

SHB 1223 - S COMM AMD

By Committee on Law & Justice

ADOPTED AND ENGROSSED 04/10/2021

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** SHORT TITLE. This chapter may be known
4 and cited as the uniform electronic recordation of custodial
5 interrogations act.

6 NEW SECTION. **Sec. 2.** DEFINITIONS. In this chapter:

7 (1) "Custodial interrogation" means express questioning or other
8 actions or words by a law enforcement officer which are reasonably
9 likely to elicit an incriminating response from an individual and
10 occurs when reasonable individuals in the same circumstances would
11 consider themselves in custody.

12 (2) "Electronic recording" means an audio recording or audio and
13 video recording that accurately records a custodial interrogation.
14 "Record electronically" and "recorded electronically" have a
15 corresponding meaning.

16 (3) "Law enforcement agency" means a general authority Washington
17 law enforcement agency or limited authority Washington law
18 enforcement agency as those terms are defined in RCW 10.93.020.

19 (4) "Law enforcement officer" means a general authority
20 Washington peace officer or limited authority Washington peace
21 officer as those terms are defined in RCW 10.93.020.

22 (5) "Person" means an individual, corporation, business trust,
23 statutory trust, estate, trust, partnership, limited liability
24 company, association, joint venture, public corporation, or
25 government; governmental subdivision, agency, or instrumentality; or
26 any other legal or commercial entity.

27 (6) "Place of detention" means a fixed location under the control
28 of a law enforcement agency where individuals are questioned about
29 alleged crimes or status offenses. The term includes a jail, police
30 or sheriff's station, holding cell, correctional or detention
31 facility, police vehicle, and in the case of juveniles, schools.

1 (7) "State" means a state of the United States, the District of
2 Columbia, Puerto Rico, the United States Virgin Islands, or any
3 territory or insular possession subject to the jurisdiction of the
4 United States.

5 (8) "Statement" means a communication whether oral, written,
6 electronic, or nonverbal.

7 NEW SECTION. **Sec. 3.** ELECTRONIC RECORDING REQUIREMENT. (1)

8 Except as otherwise provided by sections 5 through 10 of this act, a
9 custodial interrogation, including the giving of any required
10 warning, advice of the rights of the individual being questioned, and
11 the waiver of any rights by the individual, must be recorded
12 electronically in its entirety if the interrogation subject is a
13 juvenile or if the interrogation relates to a felony crime. A
14 custodial interrogation at a jail, police or sheriff's station,
15 holding cell, or correctional or detention facility must be recorded
16 by audio and video means. A custodial interrogation at any other
17 place of detention must be recorded by audio means at minimum.

18 (2) If a law enforcement officer conducts a custodial
19 interrogation to which subsection (1) of this section applies without
20 electronically recording it in its entirety, the officer shall
21 prepare a written or electronic report explaining the reason for not
22 complying with this section and summarizing the custodial
23 interrogation process and the individual's statements.

24 (3) A law enforcement officer shall prepare the report required
25 by subsection (2) of this section as soon as practicable after
26 completing the interrogation.

27 (4) As soon as practicable, a law enforcement officer conducting
28 a custodial interrogation outside a place of detention shall prepare
29 a written or electronic report explaining the decision to interrogate
30 outside a place of detention and summarizing the custodial
31 interrogation process and the individual's statements made outside a
32 place of detention.

33 (5) This section does not apply to a spontaneous statement made
34 outside the course of a custodial interrogation or a statement made
35 in response to a question asked routinely during the processing of
36 the arrest of an individual.

37 NEW SECTION. **Sec. 4.** CONSENT NOT REQUIRED—NOTICE.

38 Notwithstanding RCW 9.73.030 and 9.73.090, a law enforcement officer

1 conducting a custodial interrogation is not required to obtain
2 consent to electronic recording from the individual being
3 interrogated, but must inform the individual that an electronic
4 recording is being made of the interrogation. This chapter does not
5 permit a law enforcement officer or a law enforcement agency to
6 record a private communication between an individual and the
7 individual's lawyer.

