

# HOUSE BILL REPORT

## ESSB 5038

---

**As Reported by House Committee On:**  
Judiciary

**Title:** An act relating to disclosures regarding incentivized evidence and testimony.

**Brief Description:** Concerning disclosures regarding incentivized evidence and testimony.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Padden, Pedersen, Kuderer, Darneille, Frockt and Angel).

**Brief History:**

**Committee Activity:**

Judiciary: 3/21/17, 3/23/17 [DPA].

**Brief Summary of Engrossed Substitute Bill  
(As Amended by Committee)**

- Requires the state, prior to introducing any testimony or statement of an informant in a criminal proceeding, to disclose to a defendant certain information relating to the informant and the circumstances surrounding any statement or information provided by the informant.
- Establishes remedies that a court may impose if a prosecuting attorney fails to comply with required disclosure of materials and information relating to an informant.

---

### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 10 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Frame, Goodman, Graves, Haler, Hansen, Kirby, Orwall and Shea.

**Minority Report:** Without recommendation. Signed by 2 members: Representatives Rodne, Ranking Minority Member; Muri, Assistant Ranking Minority Member.

**Minority Report:** Do not pass. Signed by 1 member: Representative Klippert.

**Staff:** Edie Adams (786-7180).

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

Under both statute and court rule, any person of sound mind and discretion may be a witness in a court proceeding. Witnesses, however, may be prohibited from offering certain types of testimony that present evidence that is inadmissible under court rule or statute or due to constitutional violations, and there are procedures for the court to make pretrial determinations about the admissibility of evidence, or the ability of certain witnesses to testify.

Juries are generally instructed that they are to judge the credibility and weight of the evidence and may consider a number of factors, including any personal interest the witness has, any bias or prejudice the witness shows, or other factors impacting the jury's belief of the witness or testimony. The rules of evidence do not specifically address the issue of testimony offered by informants, although there is a jury instruction that can be used in the case of accomplice testimony.

In the case of accomplice testimony given on behalf of the state, the court may provide a jury instruction that directs the jury to subject the accomplice's testimony to careful examination and to act upon the testimony with great caution. The instruction further provides that the jury should not find the defendant guilty upon the accomplice's testimony alone unless after careful consideration the jury is satisfied beyond a reasonable doubt of its truth. This instruction is mandatory in cases where the prosecution relies solely on the uncorroborated testimony of the accomplice. Washington appellate courts have ruled that a trial court is not required to give a jury instruction cautioning the jury regarding informant testimony.

Under *Brady v. Maryland* and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. This obligation extends not only to exculpatory evidence, but also to evidence impeaching the credibility of a government witness. In the case of an informant, the prosecution is obligated to disclose to the defense any benefit or advantage the informant receives, as well as other material evidence that impacts the credibility of the informant.

---

## **Summary of Amended Bill:**

New requirements governing the use of testimony or statements of an informant in a criminal trial or proceeding are established. "Informant" means any incarcerated person or criminal suspect who provides information or testimony in exchange for a benefit or in reliance on a communicated benefit. "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement, but does not include a court-issued protection order or assistance ordinarily provided to facilitate the presence of a witness, such as lodging, meals, travel expenses, or parking fees. "Statement" means an oral, written, or nonverbal communication related to the crime charged.

Before the state may introduce any testimony or statement of an informant in a criminal proceeding, the state must request and disclose specified material and information to the

defendant. The state must request the specified material and information from the investigative agency, the informant, and investigative agencies and prosecutors in jurisdictions where the informant has a criminal record or pending charges. The state must disclose to the defendant the results of those requests and any other material and information that is known or reasonably available to be obtained from a review of material and information internal to the prosecutor's office.

The state must disclose the required materials and information as soon as practicable after discovery but no later than 14 days before the testimony or statement is introduced in a criminal proceeding. The material and information the state must request and disclose to the defense are:

- the informant's complete criminal history and any pending charges or investigations;
- any benefit the state has provided or may provide to the informant in the present case, including any breach of conditions of the agreement;
- the substance, time, and place of any statement by the defendant to the informant, and by the informant to law enforcement implicating the defendant in the crime charged;
- the names of all persons present when the defendant's statement was given to the informant;
- whether the informant has at any time modified or recanted his or her testimony or statement, and if so, the nature of and circumstances surrounding the modification or recantation and the persons present;
- other cases in which the informant offered to provide information or testify for the state in exchange for a benefit;
- other cases in which the informant testified in exchange for a benefit or in which the informant received any benefit in exchange for his or her testimony;
- the relationship between the defendant and the informant, including time incarcerated in the same custodial section of a jail or prison;
- all corroborating evidence of the informant's testimony or statement implicating the defendant in the crime charged; and
- any other material or information in the possession, custody, or control of the state that bears on the credibility or reliability of the informant or the informant's statement.

The state may not introduce any testimony or statement of an informant unless the materials and information are disclosed to the defendant as required. If the state fails to disclose the materials and information, the court must order the state to immediately disclose the materials and information. In addition, the court may grant a continuance, preclude the informant from testifying or the statement from being introduced, dismiss the action, or enter another order the court deems just.

Nothing in the act diminishes federal constitutional disclosure obligations to defendants or related obligations under Washington case law, statutes, or court rules.

