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## **Public Protection: Informants**

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## **1. Introduction**

Law enforcement agencies have frequently found the use of informants beneficial, and, in some cases, even essential, in successfully pursuing criminal investigations and prosecutions. Informants are necessarily asked to place themselves in a variety of dangerous situations, where they may encounter violent retaliation from suspects.

What are the obligations of law enforcement to provide protection to informants against such violent reprisals, and under what circumstances will failure to adequately do so result in civil liability? That is the subject briefly discussed in this article.

## **2. Protection of Informants**

A number of cases involving alleged failure to provide adequate protection to informants have resulted in large damage awards. The facts of these cases have sometimes involved both promises of protection or safety and alleged affirmative acts by law enforcement personnel that plaintiffs have claimed created or increased the risks faced by the informant.

In [McIntyre v. U.S.](#), #07-1663, 545 F.3d 27 (1st Cir. 2008), the court ruled that the estate of an FBI informant murdered by two organized crime figures was properly awarded \$3.1 million in a lawsuit against the FBI under the Federal Tort Claims Act. The plaintiff alleged that an FBI agent caused the death by leaking the fact that the decedent was

cooperating with authorities to the two organized crime figures, who themselves had been serving as informants. The appeals court rejected the argument that the FBI agent was a rogue agent who acted outside the scope of his employment and in violation of F.B.I. policies.

In [Butera v. District of Columbia](#), #00-7008, 235 F.3d 637 (D.C. Cir. 2001), a federal appeals court reduced a jury award of \$98 million for failure to protect an informant from being murdered to \$1.1 million, while upholding the determination that the officers should have constantly monitored the informant as he faced a dangerous situation in attempting to purchase crack cocaine. He was murdered while going to purchase additional crack from a house, as he had been asked to do. Punitive damages, the court noted, were not available against D.C. and the informant's mother had no constitutional claim based on her loss of companionship of the informant, who was her adult non-dependent son.

The state of New York was held liable for \$10.8 million to the families of two informants who were murdered based on a court ruling that law enforcement failed to provide promised protection. Liability was upheld in [Kubecka v. State of New York](#), #97-01230, 672 N.Y.S.2d 122 (A.D. 2<sup>nd</sup> 1998). Damages were awarded in [Kubecka v. State of New York](#), Claim No. 81781, New York Court of Claims, reported in The New York Times, National Edition, p. A15 (July 22, 1998).

In a case where promised protection and assistance was provided to an informant, there was no liability when an informant's own unwise and unforeseen actions resulted in his murder. In this case, [Gatlin v. Green](#), #02-3705, 362 F.3d 1089 (8th Cir. 2004), a man in Minneapolis was murdered by gang members after he cooperated with police, and his widow and estate sued a police detective and the city, claiming a violation of his federal civil rights because of the alleged failure to adequately protect him. The decedent was a long-time member of the gang in question, known as the "Mickey Cobra" gang. While he was in the county jail on charges of armed robbery, he stated that he wanted to cooperate with the police in exchange for assistance with his state charges and a chance to start a new life free of gang ties.

He was interviewed by two police sergeants and told them what he knew about the gang's criminal activities, including furnishing detailed information relating to the suspected Mickey Cobra gang-murder of a member of the Gangster Disciples, a rival gang. Subsequently, based on this information, an alleged gang member was indicted and arrested for the murder and a related attempted murder. The informant's sentence was reduced to three years probation in return for his assistance, and he was ordered to remain in contact with the prosecutor and available to testify at trial.

The man arrested for the murder was discovered by jail officials to be attempting to mail a transcript of the informant's police statement to an outside friend, along with a handwritten note stating, "Check this out. Something must be done about this." Officers from the jail allegedly contacted one of the police sergeants about what they should do with the letter. The sergeant subsequently told them that the police were not interested in subpoenaing the letter, and that if the sheriff department's policies did not prohibit mailing the letter, he personally did not know how it could lawfully be withheld from mailing. Jail officials then released the hold on the letter and it was mailed to the outside friend.

The police sergeant then informed the other sergeant who had been in on the interview of the informant, who in turn contacted the informant and advised him of the mailing. The informant expressed his fear that if the letter was circulated to gang members, his life could be in danger.

Officers and the prosecutor's office, with court approval, gave the informant permission to leave town until he was needed to testify, and furnished some funds from a witness protection program to allow him to relocate. It was believed that the informant had left town and relocated to Arkansas. Less than a month later, police found the informant's body in an alley in Minneapolis, where he had been shot between 13 and 15 times. Three Mickey Cobra gang members were later indicted for the murder, with two of them convicted and one allegedly killed in Chicago before he could be arrested.

A federal appeals court ruled that the police sergeant, who was sued by the widow and estate, was protected against liability for violation of the informant's federal civil rights under the principles set down in [DeShaney v. Winnebago County Dep't of Social Services](#), #87-154, 489 U.S. 189 (1989). There is no general duty on states under federal civil rights law to protect individuals against private violence. The court found that no exception to this ruling applied in this case.

