



PRISON LAW OFFICE

General Delivery, San Quentin, CA 94964
Telephone (510) 280-2621 ☐ Fax (510) 280-2704
www.prisonlaw.com

Director:
Donald Specter

Managing Attorney:
Sara Norman

Staff Attorneys:
Rana Anabtawi
Patrick Booth
Steven Fama
Alison Hardy
Sophie Hart
Corene Kendrick
Rita Lomio
Margot Mendelson

Your Responsibility When Using this Information:

This information is not intended to be legal advice about the facts in your case, but it will give you more information about your rights and what you can do to help yourself. When we wrote this document we did our best to give you useful and accurate information, because we know that people often have difficulty obtaining legal information in prison or jail and we cannot provide specific advice everyone who requests it. Also, the laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this document, it is your responsibility to make sure that the law has not changed and applies to your situation.

Use of Confidential Information in CDCR Decisions (updated May 2020)

The California Department of Corrections and Rehabilitation (CDCR) defines confidential information as information that, if disclosed, would endanger the safety of any person or jeopardize the security of the institution, information in Security Threat Group (STG) debrief reports, or information classified as confidential by another government agency.¹ Prison and parole officials sometimes use confidential information in rule violation proceedings, classification and segregation decisions, STG validations, and parole violation proceedings. When information about you is deemed confidential, prison or parole officials will not reveal the identity of the person who provided the information and they will tell you only as much of the information as can be disclosed without revealing the identity of the informant.² The name of the informant and the details of the information will be placed in a confidential part of your prison or parole record, which neither you nor your lawyers will be allowed to review.³

Confidential information can be unreliable because an informant may lie, and it is not easy to challenge an informant's statements. However, there are some legal limits on the use of confidential information by prison and parole officials. This letter will discuss your rights when faced with confidential information. It will also provide an overview of steps that you can take to enforce those rights.

¹ 15 California Code of Regulations (CCR) § 3321(a)(1), (2), (4), (5). Also, medical or psychological information about a person that would be harmful if disclosed to that person may be deemed confidential. 15 CCR § 3321(a)(3).

² 15 CCR § 3321(b)(3); see also *In re Olson* (1974) 37 Cal.App.3d 783, 788, fn. 5 [112 Cal.Rptr. 579] (state has valid interest in keeping certain prison records confidential); *In re Muszalski* (1975) 52 Cal.App.3d 475 [125 Cal.Rptr. 281] (no right to review confidential documents in prison file).

³ 15 CCR § 3321(d); see also 15 CCR § 3450(d) (no person who is in prison or on parole shall handle confidential information); 15 CCR § 3370(d) (no person in prison or on parole shall access confidential information).

Board of Directors

Penelope Cooper, President • Michele WalkinHawk, Vice President • Marshall Krause, Treasurer
Harlan Grossman • Christiane Hipps • Margaret Johns • Cesar Lagleva
Laura Magnani • Michael Marcum • Ruth Morgan • Seth Morris

CDCR Rules Regarding Confidential Information

Title 15, section 3321 is the CDCR rule on what information can be deemed confidential and what requirements must be met before prison or parole staff may rely on confidential information in making a decision. Section 3321 is in the part of Title 15 that covers rule violation hearings, but its general language appears to apply to other uses of confidential information by CDCR staff.⁴ Moreover, other rules state that the section 3321 requirements apply when confidential information is used in classification,⁵ administrative segregation,⁶ STG validation,⁷ and parole violations.⁸

Section 3321 sets forth the following requirements:

- (1) CDCR staff must inform you when confidential information is being used against you, and must state that the identity of the informant cannot be disclosed without endangering the informant or the security of the institution.**⁹

You should receive a CDCR Confidential Information Disclosure Form stating that confidential information is being considered and that staff have determined that the identity of the source cannot be disclosed. The Form also includes a section for CDCR staff to state where and how the confidential information appears in your record (for example, “a confidential chrono dated January 1, 2019 in the confidential information section of John Doe’s ERMS file”).

⁴ 15 CCR § 3321(b) (“[n]o decision shall be based on information from a confidential source” unless requirements are met and “[a]ny document containing information from a confidential source” must meet requirements).

⁵ 15 CCR § 3075.2(h)(1) (Institutional Staff Recommendation Summary shall state whether there is confidential information on file); 15 CCR § 3375(g)(5)(Q) (documents at Initial Classification reviews shall include existence and review of confidential information).