8 NEW SECTION. **Sec. 5.** EXCEPTION FOR EXIGENT CIRCUMSTANCES. A
9 custodial interrogation to which section 3 of this act otherwise
10 applies need not be recorded electronically if recording is not
11 feasible because of exigent circumstances. The law enforcement
12 officer conducting the interrogation shall record electronically an
13 explanation of the exigent circumstances before conducting the
14 interrogation, if feasible, or as soon as practicable after the
15 interrogation is completed.

16 NEW SECTION. **Sec. 6.** EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE
17 RECORDED ELECTRONICALLY. (1) A custodial interrogation to which
18 section 3 of this act otherwise applies need not be recorded
19 electronically if the individual to be interrogated indicates that
20 the individual will not participate in the interrogation if it is
21 recorded electronically. If feasible, the agreement to participate
22 without recording must be recorded electronically.

23 (2) If, during a custodial interrogation to which section 3 of
24 this act otherwise applies, the individual being interrogated
25 indicates that the individual will not participate in further
26 interrogation unless electronic recording ceases, the remainder of
27 the custodial interrogation need not be recorded electronically. If
28 feasible, the individual's agreement to participate without further
29 recording must be recorded electronically.

30 (3) A law enforcement officer, with intent to avoid the
31 requirement of electronic recording in section 3 of this act, may not
32 encourage an individual to request that a recording not be made.

33 NEW SECTION. **Sec. 7.** EXCEPTION FOR INTERROGATION CONDUCTED BY
34 OTHER JURISDICTION. If a custodial interrogation occurs in another
35 state in compliance with that state's law or is conducted by a
36 federal law enforcement agency in compliance with federal law, the
37 interrogation need not be recorded electronically unless the

1 interrogation is conducted with intent to avoid the requirement of
2 electronic recording in section 3 of this act.

3 NEW SECTION. **Sec. 8.** EXCEPTION BASED ON BELIEF RECORDING NOT
4 REQUIRED. (1) A custodial interrogation to which section 3 of this
5 act otherwise applies need not be recorded electronically if the
6 interrogation occurs when no law enforcement officer conducting the
7 interrogation has knowledge of facts and circumstances that would
8 lead an officer reasonably to believe that the individual being
9 interrogated may have committed an act for which section 3 of this
10 act requires that a custodial interrogation be recorded
11 electronically.

12 (2) If, during a custodial interrogation under subsection (1) of
13 this section, the individual being interrogated reveals facts and
14 circumstances giving a law enforcement officer conducting the
15 interrogation reason to believe that an act has been committed for
16 which section 3 of this act requires that a custodial interrogation
17 be recorded electronically, continued custodial interrogation
18 concerning that act must be recorded electronically, if feasible.

19 NEW SECTION. **Sec. 9.** EXCEPTION FOR SAFETY OF INDIVIDUAL OR
20 PROTECTION OF IDENTITY. A custodial interrogation to which section 3
21 of this act otherwise applies need not be recorded electronically if
22 a law enforcement officer conducting the interrogation or the
23 officer's superior reasonably believes that electronic recording
24 would disclose the identity of a confidential informant or jeopardize
25 the safety of an officer, the individual being interrogated, or
26 another individual. If feasible and consistent with the safety of a
27 confidential informant, an explanation of the basis for the belief
28 that electronic recording would disclose the informant's identity
29 must be recorded electronically at the time of the interrogation. If
30 contemporaneous recording of the basis for the belief is not
31 feasible, the recording must be made as soon as practicable after the
32 interrogation is completed.

33 NEW SECTION. **Sec. 10.** EXCEPTION FOR EQUIPMENT MALFUNCTION. (1)
34 All or part of a custodial interrogation to which section 3 of this
35 act otherwise applies need not be recorded electronically to the
36 extent that recording is not feasible because the available

1 electronic recording equipment fails, despite reasonable maintenance
2 of the equipment, and timely repair or replacement is not feasible.

3 (2) If both audio and video recording of a custodial
4 interrogation are otherwise required by section 3 of this act,
5 recording may be by audio alone if a technical problem in the video
6 recording equipment prevents video recording, despite reasonable
7 maintenance of the equipment, and timely repair or replacement is not
8 feasible.

