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**SUBSTITUTE HOUSE BILL 1223**

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**State of Washington**

**67th Legislature**

**2021 Regular Session**

**By** House 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)

READ FIRST TIME 02/22/21.

1 AN ACT Relating to the uniform electronic recordation of  
2 custodial interrogations act; reenacting and amending RCW 9.73.030;  
3 adding a new chapter to Title 10 RCW; and providing an effective  
4 date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** SHORT TITLE. This chapter may be known and  
7 cited as the uniform electronic recordation of custodial  
8 interrogations act.

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

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

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

19 (3) "Law enforcement agency" means a governmental entity or  
20 person authorized by a governmental entity or state law to enforce

1 criminal laws or investigate suspected criminal activity. The term  
2 includes a nongovernmental entity that has been delegated the  
3 authority to enforce criminal laws or investigate suspected criminal  
4 activity. The term does not include a law enforcement officer.

5 (4) "Law enforcement officer" means:

6 (a) An individual employed by a law enforcement agency whose  
7 responsibilities include enforcing criminal laws or investigating  
8 suspected criminal activity; or

9 (b) An individual acting at the request or direction of an  
10 individual described in (a) of this subsection.

11 (5) "Person" means an individual, corporation, business trust,  
12 statutory trust, estate, trust, partnership, limited liability  
13 company, association, joint venture, public corporation, or  
14 government; governmental subdivision, agency, or instrumentality; or  
15 any other legal or commercial entity.

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

21 (7) "State" means a state of the United States, the District of  
22 Columbia, Puerto Rico, the United States Virgin Islands, or any  
23 territory or insular possession subject to the jurisdiction of the  
24 United States.

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

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

28 Except as otherwise provided by sections 5 through 10 of this act, a  
29 custodial interrogation, including the giving of any required  
30 warning, advice of the rights of the individual being questioned, and  
31 the waiver of any rights by the individual, must be recorded  
32 electronically in its entirety if the interrogation subject is a  
33 juvenile or if the interrogation relates to a felony crime. A  
34 custodial interrogation at a jail, police or sheriff's station,  
35 holding cell, or correctional or detention facility must be recorded  
36 by audio and video means. A custodial interrogation at any other  
37 place of detention must be recorded by audio means at minimum.

38 (2) If a law enforcement officer conducts a custodial  
39 interrogation to which subsection (1) of this section applies without

1 electronically recording it in its entirety, the officer shall  
2 prepare a written or electronic report explaining the reason for not  
3 complying with this section and summarizing the custodial  
4 interrogation process and the individual's statements.

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

8 (4) As soon as practicable, a law enforcement officer conducting  
9 a custodial interrogation outside a place of detention shall prepare  
10 a written report explaining the decision to interrogate outside a  
11 place of detention and summarizing the custodial interrogation  
12 process and the individual's statements made outside a place of  
13 detention.

14 (5) This section does not apply to a spontaneous statement made  
15 outside the course of a custodial interrogation or a statement made  
16 in response to a question asked routinely during the processing of  
17 the arrest of an individual.

18 NEW SECTION. **Sec. 4.** CONSENT NOT REQUIRED—NOTICE.  
19 Notwithstanding RCW 9.73.030 and 9.73.090, a law enforcement officer  
20 conducting a custodial interrogation is not required to obtain  
21 consent to electronic recording from the individual being  
22 interrogated, but must inform the individual that an electronic  
23 recording is being made of the interrogation. This chapter does not  
24 permit a law enforcement officer or a law enforcement agency to  
25 record a private communication between an individual and the  
26 individual's lawyer.

27 NEW SECTION. **Sec. 5.** EXCEPTION FOR EXIGENT CIRCUMSTANCES. A  
28 custodial interrogation to which section 3 of this act otherwise  
29 applies need not be recorded electronically if recording is not  
30 feasible because of exigent circumstances. The law enforcement  
31 officer conducting the interrogation shall record electronically an  
32 explanation of the exigent circumstances before conducting the  
33 interrogation, if feasible, or as soon as practicable after the  
34 interrogation is completed.

35 NEW SECTION. **Sec. 6.** EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE  
36 RECORDED ELECTRONICALLY. (1) A custodial interrogation to which  
37 section 3 of this act otherwise applies need not be recorded

1 electronically if the individual to be interrogated indicates that  
2 the individual will not participate in the interrogation if it is  
3 recorded electronically. If feasible, the agreement to participate  
4 without recording must be recorded electronically.

5 (2) If, during a custodial interrogation to which section 3 of  
6 this act otherwise applies, the individual being interrogated  
7 indicates that the individual will not participate in further  
8 interrogation unless electronic recording ceases, the remainder of  
9 the custodial interrogation need not be recorded electronically. If  
10 feasible, the individual's agreement to participate without further  
11 recording must be recorded electronically.

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

15 NEW SECTION. **Sec. 7.** EXCEPTION FOR INTERROGATION CONDUCTED BY  
16 OTHER JURISDICTION. If a custodial interrogation occurs in another  
17 state in compliance with that state's law or is conducted by a  
18 federal law enforcement agency in compliance with federal law, the  
19 interrogation need not be recorded electronically unless the  
20 interrogation is conducted with intent to avoid the requirement of  
21 electronic recording in section 3 of this act.

22 NEW SECTION. **Sec. 8.** EXCEPTION BASED ON BELIEF RECORDING NOT  
23 REQUIRED. (1) A custodial interrogation to which section 3 of this  
24 act otherwise applies need not be recorded electronically if the  
25 interrogation occurs when no law enforcement officer conducting the  
26 interrogation has knowledge of facts and circumstances that would  
27 lead an officer reasonably to believe that the individual being  
28 interrogated may have committed an act for which section 3 of this  
29 act requires that a custodial interrogation be recorded  
30 electronically.