⁶ 15 CCR § 3337(a)(3) (for administrative segregation hearings, notice of any confidential information shall be provided in accord with § 3321(b)(3)).

⁷ 15 CCR § 3378(a) (any confidential material affecting STG identification, prevention, and management shall conform to § 3321); 15 CCR § 3378.2(b)(3),(4) (confidential material that is considered in STG validation shall meet requirements of § 3321); 15 CCR § 3378.2(c)(1) (confidential information used in STG validation shall be disclosed on a Confidential Information Disclosure Form); 15 CCR § 3378.3(c) (confidential information used in STG validation shall be disclosed on a Confidential Information Disclosure Form); 15 CCR § 3378.4 STG(c)(7) (investigators shall establish reliability per § 3321 of information about STG behavior that occurred while person was outside jurisdiction of CDCR); 15 CCR § 3378.6 (upon receipt of an STG debrief report, staff shall investigate the information and prepare Confidential Information Disclosure Form documenting as much information as can be disclosed without identifying the source).

⁸ 15 CCR § 3460 (neither person on or their attorney shall have access to information in parole field file that is confidential per § 3321).

⁹ 15 CCR § 3321(b)(3)(A).

(2) CDCR staff must evaluate the informant's reliability and give you a brief statement of why they believe the information is reliable.¹⁰

Staff may conclude that reliability is established based on factors including:

- the source has previously provided information that proved to be true;;
- other confidential sources have independently provided the same information;
- the information provided by the source is self-incriminating;
- part of the information is corroborated by investigation or by information from non-confidential sources;
- the source of the information is the victim; or
- the source passed a polygraph (lie-detector) examination.¹¹

The Confidential Information Disclosure Form includes a standard statement that the information "is considered reliable because" followed by boxes that staff can use to check off any of the reasons listed above. The form also has space for staff to state any "other" reason and provide a brief explanation of that reason.

(3) CDCR staff must disclose to you as much of the information as possible without identifying the informant.¹²

The information that is being disclosed to you will be on the Confidential Information Disclosure Form. It may also appear on the portion of a Rules Violation Report describing the charge.

In addition, when confidential information is used to validate you as an STG affiliate, CDCR staff must disclose the date of the information and how the information specifically relates to your involvement with an STG.¹³

(4) No decision may be based on confidential information unless (1) other evidence corroborates the confidential information or (2) circumstances surrounding the event and the reliability of the informant satisfy the decision-maker that the confidential information is true.¹⁴

¹⁰ 15 CCR § 3321(b)(2)-(3), (c).

¹¹ 15 CCR § 3321(c).

¹² 15 CCR § 3321(b)(3)(B).

¹³ 15 CCR § 3378.2(b)(3).

¹⁴ 15 CCR § 3321(b)(1).

There are some additional limits on using confidential information to validate you as an STG affiliate. The information may be used as a source of STG validation only if the informant provides specific knowledge of how they knew you were involved with an STG, and staff cannot rely on only hearsay information to validate you. If information comes from another person's debrief report, it cannot be considered as a source item for validation unless the information refers to specific STG-related acts or conduct. Multiple confidential sources providing information regarding a single STG-related incident or behavior only count as one validation source item.¹⁵

Constitutional Due Process Rights Regarding Use of Confidential Information

The Fourteenth Amendment of the United States Constitution and Article 1, section 7 of the California Constitution guarantee that people shall not be deprived of liberty without due process of law. Depending on what type of action prison or parole officials are taking – and the extent to which the action affects your liberty -- you may have some constitutional due process rights regarding use of confidential information.

The majority of court cases on due process rights regarding confidential information involve **serious prison rule violation proceedings** for which good conduct or programming credits may be lost. The United States Supreme Court has held that some federal due process rights apply in serious prison rule violation proceedings, including rights to notice of the charges and a written statement of the decision-maker as to the evidence relied upon and the reason for the decision. However, the Court held that there is no right in rule violation proceedings to confront or cross-examine adverse (unfavorable) witnesses, and that prison officials have discretion whether or not to disclose of the identity of an accuser.¹⁶ There also is a federal due process requirement that serious disciplinary findings of guilt must be supported by at least “some evidence.”¹⁷ A few cases have specifically discussed confidential information in rule violation proceedings:

- *Cato v. Rusben* (9th Cir. 1987) 824 F.2d 703: California prison officials found Cato guilty of a rule violation for conspiring to take hostages, based on the statement of a confidential informant. The Ninth Circuit Court of Appeal held that when a prison rule violation finding is based on confidential information, due process requires that there be some indication that the information is reliable. In this case, there was not some evidence of reliability because the only evidence was an uncorroborated hearsay statement told to prison officials by a confidential informant who had no first-hand knowledge of anything. Furthermore, the original statement did not indicate that Cato actually knew about the hostage plot, and the polygraph test of the person who made the statement was inconclusive.

