

HOUSE BILL REPORT

HB 1223

As Reported by House Committee On:

Public Safety
Transportation

Title: An act relating to the uniform electronic recordation of custodial interrogations act.

Brief Description: Enacting the uniform electronic recordation of custodial interrogations act.

Sponsors: Representatives Peterson, Simmons, Bateman, Sells, Davis, Lovick, Orwall, Ryu, Ortiz-Self, Senn, Dolan, Fitzgibbon, Ormsby, Gregerson, Hackney, Valdez, Macri and Frame; by request of Uniform Law Commission.

Brief History:

Committee Activity:

Public Safety: 2/5/21, 2/12/21 [DP];
Transportation: 2/17/21, 2/22/21 [DPS].

Brief Summary of Substitute Bill

- Requires law enforcement officers to electronically record custodial interrogations if the interrogation is of a juvenile or related to a felony.
- Requires law enforcement officers to electronically record audio and video of qualifying custodial interrogations at a jail, police or sheriff's station, holding cell, or correctional or detention facility.
- Requires law enforcement officers to electronically record, at minimum, audio of qualifying custodial interrogations at any other place of detention.
- Requires law enforcement agencies to establish and enforce rules and procedures relating to electronic recordings of custodial interrogations.

HOUSE COMMITTEE ON PUBLIC SAFETY

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

Majority Report: Do pass. Signed by 8 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Davis, Hackney, Lovick, Orwall, Ramos and Simmons.

Minority Report: Do not pass. Signed by 2 members: Representatives Mosbrucker, Ranking Minority Member; Klippert, Assistant Ranking Minority Member.

Minority Report: Without recommendation. Signed by 2 members: Representatives Graham and Young.

Staff: Corey Patton (786-7388).

Background:

The federal and state constitutions provide a series of protections for individuals when they interact with law enforcement officers. Those protections include the right to remain silent and the right to counsel during a custodial interrogation. A custodial interrogation generally means any nonroutine questioning, actions, or words by a law enforcement officer designed to elicit an incriminating response from a person after the person has been taken into custody or otherwise been deprived the freedom of action in any significant way.

Prior to engaging in a custodial interrogation of a person, an officer must provide a *Miranda* warning to advise the person of the person's constitutional rights and ability to invoke those rights at any time during the interrogation. A person may waive those rights, provided the waiver is voluntary, knowing, and intelligent. A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. A waiver is knowing and intelligent if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

If an officer fails to give a person an effective *Miranda* warning or fails to obtain a valid waiver prior to engaging in a custodial interrogation, a court may rule any incriminating statements made by the person during the interrogation inadmissible as evidence. Courts consider the totality of the circumstances in evaluating whether a waiver is valid.

The Uniform Law Commission (ULC) is a state-supported, nonpartisan, nonprofit organization that drafts and proposes specific statutory language that may be adopted by states. In 2010 the ULC drafted the Uniform Electronic Recordation of Custodial Interrogations Act, which requires law enforcement to electronically record the entirety of custodial interrogations.

Summary of Bill:

Requirements for Electronic Recordings of Custodial Interrogations.

Law enforcement officers must electronically record custodial interrogations that occur at a

place of detention if the interrogation is of a juvenile or related to a felony, unless an exception applies. Electronic recordings must include both audio and video.

An officer who conducts a custodial interrogation of a person at a place of detention without electronically recording it must, as soon as practicable, prepare a report that explains the reason for failing to record the interrogation and summarizes the interrogation process and the person's statements.

An officer who conducts a custodial interrogation of a person outside a place of detention must, as soon as practicable, prepare a report that explains the decision to interrogate outside a place of detention and summarizes the interrogation process and the person's statements.

Law enforcement agencies must establish and enforce procedures to ensure electronic recordings of custodial interrogations are identifiable, accessible, and preserved throughout the duration of any related criminal cases through final discharge. Law enforcement agencies must adopt and enforce rules that address the following:

- standards for electronic recordings, including standards for the angle, focus, and field of vision for recording devices that reasonably promote accurate recordings and reliable assessment of accuracy and completeness;
- the collection and review of electronic recordings by supervisors;
- the assignment of supervisory responsibilities and a chain of command to promote internal accountability;
- a process for explaining noncompliance with procedures and imposing administrative sanctions for unjustified noncompliance;
- a supervisory system expressly imposing on individuals in specific positions a duty to ensure adequate staffing, education, training, and material resources; and
- a process for monitoring chain of custody.

Exceptions to Requirements for Electronic Recordings.

