

SHB 1223 - S COMM AMD

By Committee on Law & Justice

ADOPTED AS AMENDED 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

1 or sheriff's station, holding cell, correctional or detention
2 facility, police vehicle, and in the case of juveniles, schools.

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

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

9 NEW SECTION. **Sec. 3.** ELECTRONIC RECORDING REQUIREMENT. (1)
10 Except as otherwise provided by sections 5 through 10 of this act, a
11 custodial interrogation, including the giving of any required
12 warning, advice of the rights of the individual being questioned, and
13 the waiver of any rights by the individual, must be recorded
14 electronically in its entirety if the interrogation subject is a
15 juvenile or if the interrogation relates to a felony crime. A
16 custodial interrogation at a jail, police or sheriff's station,
17 holding cell, or correctional or detention facility must be recorded
18 by audio and video means. A custodial interrogation at any other
19 place of detention must be recorded by audio means at minimum.

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

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

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

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

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

2 Notwithstanding RCW 9.73.030 and 9.73.090, a law enforcement officer
3 conducting a custodial interrogation is not required to obtain
4 consent to electronic recording from the individual being
5 interrogated, but must inform the individual that an electronic
6 recording is being made of the interrogation. This chapter does not
7 permit a law enforcement officer or a law enforcement agency to
8 record a private communication between an individual and the
9 individual's lawyer.

10 NEW SECTION. **Sec. 5.** EXCEPTION FOR EXIGENT CIRCUMSTANCES. A

11 custodial interrogation to which section 3 of this act otherwise
12 applies need not be recorded electronically if recording is not
13 feasible because of exigent circumstances. The law enforcement
14 officer conducting the interrogation shall record electronically an
15 explanation of the exigent circumstances before conducting the
16 interrogation, if feasible, or as soon as practicable after the
17 interrogation is completed.

18 NEW SECTION. **Sec. 6.** EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE

19 RECORDED ELECTRONICALLY. (1) A custodial interrogation to which
20 section 3 of this act otherwise applies need not be recorded
21 electronically if the individual to be interrogated indicates that
22 the individual will not participate in the interrogation if it is
23 recorded electronically. If feasible, the agreement to participate
24 without recording must be recorded electronically.

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

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

35 NEW SECTION. **Sec. 7.** EXCEPTION FOR INTERROGATION CONDUCTED BY

36 OTHER JURISDICTION. If a custodial interrogation occurs in another
37 state in compliance with that state's law or is conducted by a

1 federal law enforcement agency in compliance with federal law, the
2 interrogation need not be recorded electronically unless the
3 interrogation is conducted with intent to avoid the requirement of
4 electronic recording in section 3 of this act.

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

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

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

35 NEW SECTION. **Sec. 10.** EXCEPTION FOR EQUIPMENT MALFUNCTION. (1)
36 All or part of a custodial interrogation to which section 3 of this
37 act otherwise applies need not be recorded electronically to the

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

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

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

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

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

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

36 (2) If the court admits into evidence a statement made during a
37 custodial interrogation that was not recorded electronically in

1 compliance with section 3 of this act, the court shall afford the
2 defendant the opportunity to present to the jury the fact that the
3 statement was not recorded electronically in compliance with section
4 3 of this act.

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

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

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

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

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

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

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

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

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

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

1 NEW SECTION. **Sec. 16.** LIMITATION OF LIABILITY. (1) A law
2 enforcement agency that is a governmental entity in this state which
3 has implemented procedures reasonably designed to enforce the rules
4 adopted pursuant to section 15 of this act and ensure compliance with
5 this chapter is not subject to civil liability for damages arising
6 from a violation of this chapter.

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

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

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

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

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

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

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

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

1 (1) Except as otherwise provided in this chapter, it shall be
2 unlawful for any individual, partnership, corporation, association,
3 or the state of Washington, its agencies, and political subdivisions
4 to intercept, or record any:

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

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

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

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

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

1 magazine, wire service, or radio or television station from divulging
2 the communication or conversation.

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

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

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

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

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ADOPTED AS AMENDED 04/10/2021

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

EFFECT: Modifies definitions of law enforcement agency and
officer.

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