¹⁵ 15 CCR § 3378.2(b)(3).

¹⁶ *Wolff v. McDonnell* (1974) 418 U.S. 539 [94 S.Ct. 2963; 41 L.Ed.2d 935].

¹⁷ *Superintendent v. Hill* (1985) 472 U.S. 445 [105 S.Ct. 276; 86 L.Ed.2d 356]; see also *In re Rothwell* (2008) 164 Cal.App.4th 160 [78 Cal.Rptr.3d 723] (rejecting argument that higher standard should apply to California prison rule violations).

- *Zimmerlee v. Keeney* (9th Cir. 1987) 831 F.2d 183: Oregon prison officials found Zimmerlee guilty of a rule violation based on a confidential informant's statement that Zimmerlee and other members of a motorcycle club had smuggled drugs into the prison during a six-month period and that during at least one club meeting Zimmerlee had received drugs from a specific club member. The Ninth Circuit Court of Appeals ruled that federal due process requires that when a rule violation finding is based on confidential information, the record must contain (1) some factual information from which prison officials can reasonably conclude that the information is reliable and (2) a prison official's statement that safety considerations prevent disclosure of the informant's name. An informant's reliability may be established in various ways. In this case, reliability was shown by a police report of the investigation, the informant's polygraph examination results and statements, and a confidential memorandum describing the word-for-word statement of the informant's personal observations, the informant's identity, and prior instances in which the informant supplied reliable information. The Court also found the summary of the confidential information provided sufficient notice of the charge.
- *In re Jackson* (1987) 43 Cal.3d 501 [233 Cal.Rptr. 911]: California prison officials found Jackson guilty of a rule violation for "force and violence" based on statements of three confidential informants. The California Supreme Court held that neither the federal nor state constitutional due process clauses require a rule violation hearing officer to hold an *in camera* (private) hearing to test the truthfulness of an informant. CDCR rules requiring a hearing officer to make a finding about the informant's reliability meet due process requirements so long as there is information in the record from which a reviewing court could conclude the hearing officer actually made a finding and that the finding is supported by evidence.
- *In re Estrada* (1996) 47 Cal.App.4th 1688 [55 Cal.Rptr.2d 506]: CDCR staff charged Estrada and another person with a rule violation for conspiracy to commit battery. An officer investigated the incident and filed a confidential report. The charges included the name of the victim, the date and type of injury, the name of the alleged co-conspirator, and a confidential information disclosure form. A California court of appeal found that Estrada had been given sufficient of the charge to allow him to prepare a defense. The court also reviewed the record including the confidential report, and found that the hearing officer made a reasonable reliability determination, that disclosing further information would have posed a serious risk to safety and security, and that the evidence was sufficient to support the rule violation finding. The court further opined that prison officials could rely entirely on hearsay information to support a rule violation finding, depending on the circumstances.

You also have due process rights at **parole revocation hearings**, including rights to notice of the charge and disclosure of the evidence against you and of any exculpatory (favorable) evidence, an opportunity to confront and cross-examine unfavorable witnesses, and a written decision of the evidence relied upon and the reasons for the decision.¹⁸ However, hearsay evidence may be admitted

¹⁸ *Morrissey v. Brewer* (1972) 408 U.S. 471, 485-489 [92 S.Ct. 2593; 33 L.Ed.2d 484]; see also *People v. DeLeon* (2017) 3 Cal.5th 640 [220 Cal.Rptr.3d 784].