A prosecuting attorney may introduce a person's statement made during an unrecorded custodial interrogation of a juvenile or related to a felony if one of the following exceptions applies:

- *Exigent Circumstances.* If recording a custodial interrogation is not feasible due to exigent circumstances, the officer conducting the interrogation must electronically record an explanation of the exigent circumstances before conducting the interrogation or as soon as practicable after the interrogation is completed.
- *Refusal to be Recorded.* If a person subject to a custodial interrogation indicates at any point that the person will not participate in the interrogation if it is electronically recorded, the officer must electronically record the person's agreement to participate without further recording if feasible.
- *Interrogations Conducted by Another Jurisdiction.* If a custodial interrogation is conducted in another state in compliance with that state's law or conducted by a federal law enforcement agency in compliance with federal law, the interrogation

does not need to be electronically recorded unless the interrogation is conducted with intent to avoid the electronic recording requirements.

- *Belief Recording not Required.* If an officer conducting a custodial interrogation does not have knowledge of facts and circumstances that would reasonably lead an officer to believe the interrogation is of a juvenile or related to a felony, the officer is not required to electronically record the interrogation. If the person being interrogated subsequently reveals facts and circumstances giving the officer reason to believe that the interrogation is of a juvenile or related to a felony, any further interrogation must be electronically recorded if feasible.
- *Safety and Protection.* If an officer conducting a custodial interrogation or the officer's superior reasonably believes that an electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the person being interrogated, or another individual, the officer is not required to electronically record the interrogation. The officer must electronically record an explanation of the belief that an electronic recording would disclose the informant's identity at the time of the interrogation or as soon as practicable after the interrogation is completed.
- *Equipment Malfunctions.* If the electronic recording equipment used during a custodial interrogation fails despite reasonable maintenance of the equipment, and timely repair of the equipment is not feasible, any affected part of the interrogation does not need to be electronically recorded. If technical problems only affect either the audio or video of a recording, the recording may be done by either audio or video alone.

The prosecuting attorney relying on an exception to introduce the person's unrecorded statement must: (1) prove the exception applies by a preponderance of the evidence; and (2) serve the person with written notice of the intent to introduce the statement and identify the exception the attorney intends to rely upon. Unless a court finds that an exception applies, the court must consider the failure to electronically record all or part of a custodial interrogation in determining whether a statement is admissible. If the court admits a person's unrecorded statement into evidence, the court must, upon the person's request, give a cautionary instruction to the jury.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the provision relating to electronic recordings of custodial interrogations at a place of detention: requires law enforcement officers to electronically record audio and video of qualifying custodial interrogations at a jail, police or sheriff's station, holding cell, or correctional or detention facility, rather than at any place of detention; and requires law enforcement officers to electronically record, at minimum, audio of qualifying custodial interrogations at any other place of detention. The substitute bill also requires courts to afford a defendant the opportunity to present to the jury the fact that an admissible statement made during a qualifying custodial interrogation was not electronically recorded in compliance with this act, rather than requiring courts to give a cautionary instruction to the jury.

Appropriation: None.

Fiscal Note: Available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 1 through 20, relating to requiring the electronic recording of custodial interrogations, which take effect January 1, 2022.

Staff Summary of Public Testimony:

(In support) Confessions are often electronically recorded in Washington, but the custodial interrogations that produce those confessions are typically unrecorded. Law enforcement officers sometimes intentionally or inadvertently engage in interrogation methods that wear down a suspect over time and coerce a false confession. As an investigation proceeds, confirmation bias may cause officers to ignore other evidence of a suspect's innocence. These factors ultimately lead to wrongful convictions and public distrust of the criminal justice system. In Washington, one out of every four wrongful convictions that have been overturned involved a false confession. Even when people who are wrongfully convicted are later exonerated, their lives have already been irreversibly damaged.

This bill establishes a uniform and predictable policy for the electronic recordation of custodial interrogations. Recent advancements in technology make it more feasible to capture and preserve electronic recordings, which has led to over 24 other states mandating electronic recordings of custodial interrogations to some degree. An electronic recording ensures that, at trial, the finder of fact does not have to depend solely on the memories of law enforcement officers and other witnesses. Having the ability to see and hear a custodial interrogation puts the trier of fact in the best position to determine what happened during the interrogation and whether a subsequent confession is legitimate. An electronic recording may corroborate other incriminating evidence and facilitate a rightful conviction, or it may reveal coercive tactics that evince a false confession. In either scenario, electronic recordings allow prosecutors and defense counsel to better understand and prepare their cases, reducing the judicial resources needed to address pretrial issues and lowering the frequency of wrongful convictions. Additionally, the added transparency and accountability that comes from electronic recordings will improve public trust in the integrity and credibility of the criminal justice system.