9 (3) If both audio and video recording of a custodial
10 interrogation are otherwise required by section 3 of this act,
11 recording may be by video alone if a technical problem in the audio
12 recording equipment prevents audio recording, despite reasonable
13 maintenance of the equipment, and timely repair or replacement is not
14 feasible.

15 NEW SECTION. **Sec. 11.** BURDEN OF PERSUASION. If the prosecution
16 relies on an exception in sections 5 through 10 of this act to
17 justify a failure to record electronically a custodial interrogation,
18 the prosecution must prove by a preponderance of the evidence that
19 the exception applies.

20 NEW SECTION. **Sec. 12.** NOTICE OF INTENT TO INTRODUCE UNRECORDED
21 STATEMENT. If the prosecution intends to introduce in its case in
22 chief a statement made during a custodial interrogation to which
23 section 3 of this act applies which was not recorded electronically,
24 the prosecution, not later than the time specified by the local rules
25 governing discovery, shall serve the defendant with written notice of
26 that intent and of any exception on which the prosecution intends to
27 rely.

28 NEW SECTION. **Sec. 13.** PROCEDURAL REMEDIES. (1) Unless the court
29 finds that an exception in sections 5 through 10 of this act applies,
30 the court shall consider the failure to record electronically all or
31 part of a custodial interrogation to which section 3 of this act
32 applies in determining whether a statement made during the
33 interrogation is admissible, including whether it was voluntarily
34 made.

35 (2) If the court admits into evidence a statement made during a
36 custodial interrogation that was not recorded electronically in
37 compliance with section 3 of this act, the court shall afford the

1 defendant the opportunity to present to the jury the fact that the
2 statement was not recorded electronically in compliance with section
3 3 of this act.

4 NEW SECTION. **Sec. 14.** HANDLING AND PRESERVING ELECTRONIC
5 RECORDING. Each law enforcement agency in this state shall establish
6 and enforce procedures to ensure that the electronic recording of all
7 or part of a custodial interrogation is identified, accessible, and
8 preserved throughout the length of any resulting sentence, including
9 any period of community custody extending through final discharge.

10 NEW SECTION. **Sec. 15.** POLICIES AND PROCEDURES RELATING TO
11 ELECTRONIC RECORDING. (1) Each law enforcement agency that is a
12 governmental entity of this state shall adopt and enforce policies
13 and procedures to implement this chapter.

14 (2) The policies and procedures adopted under subsection (1) of
15 this section must address the following topics:

16 (a) How an electronic recording of a custodial interrogation must
17 be made;

18 (b) The collection and review of electronic recordings, or the
19 absence thereof, by supervisors in each law enforcement agency;

20 (c) The assignment of supervisory responsibilities and a chain of
21 command to promote internal accountability;

22 (d) A process for explaining noncompliance with procedures and
23 imposing administrative sanctions for a failure to comply that is not
24 justified;

25 (e) A supervisory system expressly imposing on individuals in
26 specific positions a duty to ensure adequate staffing, education,
27 training, and material resources to implement this chapter; and

28 (f) A process for preserving the chain of custody of an
29 electronic recording.

30 (3) The policies and procedures adopted under subsection (2)(a)
31 of this section for video recording must contain standards for the
32 angle, focus, and field of vision of a recording device which
33 reasonably promote accurate recording of a custodial interrogation at
34 a place of detention and reliable assessment of its accuracy and
35 completeness.

36 NEW SECTION. **Sec. 16.** LIMITATION OF LIABILITY. (1) A law
37 enforcement agency that is a governmental entity in this state which

1 has implemented procedures reasonably designed to enforce the rules
2 adopted pursuant to section 15 of this act and ensure compliance with
3 this chapter is not subject to civil liability for damages arising
4 from a violation of this chapter.

5 (2) This chapter does not create a right of action against a law
6 enforcement officer.

7 NEW SECTION. **Sec. 17.** SELF-AUTHENTICATION. (1) In any pretrial
8 or posttrial proceeding, an electronic recording of a custodial
9 interrogation is self-authenticating if it is accompanied by a
10 certificate of authenticity sworn under oath or affirmation by an
11 appropriate law enforcement officer.

