

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
CHICAGO, ILLINOIS
JULY 9 - JULY 16, 2010

WITHOUT PREFATORY NOTE OR COMMENTS

COPYRIGHT © 2010

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

July 21, 2010

*The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

**UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS
ACT**

GENERAL PROVISIONS

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Recordation of Custodial Interrogations Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Custodial interrogation” means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occurs when reasonable individuals in the same circumstances would consider themselves in custody.

(2) “Electronic recording” means an audio recording or an audio and video recording that accurately records a custodial interrogation.

(3) “Law enforcement agency” means a governmental entity or person authorized by a governmental entity or by state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity.

(4) “Law enforcement officer” means:

(A) an individual:

(i) employed by a law enforcement agency; and

(ii) whose responsibilities include enforcing criminal laws or investigating criminal activity; or

(B) an individual acting at the request or direction of an individual described in

subparagraph (A).

(5) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) “Place of detention” means a fixed location under the control of a law enforcement agency where individuals are questioned about an alleged crime or [insert the state’s term for juvenile delinquency]. The term includes a jail, police or sheriff’s station, holding cell, and correctional or detention facility.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(8) “Statement” means a communication whether it is oral, written, electronic, nonverbal, or in sign language.

SECTION 3. ELECTRONIC RECORDING REQUIREMENT.

(a) Except as otherwise provided by Sections 5 through 10, a custodial interrogation [at a place of detention], including the giving of any required warning, advice of the rights of the individual being questioned, and the waiver of any rights by the individual, must be electronically recorded in its entirety [by both audio and video means] if the interrogation relates to [a] [an] [felony] [crime] [delinquent act] [or] [offense] described in [insert applicable section numbers of the state’s criminal and juvenile codes]. [A custodial interrogation at a place of detention must be recorded by both audio and video means.]

(b) If a law enforcement officer conducts a custodial interrogation to which subsection (a) applies without electronic recording, the officer shall prepare a written report explaining the

reason for not complying with this section and summarizing the custodial interrogation process and the individual's statements.

(c) A law enforcement officer shall prepare the report required by subsection (b) as soon as practicable after completing the interrogation.

[(d) As soon as practicable, a law enforcement officer conducting a custodial interrogation outside a place of detention shall prepare a written report explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process and the individual's statements made outside a place of detention.]

(e) This section does not apply to a spontaneous statement made outside the course of a custodial interrogation or a statement made in response to questions asked routinely during the processing of the arrest of an individual.

Legislative Note: *In subsection (a), a state that wants to require recording of all custodial interrogations, regardless of where they occur, should omit the bracketed phrase "at a place of detention." A state that wants to limit the recording requirement to a place of detention should instead keep that bracketed phrase. Each state must also decide whether it wants to require video recording in addition to audio recording. If a state intends to also require video recording, it should include the bracketed language "by both audio and video means." If a state elects to require recording of all custodial interrogations, regardless of location, but wishes to require video recording only of those occurring at a place of detention, the state should not adopt that bracketed language ("by both audio and video means") but should instead adopt the bracketed sentence at the end of subsection (a). In a state that elects this last option, and only in such a state, subsection (d) becomes relevant. It is for this reason that subsection (d) is also bracketed.*

SECTION 4. NOTICE AND CONSENT NOT REQUIRED. Notwithstanding [cite statutes], a law enforcement officer conducting a custodial interrogation is not required to obtain the individual's consent to the recording nor to inform the individual being interrogated that an electronic recording is being made of the interrogation. This [act] does not permit a law enforcement officer or a law enforcement agency to record a private communication between an individual and the individual's legal counsel.

Legislative Note: *The bracketed language refers to any state statute requiring that an individual be informed of, or consent to, the recording of the individual's conversations. The "notwithstanding" clause makes clear that the electronic recording of a custodial interrogation is exempt from all the requirements of any such notice and consent statutes.*

SECTION 5. EXCEPTION FOR EXIGENT CIRCUMSTANCES. A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if recording is not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall electronically record an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable thereafter.

SECTION 6. EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE ELECTRONICALLY RECORDED.

(a) A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if the individual to be interrogated indicates that the individual will not participate in the interrogation if it is electronically recorded. If feasible, the agreement to participate without recording must be electronically recorded.

(b) If, during a custodial interrogation to which Section 3 otherwise would apply, the individual being interrogated indicates that the individual will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be electronically recorded. If feasible, the individual's agreement to participate without further recording must be electronically recorded.

(c) A law enforcement officer may not encourage, with intent to avoid the requirement of electronic recording, an individual to request that a recording not be made.

SECTION 7. EXCEPTION FOR INTERROGATION CONDUCTED BY OTHER

JURISDICTIONS. If a custodial interrogation occurs in another state in compliance with that state's law or is conducted by a federal law enforcement agency in compliance with federal law, the interrogation need not be electronically recorded unless the interrogation is conducted with intent to avoid the requirement of electronic recording in Section 3.

SECTION 8. EXCEPTION BASED ON BELIEF THAT RECORDING IS NOT REQUIRED.

(a) A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer reasonably to believe that the individual being interrogated may have committed [a] [an] [felony] [crime] [delinquent act] [or] [offense] for which Section 3 requires that a custodial interrogation be recorded.

(b) If, during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that [a] [an] [felony] [crime] [delinquent act] [or] [offense] has been committed for which Section 3 requires that a custodial interrogation be electronically recorded, continued custodial interrogation concerning that [felony] [crime] [delinquent act] [or] [offense] must be electronically recorded, if feasible.

SECTION 9. EXCEPTION FOR SAFETY OF INDIVIDUAL OR PROTECTION OF IDENTITY. A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if a law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or

another individual. If feasible and consistent with the safety of a confidential informant, an explanation of the basis for the belief that electronic recording would disclose the informant's identity must be electronically recorded at the time of the interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be made as soon as practicable after the interrogation is completed.