if the state has good cause for failing to produce a witness that outweighs the person's interest in confronting the witness; factors to be considered are whether the evidence falls into some hearsay exception making it more likely to be reliable, and the importance of the evidence to the issues in the case.¹⁹ Furthermore, if the hearing officer finds that a confidential informant would be subjected to a risk of harm if their identity were disclosed, the state can keep the informant's identity secret and you will not be allowed to confront or cross-examine the informant."²⁰ The right of nondisclosure applies only to the extent necessary to protect the informant's identity; the identity of reporting officials and agencies and information provided by them must otherwise be disclosed.²¹ In addition, a California statute states that you or your attorney must be notified if there is any confidential information that is being withheld, and the state must disclose the nature and scope of the confidential information to the extent possible without endangering the informant.²²

In regards to **placement in segregation or other classification decisions**, the scope of any due process rights depends on the extent to which the decision affects your liberty interests. The U.S. Supreme Court has held that the U.S. Constitution does not give you a right to due process protections before you are placed or kept in segregation, classified in a specific security level, or placed in or denied some type of housing or program.²³ However, as a general rule, a state can establish a "liberty interest" that *is* protected by the federal right to due process if the state's laws create an expectation that certain procedures or standards will be followed before prison officials take an action *and* the action imposes an "atypical and significant hardship" in relation to ordinary prison life.²⁴ For example, the U.S. Supreme Court has found that open-ended "supermax" placement constituted an "atypical and significant hardship."²⁵ In addition, California courts have held that the California Constitution's due process clause (Article I, § 7) requires notice and an opportunity for a fair hearing whenever a classification decision could affect you negatively,²⁶ and

¹⁹ *United States v. Comito* (9th Cir. 1999) 177 F.3d 1166; *Valdivia v Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 989.

²⁰ *Morrissey v. Brewer* (1972) 408 U.S. 471, 487, 498 [92 S.Ct. 2593; 33 L.Ed.2d 484].

²¹ *In re Love* (1974) 11 Cal.3d 179, 184-185 [113 Cal.Rptr. 89]; *In re Prewitt* (1972) 8 Cal.3d 470, 477-478 [105 Cal.Rptr. 318] (applying same principle to parole rescission).

²² Penal Code § 3063.5.

²³ *Sandin v. Conner* (1995) 515 U.S. 472, 483-485 [115 S.Ct. 2293; 132 L.Ed.2d 418] (no due process right to be free from segregation placement); *Moody v. Daggett* (1976) 429 U.S. 78, 87 fn. 9 [97 S.Ct. 274; 50 L.Ed.2d 236] (no due process right to particular classification or rehabilitation programs); *Meachum v. Fano* (1976) 427 U.S. 215, 223-225 [96 S.Ct. 2532; 49 L.Ed.2d 451] (no due process liberty interest to be free from transfer to higher security level).

²⁴ *Sandin v. Conner* (1995) 515 U.S. 472, 483-485 [115 S.Ct. 2293; 132 L.Ed.2d 418].

²⁵ *Wilkinson v. Austin* (2005) 545 U.S. 209, 224-230 [125 S.Ct. 2384; 162 L.Ed.2d 174].

²⁶ *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [158 Cal.Rptr. 316]; *In re Carr* (1981) 116 Cal.App.3d 962, 966-967 [172 Cal.Rptr. 417] (due process requires notice and a hearing before custody level raised).

also requires that classification actions be supported by “some evidence.”²⁷ Thus, depending on the circumstances, you may be able to argue that prison officials have violated your federal and/or state due process rights by relying on confidential information to make segregation or classification decisions.

Challenging Use of Confidential Information

There are three types of actions you can take to challenge the use of confidential information against you.

First, you can **ask for more investigation of the confidential information during your disciplinary hearing, STG validation process, segregation hearing, classification hearing, or parole violation hearing.** For example, you could request that the staff member who received the confidential information be present at the hearing so that they can be questioned about the reliability of the informant, whether the informant had personal knowledge of the information or was just passing along hearsay from someone else, and whether anyone gathered information about reasons the informant might have had to lie (such as holding a grudge, wanting favorable treatment from staff, or needing to clear themselves of suspected wrongdoing). If an Investigative Employee (IE) or Staff Assistant (SA) is assigned, you can ask them to question the staff member who wrote the confidential report. You also can **object to use of or reliance on the confidential information.** Possible grounds for objecting could include that (1) not enough information was disclosed to allow you to present a defense, (2) the disclosure form or other documents do not say whether the confidential source had personal knowledge of information, (3) the information is unreliable because there might be a motive for the informant, (4) the confidential information alone is not enough to support the proposed action, if there is no other evidence corroborating the confidential information.