The informant, the appeals court commented, "made a courageous decision" to leave the gang and cooperate with police in order to start a new life. By doing so, he "knowingly assumed a considerable risk" that gang members would eventually discover his cooperation and seek revenge against him. As a twenty-five year veteran member of the gang, he could "evaluate better than anyone the deadly risk inherent in cooperating with police."

The appeals court also noted that the officer, the prosecutor, and others took actions to attempt to minimize the risk of a retaliatory gang "hit." The fact that the informant would choose to ultimately remain in or return to Minneapolis after being given assistance to leave, without informing authorities, was unknown to the defendant police sergeant. The informant "miscalculated the grave risk of harm he assumed," and "tragically, his

miscalculation cost him his life.” The appeals court also failed to find that any official city policy, practice or custom caused the death. It rejected arguments that the city failed to properly train its officers in how to protect witnesses and informants.

Negligence, standing alone, even if it may result in harm to an informant, is not enough for liability under federal civil rights law. In [Coyne v. Cronin](#), #03-2357, 386 F.3d 280 (1st Cir. 2004), a federal appeals court ruled that a trial court should dismiss a federal constitutional claim filed against an FBI agent by an informant who claimed that her actions had disclosed his identity to persons who might harm him.

It held that the agent was entitled to qualified immunity, that the complaint, at most, alleged negligence, rather than deliberate indifference to the informant's safety, and that no clearly established right of the informant had been violated. It did not answer the question of whether a “deliberate indifference” standard or some other legal standard would govern or support such a claim, stating that it did not have to reach that issue, since no deliberate indifference was even alleged.

The plaintiff was formerly a prisoner at a Massachusetts state prison, and sent letters to the security team at the prison containing information about both alleged corruption in the prison and crimes being committed or planned by other prisoners. He subsequently met with the defendant FBI agent, another FBI agent, a federal prosecutor and a police officer. The defendant FBI agent assured him that she would take precautions to keep him safe, in response to his fears if he passed along some additional information. He then shared information with her, and she encouraged him to pretend an interest in a still-developing plan by prisoners to rob an armored car after their release from prison.

She asked him to send a letter to one of the persons planning the robbery--an inmate at another prison, saying that he would participate in the robbery if the others could wait until after his release. She instructed him to send this “dummy letter,” along with a second letter containing more detailed information for the FBI to a phony company address that served as an FBI mail drop. She told him that the letter to the inmate would be forwarded to the inmate's girlfriend, who would pass it along to the other inmate, while she would keep the letter to the FBI. He sent the letters as instructed.

She later told him that the FBI had made a “terrible mistake” and forwarded his entire parcel, including the letter to the FBI, which would make it clear to anyone that he was an FBI informant, to the girlfriend of the other inmate. Word of his informing allegedly spread through the prison system, and he had his teeth broken by a fellow inmate who accused him of being a “rat.” He was transferred and subsequently released, but stated that he now lives in fear for his safety and has received numerous threats since his release.

The appeals court agreed that it might be a violation of due process when a governmental actor “affirmatively acts to increase the threat to an individual of third-party private harm or prevents that individual from receiving assistance.” So it was at least theoretically possible that the agent's actions, in permitting the letter to the FBI to be forwarded and in failing to protect him afterwards -- were the source of an increased danger that ultimately caused him harm.

To prevail on such a claim, even assuming its validity, the appeals court stated, he would have to show that the agent's conduct was so egregious or outrageous that it may fairly be said to “shock the contemporary conscience.”

Such conduct could range from malicious and sadistic actions taken for the very purpose of causing harm to those in which a government official displays deliberate indifference to a known risk of harm. In this case, however, the court found that it did have to determine where along this spectrum of levels of fault the plaintiff's claim against the agent might lie, “because the complaint does not fairly allege deliberate indifference, let alone any more serious level” of misconduct.

To show deliberate indifference, the plaintiff would have to, at a bare minimum, the court commented, demonstrate that the agent actually knew of a “substantial risk of serious harm to him and disregarded that risk.”

No such showing was made. The agent did not deliberately cause the plaintiff's role as a government informant to be revealed. Further, the evidence did not show that the agent “abandoned him” after learning of the mistaken mailing, rather she arranged for his transfer to another prison, and a prison security official was present when she met with him to inform him of the mistaken mailing.

At times, obligations to provide a certain level of protection to informants may arise as a result of contractual or quasi-contractual agreements between a law enforcement agency and an informant. In one such case, a federal court found that the DEA breached its duty of fair dealing inherent in an implied-in-fact contract with an undercover informant SGS-92-X003, known as the “Princess,” by “failing to follow its own protocol in sending her to Colombia.” In 1995, the informant endured three months in captivity in a windowless, dirt-floor room where she slept on a straw mattress. Damages are to be computed in a separate proceeding. [SGS-92-X003 v. U.S.](#), #97-579C, 2009 U.S. Claims Lexis 31 (2009); [prior opin.](#) (2007).