SECTION 10. EXCEPTION FOR EQUIPMENT MALFUNCTION.

[(a)] All or part of a custodial interrogation to which Section 3 otherwise applies need not be electronically recorded to the extent that recording is not feasible because the available electronic recording equipment fails, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

[(b) If both audio and video recording of a custodial interrogation are otherwise required by Section 3, recording may be by audio alone if a technical problem in video recording equipment prevents video recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.]

[[(b)] [(c)] If both audio and video recording of a custodial interrogation are otherwise required by Section 3, recording may be by video alone if a technical problem in the audio recording equipment prevents audio recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.]

Legislative Note: Section (b) and (c) need be considered only in jurisdictions that choose to mandate both audio and video recording in Section 3.

SECTION 11. BURDEN OF PERSUASION. If the prosecution relies on an exception in Sections 5 through 10 to justify a failure to make an electronic recording of a custodial interrogation, the prosecution must prove by a preponderance of the evidence that the exception applies.

SECTION 12. NOTICE OF INTENT TO INTRODUCE UNRECORDED

STATEMENT. If the prosecution intends to introduce in its case in chief a statement made during a custodial interrogation to which Section 3(a) applies which was not electronically recorded, the prosecution, not later than the time specified by [insert citation to statute or rule of procedure], shall serve the defendant with written notice of that intent and of any exception on which the prosecution intends to rely.

SECTION 13. PROCEDURAL REMEDIES.

(a) Unless the court finds that an exception in Sections 5 through 10 applies, the court shall consider the failure to make an electronic recording of all or part of a custodial interrogation to which Section 3 applies [as a factor] in determining whether a statement made during the interrogation is admissible, including whether it was voluntarily made [or is reliable].

(b) If the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded in compliance with Section 3, the court, upon request of the defendant, shall give cautionary instructions to the jury.

SECTION 14. HANDLING AND PRESERVATION OF ELECTRONIC

RECORDING. Each law enforcement agency shall establish and enforce procedures to ensure that the electronic recording of any or all of a custodial interrogation is identified, accessible, and preserved in the manner required by [cite statutes, court rules, or other state authority generally governing the manner in which evidence in criminal cases is to be preserved].

SECTION 15. RULES RELATING TO ELECTRONIC RECORDING.

(a) [Each law enforcement agency in this state] [insert name of the appropriate state authority] [insert name of the state agency charged with monitoring law enforcement's compliance with this act] shall adopt and enforce rules to implement this [act].

(b) The rules adopted under subsection (a) must address the following topics:

(1) the manner in which an electronic recording of a custodial interrogations must be made;

(2) the collection and review of electronic recording data, or the absence thereof, by superiors within the law enforcement agency;

(3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability;

(4) a process for explaining noncompliance with procedures and imposing administrative sanctions for failures to comply that are not justified;

(5) a supervisory system expressly imposing on specific individuals a duty to ensure adequate staffing, education, training, and material resources to implement this [act];
[and]

(6) a process for monitoring the chain of custody of electronic recordings of custodial interrogations[.]; and]

[(7) insert other topic]

[(c) The rules adopted under subsection (a) for video recording must contain standards for the angle, focus, and field of vision of a recording device which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness.]

[(d) Each law enforcement agency shall adopt and enforce rules providing for administrative discipline of a law enforcement officer found by a court or a supervisor of the agency to have violated the terms of this [act]. [The rules must provide a range of disciplinary sanctions reasonably designed to promote compliance with this [act].]]

Legislative Note: Subsection (a) offers three bracketed choices. The first choice requires each local and state law enforcement agency to draft its own rules. The second choice leaves it to a single state authority to draft rules to govern all state and local law enforcement agencies, though that single state authority is assigned no obligations relevant to this Act other than drafting the rules. The third choice assigns the rule-drafting task to a new or existing agency that is not assigned an additional responsibility, that is, monitoring all state and local law enforcement agencies' compliance with the terms of this Act. The third choice thus differs from the second in that the specified agency would have both rule-drafting and Act-implementation monitoring responsibilities, but the intention would still be that that agency would draft rules meant to govern all state and local law enforcement. Subsection (b)(7) is bracketed, applying if a jurisdiction chooses to add to the topics that the rules discussed in subsection (b) must address. Subsection (c) is necessary only in a jurisdiction that requires both audio and video recording under subsection 3 (a). In collective bargaining states, subsection (d) would not apply. Instead, the matter would be controlled by collective bargaining agreements. Thus subsection (d) is bracketed.

SECTION 16. LIMITATION OF LIABILITY.

(a) A law enforcement agency [in this state] that has enforced rules adopted pursuant to Section 15 that are reasonably designed to ensure compliance with the terms of this [act] is not subject to civil liability for damages arising from a violation of this [act].

(b) This [act] does not create a cause of action against a law enforcement officer.

SECTION 17. SELF-AUTHENTICATION.

(a) In any pretrial or post-trial proceeding, an electronic recording of a custodial interrogation is self authenticating if it is accompanied by a certificate of authenticity sworn under oath or affirmation by an appropriate law enforcement officer.

(b) This [act] does not limit the right of a defendant under law other than this [act] to challenge the authenticity of an electronic recording of a custodial interrogation.

SECTION 18. NO RIGHT TO ELECTRONIC RECORDING OR TRANSCRIPT.

(a) This [act] does not create a right of an individual to require a custodial interrogation to be electronically recorded.

(b) This [act] does not require preparation of a transcript of an electronic recording of a

custodial interrogation.

SECTION 19. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 20. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 21. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 22. REPEALS. The following are repealed: [insert title and section numbers].

SECTION 23. EFFECTIVE DATE. This [act] takes effect