31 (2) If, during a custodial interrogation under subsection (1) of  
32 this section, the individual being interrogated reveals facts and  
33 circumstances giving a law enforcement officer conducting the  
34 interrogation reason to believe that an act has been committed for  
35 which section 3 of this act requires that a custodial interrogation  
36 be recorded electronically, continued custodial interrogation  
37 concerning that act must be recorded electronically, if feasible.

1        NEW SECTION.    **Sec. 9.**    EXCEPTION FOR SAFETY OF INDIVIDUAL OR  
2 PROTECTION OF IDENTITY. A custodial interrogation to which section 3  
3 of this act otherwise applies need not be recorded electronically if  
4 a law enforcement officer conducting the interrogation or the  
5 officer's superior reasonably believes that electronic recording  
6 would disclose the identity of a confidential informant or jeopardize  
7 the safety of an officer, the individual being interrogated, or  
8 another individual. If feasible and consistent with the safety of a  
9 confidential informant, an explanation of the basis for the belief  
10 that electronic recording would disclose the informant's identity  
11 must be recorded electronically at the time of the interrogation. If  
12 contemporaneous recording of the basis for the belief is not  
13 feasible, the recording must be made as soon as practicable after the  
14 interrogation is completed.

15        NEW SECTION.    **Sec. 10.**    EXCEPTION FOR EQUIPMENT MALFUNCTION. (1)  
16 All or part of a custodial interrogation to which section 3 of this  
17 act otherwise applies need not be recorded electronically to the  
18 extent that recording is not feasible because the available  
19 electronic recording equipment fails, despite reasonable maintenance  
20 of the equipment, and timely repair or replacement is not feasible.

21        (2) If both audio and video recording of a custodial  
22 interrogation are otherwise required by section 3 of this act,  
23 recording may be by audio alone if a technical problem in the video  
24 recording equipment prevents video recording, despite reasonable  
25 maintenance of the equipment, and timely repair or replacement is not  
26 feasible.

27        (3) If both audio and video recording of a custodial  
28 interrogation are otherwise required by section 3 of this act,  
29 recording may be by video alone if a technical problem in the audio  
30 recording equipment prevents audio recording, despite reasonable  
31 maintenance of the equipment, and timely repair or replacement is not  
32 feasible.

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

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

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

16        (2) If the court admits into evidence a statement made during a  
17 custodial interrogation that was not recorded electronically in  
18 compliance with section 3 of this act, the court shall afford the  
19 defendant the opportunity to present to the jury the fact that the  
20 statement was not recorded electronically in compliance with section  
21 3 of this act.

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

28        NEW SECTION.    **Sec. 15.**    RULES RELATING TO ELECTRONIC RECORDING.  
29 (1) Each law enforcement agency that is a governmental entity of this  
30 state shall adopt and enforce rules to implement this chapter.

31        (2) The rules adopted under subsection (1) of this section must  
32 address the following topics:

33        (a) How an electronic recording of a custodial interrogation must  
34 be made;

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

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

3 (d) A process for explaining noncompliance with procedures and  
4 imposing administrative sanctions for a failure to comply that is not  
5 justified;

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

9 (f) A process for monitoring the chain of custody of an  
10 electronic recording.

11 (3) The rules adopted under subsection (2)(a) of this section for  
12 video recording must contain standards for the angle, focus, and  
13 field of vision of a recording device which reasonably promote  
14 accurate recording of a custodial interrogation at a place of  
15 detention and reliable assessment of its accuracy and completeness.

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

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

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

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

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

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

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

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

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

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

18        (a) Private communication transmitted by telephone, telegraph,  
19 radio, or other device between two or more individuals between points  
20 within or without the state by any device electronic or otherwise  
21 designed to record and/or transmit said communication regardless how  
22 such device is powered or actuated, without first obtaining the  
23 consent of all the participants in the communication;

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

28        (2) Notwithstanding subsection (1) of this section, wire  
29 communications or conversations (a) of an emergency nature, such as  
30 the reporting of a fire, medical emergency, crime, or disaster, or  
31 (b) which convey threats of extortion, blackmail, bodily harm, or  
32 other unlawful requests or demands, or (c) which occur anonymously or  
33 repeatedly or at an extremely inconvenient hour, or (d) which relate  
34 to communications by a hostage holder or barricaded person as defined  
35 in RCW 70.85.100, whether or not conversation ensues, may be recorded  
36 with the consent of one party to the conversation.

37        (3) Where consent by all parties is needed pursuant to this  
38 chapter, consent shall be considered obtained whenever one party has



1 announced to all other parties engaged in the communication or  
2 conversation, in any reasonably effective manner, that such  
3 communication or conversation is about to be recorded or transmitted:  
4 PROVIDED, That if the conversation is to be recorded that said  
5 announcement shall also be recorded.

6 (4) An employee of any regularly published newspaper, magazine,  
7 wire service, radio station, or television station acting in the  
8 course of bona fide news gathering duties on a full-time or  
9 contractual or part-time basis, shall be deemed to have consent to  
10 record and divulge communications or conversations otherwise  
11 prohibited by this chapter if the consent is expressly given or if  
12 the recording or transmitting device is readily apparent or obvious  
13 to the speakers. Withdrawal of the consent after the communication  
14 has been made shall not prohibit any such employee of a newspaper,  
15 magazine, wire service, or radio or television station from divulging  
16 the communication or conversation.

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

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

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

25 NEW SECTION. Sec. 24. EFFECTIVE DATE. Sections 1 through 20 of  
26 this act take effect January 1, 2022.

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