

SENATE BILL REPORT

SHB 1223

As Passed Senate - Amended, April 10, 2021

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: House Committee on Transportation (originally sponsored by 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: Passed House: 3/8/21, 54-43.

Committee Activity: Law & Justice: 3/15/21, 3/18/21 [DPA-TRAN, DNP, w/oRec].

Transportation: 3/29/21, 3/31/21 [DPA (LAW)-WM, DNP].

Ways & Means: 4/01/21, 4/02/21 [DP, DNP].

Floor Activity: Passed Senate - Amended: 4/10/21, 28-20.

Brief Summary of Amended Bill

- Requires law enforcement officers to electronically record custodial interrogations at places of detention 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, and, 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.

SENATE COMMITTEE ON LAW & JUSTICE

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 as amended and be referred to Committee on Transportation.
Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Darneille, Kuderer and Salomon.

Minority Report: Do not pass.
Signed by Senators McCune, Assistant Ranking Member; Holy.

Minority Report: That it be referred without recommendation.
Signed by Senators Padden, Ranking Member; Wagoner.

Staff: Samuel Brown (786-7470)

SENATE COMMITTEE ON TRANSPORTATION

Majority Report: Do pass as amended by Committee on Law & Justice and be referred to Committee on Ways & Means.

Signed by Senators Hobbs, Chair; Saldaña, Vice Chair; Cleveland, Das, Lovelett, Nguyen, Nobles, Randall and Wilson, C.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Fortunato, Hawkins, Padden, Sheldon and Wilson, J.

Staff: Bryon Moore (786-7726)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Law & Justice.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Mullet, Pedersen, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Braun, Gildon, Muzzall, Rivers, Wagoner and Warnick.

Staff: Trevor Press (786-7446)

Background: Interrogations. The federal and state constitutions provide a series of protections for individuals when they interact with law enforcement officers, including the right to remain silent and the right to counsel during a custodial interrogation. A custodial interrogation generally means any non-routine 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 any time during the interrogation. A person may waive those rights if:

- the waiver is the product of a free and deliberate choice rather than intimidation, coercion, or deception; and
- the waiver is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Use of Statements Obtained During Interrogation. 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 when evaluating whether a waiver is valid.

Uniform Law Commission. 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. The provisions have been adopted by Vermont in statute and Indiana by court rule.

Summary of Amended Bill: Electronic Recording. 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. Both audio and video recording must be used for custodial interrogations occurring at a jail, police or sheriff's station, holding cell, or correctional or detention facility. Custodial interrogations at other places of detention must be recorded by audio means at a minimum. Consent is not required before electronically recording a custodial interrogation, but the individual must be informed that an electronic recording is being made.

An officer conducting a custodial interrogation at a place of detention without electronically recording it, or outside a place of detention, must prepare a written or electronic report as soon as practicable explaining:

- the reason for failing to record the interrogation or conducting the interrogation outside a place of detention; and
- summarizing the interrogation process and the person's statements.

Exceptions. The requirement for electronic recording does not apply if:

- exigent circumstances exist, and an officer electronically records an explanation of the exigent circumstances as soon as is practicable;
- the individual indicates they will not participate in the interrogation if it is electronically recorded;
- the interrogation occurs in another state or is conducted by a federal law enforcement

- agency;
- no officer knows facts or circumstances indicating the interrogation is of a juvenile or related to a felony;
- an officer reasonably believes 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; or
- the electronic recording equipment malfunctions despite reasonable maintenance, and timely repair of the equipment is not feasible.

Use of Unrecorded Statements. The prosecuting attorney must provide a defendant with notice of intent to introduce an unrecorded statement made during custodial interrogation and prove any exception to the recording requirement applies by a preponderance of the evidence. The court must consider the failure to electronically record all or part of a custodial interrogation in determining whether a statement is admissible unless it determines an exception applies. If a person's unrecorded statement is admitted into evidence, the court must, upon the person's request, give a cautionary instruction to the jury.

Policies and Procedures. Each law enforcement agency must adopt and enforce policies and procedures that address the following:

- identification, accessibility, and preservation of recorded interrogations;
- standards for electronic recordings, including the angle, focus, and field of vision for recording devices to promote accurate recordings and assessment;
- the collection and review of electronic recordings by supervisors;
- supervisory responsibilities and a chain of command to promote internal accountability;
- 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.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Substitute House Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: This bill will reduce wrongful convictions based on false confessions. This is not prescriptive; individual departments may feel that body cameras are the best practice, but there are many cost-effective ways to meet the bill's requirements. Law enforcement agencies should have

the information they need to secure convictions. These practices are implemented in 27 other states and the District of Columbia. False confessions can be obtained by ignoring evidence of a suspect's innocence and inadvertently feeding them details of the crime during hours of interrogation. The public expect interrogations to be recorded. If a case involves a confession, that will be attacked with vigor and there will be many pre-trial hearings on admissibility. The biggest problems with technology have been resolved at this point. It is not fair to society for a dangerous criminal to be on the streets with someone innocent standing in for them in prison. We owe it to our victims to prevent this from happening. Juries should be able to look at the actual interaction and determine whether the defendant is guilty and how much knowledge has been shown.

CON: This bill is much more expansive than just requiring recording true custodial interrogations. It requires recording interrogations out in the field, and the most rational, practical way to do that is with body cameras. Storage of body camera footage is expensive.

OTHER: Counties are concerned that the bill will require law enforcement agencies to purchase equipment for every officer and retrofit offices to comply with these changes, and want to make sure the state is reimbursing that cost.

Persons Testifying (Law & Justice): PRO: Representative Strom Peterson, Prime Sponsor; Lara Zarowsky, Washington Innocence Project; James Trainum, Criminal Case Review and Consulting; Marlin Appelwick, Washington Uniform Legislation Commission.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs.

OTHER: Juliana Roe, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on Bill as Amended by Law & Justice (Transportation): PRO: This reflects the Uniform Law Commission's recommended provisions. False confessions are the most significant factor in wrongful convictions. The wrongful convictions are very costly to the government and certainly to the individual and their families. There are efficient and less costly ways to meet this requirements under the bill. The field requirements could be met without having to do body-cams.

CON: Local law enforcement officers are unequivocally against coerced convictions and believe that recording interrogations at physical locations is a best practice. The requirements for the recordings in the field are problematic. Body-cams are not explicitly required, but this would be the best way to accomplish the goal of the bill. This would be costly, particularly for the smaller jurisdictions.

Persons Testifying (Transportation): PRO: Representative Strom Peterson, Prime Sponsor; Lara Zarowsky, Washington Innocence Project.

CON: Sanjay Walvekar, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying (Transportation): No one.

Staff Summary of Public Testimony on Bill as Amended by Law & Justice (Ways & Means): PRO: False confessions are one of the leading causes of wrongful convictions in the U.S. State of the art recording equipment is not required to meet this mandate. There are cheap solutions to obtain audio recordings that are required under the bill.

CON: There is an extremely high cost to local governments that has not been supported. The field operations need money for body cams. The bill allows for best practices, but the cost to local governments needs to be supported. Narrowing the scope of the bill could reduce the costs. Many law enforcement agencies want to implement body cameras, but costs are too high.

Persons Testifying (Ways & Means): PRO: Lara Zarowsky, Washington Innocence Project.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.