Other cases of interest in this area include:

\* [Combs v. City of Dallas](#), #06-11416, 2008 U.S. App. Lexis 15866 (Unpub. 5th Cir.). In this case, the court held that a man who claimed that he was improperly arrested on drug

charges after he had agreed with the police department to act as a confidential informant and participate in drug buys could not pursue his federal civil rights lawsuit for damages when he failed to show that his conviction had previously been reversed.

\* [Matican v. City of New York](#), #06-1983, 524 F.3d 151 (2nd Cir. 2008). This is a case in which a participant in a police drug sting operation was approached on the street by a drug dealer who had been arrested and subsequently released on bail, and accused of aiding the police. The drug dealer then allegedly slashed his face, causing him serious injuries. In a lawsuit brought by the informant, the court ruled that his participation in the sting did not create a special relationship imposing a duty of protection, but that the allegation that the sting had been planned in a manner that caused the drug dealer to learn about his involvement could be the basis for liability on a “state-created danger” theory. In this case, that claim also failed, however. The officers' actions did not shock the conscience because they were intended to protect the safety of the officers as well as the participant's.

\* [Cutter v. Metro Fugitive Squad, a/k/a U.S. Marshals Metro Fugitive Task Force](#), #Civ-06-1158, 2008 U.S. Dist. Lexis 66572 (W.D. Ok.), in which a deceased informant's widow and child claimed that Oklahoma sheriffs, a U.S. Marshal and his deputies, and other defendants improperly failed to take all reasonable measures needed to ensure the informant's safety. The informant died in a shootout that occurred while he was aiding a joint law enforcement task force in capturing a fugitive acquaintance. Federal civil rights claims against the defendant Marshal's deputies in their official capacities were allegedly not filed within the applicable statute of limitations and were therefore dismissed. Claims against the sheriffs were also dismissed, specifically claims based on an alleged state-created danger arising from their decision to engage in gunfire with the fugitive.

\* [Shuler v. U.S.A.](#), #06-5275, 531 F.3d 930 (D.C. Cir. 2008), in which a man who was shot in the back while serving as a confidential informant for the federal government claimed that the government acted negligently in placing him in harm's way, and failed to provide him with promised protection. The court found that the federal government's decision to arrest a suspected drug-trafficking boss at a particular time fell within the “discretionary function” exception to the waiver of sovereign immunity in the Federal Tort Claims Act. The court also found that the duty of protection that the plaintiff claimed the government owed him after taking actions (the arrest) that could disclose his identity was also a “discretionary duty.” The U.S. government was therefore entitled to immunity from the lawsuit.

\* [Rennick v. City of Cincinnati](#), No. 1:06-CV-00580, 2007 U.S. Dist. Lexis 56198 (S.D. Ohio), in which a police informant claimed that the officer who recruited him was present and involved in his shooting, and that the police department failed to adequately

investigate the officer's role in that incident as part of hiding the officer's involvement in a drug enterprise. The trial court denied motions to dismiss his claims for conspiracy and denial of equal protection for failure to investigate, while finding that the statute of limitations barred a claim for failure to protect the informant from the shooting.

\* Monfils v. Taylor, #97- 2338, 165 F.3d 511 (7th Cir. 1998), rehearing denied, 1999 U.S. App. Lexis 1411 (7th Cir.), in which a federal appeals court upheld an award against a city and its officers of \$2 million for releasing tapes of an informant's calls to police to a suspect in a theft case under a state open records law. The lawsuit asserted that the release of the tapes led to the informant's co-workers killing him by placing him in a vat of paper pulp at the workplace.

\* McAlpin v. City of Decatur, #1921026, 628 So. 2d 611 (Ala. 1993), ruling that officers were not liable for the burglary of a house by two men, including an informant. The fact that they knew of the impending burglary before it happened did not make them liable for it when they did not plan or arrange the burglary, but merely received a tip that it would take place, and arrested the burglars as they exited the building.

\* Williamson v. City of Virginia Beach, Va., #92-1420, 1993 U.S. App. Lexis 8421 (Unpub. 4<sup>th</sup> Cir.), finding that police were not liable for the apparent suicide of a 17-year-old boy used as an informant in drug arrests who had received threats from arrestees. The officers had no reason to believe that the informant had grave mental problems.

#### 4. Resources

The following are some useful resources related to the topic of this article.

- The Attorney General's Guidelines Regarding the Use of Confidential Informants <http://www.usdoj.gov/olp/dojguidelines.pdf>
- **Article:** “Working with Informants,” by James E. Hight, 69 FBI Law Enforcement Bulletin #5, pgs 6-9 (May 2000). [PDF].
- **Article:** “Safeguarding Undercover Employees,” by Meredith Krause, 77 FBI Law Enforcement Bulletin #8, pg. 1 (Aug. 2008).
- “Adnan Awad: The Forgotten Informant,” by Brian H. Potts, 7 Cal. Crim. Law Rev. 2 (2004). Addresses protection of informants in international terrorism cases.



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