(Opposed) The circumstances where electronic recordings are required by this bill should be further limited. In effect, this bill requires every law enforcement agency to utilize body and dashboard cameras. Although comprehensive electronic recordation is a best practice, some law enforcement agencies do not have practical access to the needed technology. Electronic recordings should only be required in a true place of detention, such as a jail or other detention facility which can be reliably equipped with recording devices.

Persons Testifying: (In support) Representative Peterson, prime sponsor; Lara Zarowsky,

Washington Innocence Project; Jim Trainum, Criminal Case Review and Consulting; and Marlin Appelwick, Washington Uniform Legislation Commission.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 16 members: Representatives Fey, Chair; Wylie, 1st Vice Chair; Bronoske, 2nd Vice Chair; Ramos, 2nd Vice Chair; Berry, Duerr, Entenman, Hackney, Lovick, Paul, Ramel, Riccelli, Slatter, Taylor, Valdez and Wicks.

Minority Report: Do not pass. Signed by 11 members: Representatives Barkis, Ranking Minority Member; Eslick, Assistant Ranking Minority Member; Robertson, Assistant Ranking Minority Member; Volz, Assistant Ranking Minority Member; Dent, Goehner, Griffey, Klicker, McCaslin, Orcutt and Walsh.

Minority Report: Without recommendation. Signed by 2 members: Representatives Chapman and Sutherland.

Staff: Beth Redfield (786-7140).

Summary of Recommendation of Committee On Transportation Compared to Recommendation of Committee On Public Safety:

The following changes are made to the provision relating to electronic recordings of custodial interrogations at a place of detention: requires law enforcement officers to electronically record audio and video of qualifying custodial interrogations at a jail, police or sheriff's station, holding cell, or correctional or detention facility, rather than at any place of detention; and requires law enforcement officers to electronically record, at minimum, audio of qualifying custodial interrogations at any other place of detention. In addition, courts are required to afford a defendant the opportunity to present to the jury the fact that an admissible statement made during a qualifying custodial interrogation was not electronically recorded in compliance with this act, rather than requiring courts to give a cautionary instruction to the jury.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 1 through 20, relating to requiring the

electronic recording of custodial interrogations, which take effect January 1, 2022.

Staff Summary of Public Testimony:

(In support) There was a case, not in Washington, some years back where a young man about 18 years old with an intelligence quotient of 60 was accused of a horrific crime. The police in that jurisdiction felt they had the person and they coerced a confession and ultimately a written confession out of this young man. The confession stood up in court, there was no recording of the interrogation and no recording of the process. Meanwhile, the actual perpetrator of the crime committed more horrific crimes and was finally caught; the first young man was exonerated after spending well over 20 years in prison. We want to avoid this for our legal system, for our law enforcement agencies, and certainly for innocent citizens in the State of Washington. This is not a bill to mandate the wearing of body cameras. Ideally, in a perfect world, with unlimited resources, all of our officers wearing body cameras would be a policy that we might want to pursue. Instead the amendment would mandate, at a minimum, an audio recording in places of detention that might be in the field, for instance, in the back of a police cruiser, in the principal's office at the school, and other instances where a person believes that they are in custody when these interrogations and investigations start. The best example out in the field would be when you are in the back of the police car handcuffed and prior to Miranda rights. This will protect law enforcement from undue accusations and protect the citizens.

(Opposed) This bill does not simply require electronic recording in a place of detention. It requires electronic recording any time that an officer by their questions or actions attempts to solicit a potentially incriminating response from somebody who considers themselves in custody, an entirely subjective determination. A recent court of appeals decision determined that a person was in custody in a voluntary, prearranged meeting in a shopping mall parking lot to discuss an incident with a law enforcement officer. While it may not be intended to require body cameras, the fiscal notes accurately reflect that the most effective way to accommodate the requirements of the bill is to deploy body cameras on all officers any time that they are in the field. The scope of the bill should be narrowed to simply limit the requirements to a place of detention and an appropriate place of detention. We would not consider a school as a place of detention. This is certainly best practice. Even in the field, it is best practice to have these interactions recorded. Agencies do not do this now because they do not have the resources.

Persons Testifying: (In support) Representative Peterson, prime sponsor.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.