#### **Amended Bill Compared to Engrossed Substitute Bill:**

The engrossed substitute bill defined "informant" as any criminal suspect or incarcerated person who provides information or testimony in exchange for, or in expectation of, a benefit. In addition, the engrossed substitute bill required the prosecutor to disclose material

and information that is reasonably available to be discovered by the state, and provided that material is reasonably available to be discovered if it is obtained through: communication with the informant; review of material internal to the prosecutor's office; or requests from prosecutors and investigative agencies in other jurisdictions where the informant has a criminal record or pending charges.

---

**Appropriation:** None.

**Fiscal Note:** Requested on original bill on March 16, 2017.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) The practice of using informant testimony is valuable in securing convictions and is necessary in some instances. However, there are grave risks with the use of this testimony. Incentivized testimony is inherently suspect and requires greater scrutiny than other testimony. False informant testimony is one of the leading causes of wrongful conviction. This type of testimony needs to be treated with more care. The practice of using incentivized witnesses in weak cases is especially common, since there is no reason for prosecutors to provide a benefit to witnesses unless they feel it is necessary. Jurors should be provided with certain basic information related to an informant so they can judge the person's credibility. The goal is not to eliminate the use of informants, but to provide the jury with more information to enhance our confidence in verdicts.

The risks associated with incentivized testimony have been demonstrated in many exoneration cases, including cases in Washington. In one case, three young men were wrongfully convicted of a crime that someone else confessed to committing, based on the testimony of an informant. As a parent, imagine having a SWAT team break down your door and come in and drag your child into the yard, bind him, and take him away for a crime he did not commit. This destroys the person's life and wreaks havoc on the whole family, and it is a struggle for all involved to put their lives back together. This bill is needed so that this will never happen again to anyone else or anyone else's family.

The bill has been a work in progress for over three years. The original proposal created a pretrial hearing for determining reliability, but that approach was met with a lot of opposition. Stakeholders worked on finding a different solution that instead establishes an enhanced discovery process. Prosecutors already have to disclose this type of information. The bill simply requires prosecutors to request information from other jurisdictions and disclose what they receive. Current disclosure rules do not provide specific enough guidelines so disclosure standards vary county by county and prosecutor by prosecutor. This bill will create a standardized set of guidelines that will apply across the state so that these decisions are not based on a prosecutor's individual judgement. Prosecutors should have the burden of finding this information because they are the ones who have the relationship with informants. There are databases that prosecutors can use to obtain this information.

(Opposed) A prosecutor's main purpose in the criminal justice system is to seek justice, not to seek convictions. Prosecutors take this duty seriously and are concerned with minimizing wrongful convictions. Prosecutors are cautious in their use of informants, and they do not use them often. When an informant is used in a case, prosecutors treat them with skepticism, evaluate the weight of their testimony, and seek corroborative evidence to give juries confidence in the testimony. This is particularly true with informants that are incentivized.

The bill is unworkable and overreaching, and it sets prosecutors up for failure. It requires them to seek information that they might not be able to find or obtain. The definition of informant is extremely broad and includes everyone who has an expectation of a benefit. This requires prosecutors to determine an informant's subjective intent. The requirement to turn over reasonably available information from any other jurisdiction is an impossible burden to meet. The bill requires us to search out whether there was ever a prior offer made to an informant, and there is no way to gather that information in any meaningful way. Even if it were possible, these requirements would be very time-consuming, and defendants have a right to go to trial within short time periods. There is no master database from which prosecutors can gather this information. The bill requires disclosure of pending investigations, which are exempt from disclosure under the Public Records Act for good policy reasons. Revealing this information can pose public and personal safety issues or jeopardize an investigation. The unworkability of the legislation is particularly concerning since one of the remedies is dismissal of the charges.

Prosecutors already have a duty to disclose this type of information under the Constitution, case law, and court rules. The biggest fear and concern of a prosecutor is getting it wrong in a case. They try to do the best job they can each and every day because the costs are high. If a prosecutor fails to comply with disclosure obligations, there are professional conduct rules under which his or her license may be jeopardized, and there are court rules and case law that can impose severe consequences. This is an important issue, but this bill is not the solution. Proposals to make the bill more workable have been met with resistance. There is room for discussion to come to a solution that is workable.

There are concerns about how judges, as the gatekeepers of admitted evidence, will handle this bill. Some of the terms and phrasing of the bill lack clarity and create ambiguities around what standards should apply when ruling on the bill's requirements. The remedy for a violation is that the court must order disclosure, and this can put the court in a difficult position if it has to order disclosure of a pending investigation that law enforcement says may create safety issues or jeopardize the investigation.

**Persons Testifying:** (In support) Senator Padden, prime sponsor; Lara Zarowsky, Innocence Project Northwest; Janelle Larson; Duane Statler; Laura Shaver, Washington Association of Criminal Defense Lawyers and Washington Defender Association; and Markus Surratt, University of Washington School of Law Legislative Advocacy Clinic.

(Opposed) Jon Tunheim, Thurston County Prosecuting Attorney's Office and Washington Association of Prosecuting Attorneys; Mark Larson, King County Prosecuting Attorney's Office; Terry Bloor, Franklin County Prosecuting Attorney's Office; Rich Weyrich, Skagit County Prosecuting Attorney's Office and Washington Association of Prosecuting Attorneys;

Jonathan Meyer, Lewis County Prosecuting Attorney's Office; James McMahan, Washington Association of Sheriffs and Police Chiefs; Mark McClain, Pacific County Prosecuting Attorney's Office; Greg Zemple, Kittitas County Prosecuting Attorney's Office; and Sean O'Donnell, Superior Court Judges Association.

**Persons Signed In To Testify But Not Testifying:** None.