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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 01/15/21. Referred to Committee on Public Safety.

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 place of detention must be recorded by
35 both audio and video means.

36 (2) If a law enforcement officer conducts a custodial
37 interrogation to which subsection (1) of this section applies without
38 electronically recording it in its entirety, the officer shall
39 prepare a written or electronic report explaining the reason for not

1 complying with this section and summarizing the custodial
2 interrogation process and the individual's statements.

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

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

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

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

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

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

26 custodial interrogation to which section 3 of this act otherwise
27 applies need not be recorded electronically if recording is not
28 feasible because of exigent circumstances. The law enforcement
29 officer conducting the interrogation shall record electronically an
30 explanation of the exigent circumstances before conducting the
31 interrogation, if feasible, or as soon as practicable after the
32 interrogation is completed.

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

34 RECORDED ELECTRONICALLY. (1) A custodial interrogation to which
35 section 3 of this act otherwise applies need not be recorded
36 electronically if the individual to be interrogated indicates that
37 the individual will not participate in the interrogation if it is

1 recorded electronically. If feasible, the agreement to participate
2 without recording must be recorded electronically.

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

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

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

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

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

36 NEW SECTION. **Sec. 9.** EXCEPTION FOR SAFETY OF INDIVIDUAL OR
37 PROTECTION OF IDENTITY. A custodial interrogation to which section 3

1 of this act otherwise applies need not be recorded electronically if
2 a law enforcement officer conducting the interrogation or the
3 officer's superior reasonably believes that electronic recording
4 would disclose the identity of a confidential informant or jeopardize
5 the safety of an officer, the individual being interrogated, or
6 another individual. If feasible and consistent with the safety of a
7 confidential informant, an explanation of the basis for the belief
8 that electronic recording would disclose the informant's identity
9 must be recorded electronically at the time of the interrogation. If
10 contemporaneous recording of the basis for the belief is not
11 feasible, the recording must be made as soon as practicable after the
12 interrogation is completed.

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

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

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

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

36 NEW SECTION. **Sec. 12.** NOTICE OF INTENT TO INTRODUCE UNRECORDED
37 STATEMENT. If the prosecution intends to introduce in its case in

1 chief a statement made during a custodial interrogation to which
2 section 3 of this act applies which was not recorded electronically,
3 the prosecution, not later than the time specified by the local rules
4 governing discovery, shall serve the defendant with written notice of
5 that intent and of any exception on which the prosecution intends to
6 rely.

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

14 (2) If the court admits into evidence a statement made during a
15 custodial interrogation that was not recorded electronically in
16 compliance with section 3 of this act, the court, on request of the
17 defendant, shall give a cautionary instruction to the jury.

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

24 NEW SECTION. **Sec. 15.** RULES RELATING TO ELECTRONIC RECORDING.

25 (1) Each law enforcement agency that is a governmental entity of this
26 state shall adopt and enforce rules to implement this chapter.

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

29 (a) How an electronic recording of a custodial interrogation must
30 be made;

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

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

35 (d) A process for explaining noncompliance with procedures and
36 imposing administrative sanctions for a failure to comply that is not
37 justified;

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

4 (f) A process for monitoring the chain of custody of an
5 electronic recording.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 (3) Where consent by all parties is needed pursuant to this
34 chapter, consent shall be considered obtained whenever one party has
35 announced to all other parties engaged in the communication or
36 conversation, in any reasonably effective manner, that such
37 communication or conversation is about to be recorded or transmitted:
38 PROVIDED, That if the conversation is to be recorded that said
39 announcement shall also be recorded.

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

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

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

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

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

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