record of confidential information, including instances of information not meeting standards of reliability.
- The evidence used to corroborate the information. Requires a summary notice, as described, to be provided if the information is corroborated by another in-custody confidential informant. Requires that if corroboration is provided by a nonconfidential informant, or by physical evidence, that information be fully disclosed in the notice.
- A signed statement by the decisionmaker that the decisionmaker has made a determination regarding the corroboration of the confidential information, as defined.

This bill provides that confidential information is "corroborated" if information about the same person, act, time, and place has been separately and independently provided by another confidential informant, nonconfidential informant, or physical evidence. This bill specifies that information is provided independently if the decisionmaker determines there has been no contact or communication between the in-custody confidential informant and the corroborating source, and there has been no prior knowledge of any supporting physical evidence.

6. Argument in Support

According to an attorney with the Prison Law Office:

I write in support of the incarcerated individuals whose transformative journeys out of prison have been knocked off course by unproven allegations, particularly those found in the confidential section of a prison file. Too often, parole commissioners and Board psychologists make decisions about an individual's credibility, or determine that individual to be dangerous, based on confidential information that has not been subjected to any meaningful review. These unsubstantiated allegations are often made by other individuals with motives for falsely implicating the parole applicant in misconduct, and as such, ought to be subjected to additional verification.

Due process suffers when unsubstantiated allegations are used to determine the questions of credibility and threat to public safety, particularly when a person's future hangs in the balance, often following decades in prison and extensive positive programming.

Senate Bill 1064 ultimately addresses a critical gap in the discretionary parole process by prohibiting the Board from making decisions that deprive people of their liberty based on allegations that have not been subjected to the equivalent of disciplinary proceedings, with their attendant due process protections.

7. Argument in Opposition

The California District Attorneys Association writes:

This bill would deprive the California Department of Corrections and Rehabilitation (CDCR) from using reliable evidence of inmate criminal activity to hold them accountable in disciplinary hearings, thwart criminal prosecutions, prohibit the Board of Parole Hearings (BPH) from considering relevant criminal misconduct at lifer parole hearings, deprive forensic psychologists from considering relevant information in determining an inmate's risk for future violence, and jeopardize the safety of inmates and correctional staff.

Currently, when an inmate is alleged to have committed a serious rules violation (115), they are given notice of the proposed disciplinary hearing, including a written rights advisement and circumstances of the violation. The names of the confidential informant(s) or non-confidential informant(s) are not provided to the inmate and correctional staff takes great care to avoid giving the inmate facts that would unmask informants to ensure the safety of the informant(s), their friends and family, and correctional staff....

Currently, at a parole suitability hearing BPH can consider "all relevant and reliable information," including the conduct behind the 115 hearings that have been dismissed for technical issues such as timeliness. BPH give the information the weight it should be given just as a court would determine weight and admissibility of evidence. Under current law, life inmates are given notice of the use of confidential information (Form 1030) in advance of their parole suitability hearing ... During a parole suitability hearing, BPH commissioners may ask the inmate about confidential information if they choose to. If they determine they will use confidential information to reach a decision, they must make a confidential tape for that part of the decision. That tape, the entire inmate central file, including the confidential section, are provided to a reviewing court if an appeal is filed. This process mirrors the criminal justice process regarding the use of confidential informants. Currently, forensic psychologists have access to all relevant information necessary for them to reach an accurate assessment of an inmate's risk for future violence prepared in advance of a parole suitability hearing, which can be relied upon by BPH.

...[SB 1064] will severely impede CDCR's ability to investigate past prison crimes and prevent future criminal misconduct. It will also jeopardize long-term investigations involving CDCR's most dangerous inmates....

SB 1064 would also detrimentally impact the ability to criminally prosecute crimes committed by inmates found not guilty at their 115 hearing, not because they were in truth and fact not guilty, but because they were successful in intimidating informants with relevant evidence against them from cooperating with law enforcement.

...

Lastly, SB 1064 is unnecessary. Existing law already affords inmates facing disciplinary hearings a summary of the evidence substantiated the charges against them. At the hearing, inmates can call witnesses or introduce evidence on their behalf. Likewise, under current law, at a lifer suitability hearing, inmates are given notice, including a summary of any confidential information that may be considered by BPH at the hearing. If confidential information is used by the commissioners in reaching their decision, that information is preserved and available for review by the court on appeal.

-- END --