12 (2) This chapter does not limit the right of an individual to
13 challenge the authenticity of an electronic recording of a custodial
14 interrogation under law of this state other than this chapter.

15 NEW SECTION. **Sec. 18.** NO RIGHT TO ELECTRONIC RECORDING OR
16 TRANSCRIPT. (1) This chapter does not create a right of an individual
17 to require a custodial interrogation to be recorded electronically.

18 (2) This chapter does not require preparation of a transcript of
19 an electronic recording of a custodial interrogation.

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

24 NEW SECTION. **Sec. 20.** RELATION TO ELECTRONIC SIGNATURES IN
25 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, and
26 supersedes the electronic signatures in global and national commerce
27 act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or
28 supersede section 101(c) of that act, 15 U.S.C. Sec. 7001(c), or
29 authorize electronic delivery of any of the notices described in
30 section 103(b) of that act, 15 U.S.C. Sec. 7003(b).

31 **Sec. 21.** RCW 9.73.030 and 1986 c 38 s 1 and 1985 c 260 s 2 are
32 each reenacted and amended to read as follows:

33 (1) Except as otherwise provided in this chapter, it shall be
34 unlawful for any individual, partnership, corporation, association,

1 or the state of Washington, its agencies, and political subdivisions
2 to intercept, or record any:

3 (a) Private communication transmitted by telephone, telegraph,
4 radio, or other device between two or more individuals between points
5 within or without the state by any device electronic or otherwise
6 designed to record and/or transmit said communication regardless how
7 such device is powered or actuated, without first obtaining the
8 consent of all the participants in the communication;

9 (b) Private conversation, by any device electronic or otherwise
10 designed to record or transmit such conversation regardless how the
11 device is powered or actuated without first obtaining the consent of
12 all the persons engaged in the conversation.

13 (2) Notwithstanding subsection (1) of this section, wire
14 communications or conversations (a) of an emergency nature, such as
15 the reporting of a fire, medical emergency, crime, or disaster, or
16 (b) which convey threats of extortion, blackmail, bodily harm, or
17 other unlawful requests or demands, or (c) which occur anonymously or
18 repeatedly or at an extremely inconvenient hour, or (d) which relate
19 to communications by a hostage holder or barricaded person as defined
20 in RCW 70.85.100, whether or not conversation ensues, may be recorded
21 with the consent of one party to the conversation.

22 (3) Where consent by all parties is needed pursuant to this
23 chapter, consent shall be considered obtained whenever one party has
24 announced to all other parties engaged in the communication or
25 conversation, in any reasonably effective manner, that such
26 communication or conversation is about to be recorded or transmitted:
27 PROVIDED, That if the conversation is to be recorded that said
28 announcement shall also be recorded.

29 (4) An employee of any regularly published newspaper, magazine,
30 wire service, radio station, or television station acting in the
31 course of bona fide news gathering duties on a full-time or
32 contractual or part-time basis, shall be deemed to have consent to
33 record and divulge communications or conversations otherwise
34 prohibited by this chapter if the consent is expressly given or if
35 the recording or transmitting device is readily apparent or obvious
36 to the speakers. Withdrawal of the consent after the communication
37 has been made shall not prohibit any such employee of a newspaper,
38 magazine, wire service, or radio or television station from divulging
39 the communication or conversation.

1 (5) This section does not apply to the recording of custodial
2 interrogations pursuant to section 4 of this act.

3 NEW SECTION. **Sec. 22.** SEVERABILITY. If any provision of this
4 act or its application to any person or circumstance is held invalid,
5 the remainder of the act or the application of the provision to other
6 persons or circumstances is not affected.

7 NEW SECTION. **Sec. 23.** CODIFICATION. Sections 1 through 20 of
8 this act constitute a new chapter in Title 10 RCW.

9 NEW SECTION. **Sec. 24.** EFFECTIVE DATE. Sections 1 through 20 of
10 this act take effect January 1, 2022."

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By Committee on Law & Justice

ADOPTED 04/10/2021

11 On page 1, line 2 of the title, after "act;" strike the remainder
12 of the title and insert "reenacting and amending RCW 9.73.030; adding
13 a new chapter to Title 10 RCW; and providing an effective date."

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