Second, you can **file a CDCR grievance and appeal of grievance challenging the use of confidential information and the decision that was based on that information.** If prison or parole officials use confidential information to make a decision that affects you, like finding you guilty of a rule violation, you can challenge the decision by filing CDCR 602 Forms, saying why you believe the use of or reliance on confidential information was unfair, improper, and/or unlawful.

Third, you can file a **court action challenging the use of confidential information and the decision that was based on that information.** You will almost always have to “exhaust administrative remedies” by completing the CDCR grievance and appeal or grievance process before you file any type of court action, although there can be exceptions to this general rule. A state court habeas corpus petition usually will be the best choice for most prison issues challenging use of confidential information, including serious rule violation findings, because (1) you can raise issues based on the U.S. Constitution, the California Constitution and statutes, and/or CDCR regulations, (2) the process for filing and deciding a petition is relatively simple and quick, and (3) the court must

²⁷ *In re Jenkins* (2010) 50 Cal.4th 1167, 1175-1176 [116 Cal.Rptr.3d 790]; *In re Lusero* (1992) 4 Cal.App.4th 572, 575-576 [5 Cal.Rptr.2d 729]; *In re Wilson* (1988) 202 Cal.App.3d 661, 666-667 [249 Cal.Rptr. 36]; see also *Superintendent v. Hill* (1985) 472 U.S. 445, 457 [105 S.Ct. 2768; 86 L.Ed.2d 356] (describing “some evidence” standard”).

appoint you a lawyer if you do not have money to hire a lawyer and the court allows your case to proceed. Note that because parole violations are decided by courts rather than CDCR, you can file a direct appeal from a parole violation finding. Depending on what types of rights were violated (federal and/or state) and what sort of relief you are asking for (money damages and/or an order that prison or parole officials do something or stop doing something), there might be other types of court actions that you could file instead of or after a state petition for writ of habeas corpus.

Because you (and your lawyer, if you have one) will never have seen the name of the informant or the details of the confidential information, it may be hard to argue that the information is not reliable or not sufficient. When you file your state habeas corpus petition or other actions, you should ask the court to (1) order CDCR to produce the confidential information for the court and (2) do an *in camera* (private) review of the information. When the court does an *in camera* review, it can decide issues like (1) whether prison officials properly decided that disclosing the name of the informant and more details of the information would pose a danger to safety and security, (2) whether the hearing officer reasonably determined that the information was reliable, and (3) whether the information is sufficient to support the rule violation finding or other action against you. Both state and federal courts have recognized *in camera* review as an appropriate procedure for reviewing challenges to use of confidential information by prison officials.²⁸

Information manuals on CDCR grievances and appeals and various types of court actions are available upon request by writing to the Prison Law Office. Information on these topics also appears in *The California Prison and Parole Law Handbook* (2019), which should be available in the prison law library. In addition, these manuals and the *Handbook* are available for free on the Resources page of the Prison Law Office website at www.prisonlaw.com.

²⁸ *Zimmerlee v. Keeney* (9th Cir. 1987) 831 F.2d 183, 186-187 and fn. 1 (indicating that requesting *in camera* review would be a way for court to assess reliability determination); *In re Jackson* (1987) 43 Cal.3d 501, 516 [233 Cal.Rptr. 911] (disciplinary record must contain information -- confidential or otherwise -- from which a reviewing court can conclude that the hearing officer made a reliability determination and that the determination is supported by evidence); *In re Muszalski* (1975) 52 Cal.App.3d 475 [125 Cal.Rptr. 281] (*in camera* review appropriate to allow court to determine whether documents properly deemed confidential); *In re Estrada* (1996) 47 Cal.App.4th 1688, 1697-1699 [55 Cal.Rptr.2d 506] (court reviewed confidential information in determining that information was properly kept confidential and deemed reliable and was sufficient to support rule violation finding); *Ochoa v. Superior Court* (2011) 199 Cal.App.4th 1274 [132 Cal.Rptr.3d 233] (in parole suitability case, appropriate for court to conduct *in camera review* to determine how much of confidential information could be released to a person's lawyer without revealing identity of the informant); see also Evidence Code § 915 (in camera procedure for determining whether information is properly deemed confidential).