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& Rep. Cooke & Rep. Dorsey Walker & Rep. K. Johnson  
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HOUSE OF REPRESENTATIVES  
150th GENERAL ASSEMBLY

HOUSE BILL NO. 360

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO ELECTRONIC RECORDATION OF  
CUSTODIAL INTERROGATIONS OF CHILDREN.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Part II, Title 11 of the Delaware Code by making deletions as shown by strike through and  
2 insertions as shown by underline as follows:

3 Chapter 20. Electronic Recordation of Custodial Interrogations of Children.

4 § 2001. Short title.

5 This chapter may be cited as the “Electronic Recordation of Custodial Interrogations of Children.”

6 § 2002. Definitions.

7 For purposes of this chapter:

8 (1) “Child” means as defined in § 901 of Title 10.

9 (2) “Crime” means as defined in § 233 of this title.

10 (3) “Custodial interrogation” means questioning or other conduct by a law enforcement officer which is  
11 reasonably likely to elicit an incriminating response from a child and occurs when a reasonable child in the same  
12 circumstances would consider themselves in custody.

13 (4) “Delinquent Act” means an act committed by a child that, if committed by an adult, would constitute a  
14 crime.

15 (5) “Electronic recording” means an audio recording or an audio and video recording that accurately records a  
16 custodial interrogation. “Record electronically” and “recorded electronically” have a corresponding meaning.

17 (6) “Law enforcement agency” means a governmental entity or person authorized by a governmental entity or  
18 state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental  
19 entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity. The term  
20 does not include a law enforcement officer.

21 (7) “Law enforcement officer” means either of the following:

22 a. An individual employed by a law enforcement agency whose responsibilities include enforcing  
23 criminal laws or investigating suspected criminal activity.

24 b. An individual acting at the request or direction of an individual described in paragraph (7)a. of this  
25 section.

26 (8) “Person” means an individual; corporation; business trust; statutory trust; estate; trust; partnership; limited  
27 liability company; association; joint venture; public corporation; government or governmental subdivision, agency, or  
28 instrumentality; or any other legal or commercial entity.

29 (9) “Place of detention” means a fixed location under the control of a law enforcement agency where  
30 individuals are questioned about alleged crimes or delinquent acts. The term includes a jail, police station, holding cell,  
31 and correctional or detention facility.

32 (10) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin  
33 Islands, or any territory or insular possession subject to the jurisdiction of the United States.

34 (11) “Statement” means a communication whether oral, written, electronic, or nonverbal.

35 § 2003. Electronic recording requirement.

36 (a) Except as otherwise provided by §§ 2005 through 2010 of this title, a custodial interrogation at a place of  
37 detention, including the giving of any required warning, advice of the rights of the child being questioned, and the waiver  
38 of any rights by the child, must be recorded electronically in its entirety if the interrogation relates to a delinquent act or a  
39 crime.

40 (b) If a law enforcement officer conducts a custodial interrogation to which subsection (a) of this section applies  
41 without electronically recording it in its entirety, the officer shall prepare a written or electronic report explaining the reason  
42 for not complying with this section and summarizing the custodial interrogation process and the child’s statements.

43 (c) A law enforcement officer shall prepare the report required by subsection (b) of this section as soon as  
44 practicable after completing the interrogation.

45 (d) As soon as practicable, a law enforcement officer conducting a custodial interrogation outside a place of  
46 detention shall prepare a written report explaining the decision to interrogate outside a place of detention and summarizing  
47 the custodial interrogation process and the child’s statements made outside a place of detention.

48 (e) This section does not apply to a spontaneous statement made outside the course of a custodial interrogation or a  
49 statement made in response to a question asked routinely during the processing of the arrest of a child.

50 § 2004. Notice and consent not required.

51 Notwithstanding Chapter 24 of Title 11, a law enforcement officer conducting a custodial interrogation is not  
52 required to obtain consent to electronic recording from the child being interrogated or to inform the child that an electronic  
53 recording is being made of the interrogation. This chapter does not permit a law enforcement officer or a law enforcement  
54 agency to record a private communication between a child and the child's lawyer or a child and the child's parent or  
55 guardian.

56 § 2005. Exception for exigent circumstances.

57 A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if  
58 recording is not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall  
59 record electronically an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon  
60 as practicable after the interrogation is completed.

61 § 2006. Exception for child's refusal to be recorded electronically.

62 (a) A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if  
63 the child to be interrogated indicates that the child will not participate in the interrogation if it is recorded electronically. If  
64 feasible, the agreement to participate without recording must be recorded electronically.

65 (b) If, during a custodial interrogation to which § 2003 of this title otherwise applies, the child being interrogated  
66 indicates that the child will not participate in further interrogation unless electronic recording ceases, the remainder of the  
67 custodial interrogation need not be recorded electronically. If feasible, the child's agreement to participate without further  
68 recording must be recorded electronically.

69 (c) A law enforcement officer, with intent to avoid the requirement of electronic recording in § 2003 of this title,  
70 may not encourage a child to request that a recording not be made.

71 § 2007. Exception for interrogation conducted by other jurisdiction.

72 If a custodial interrogation occurs in another state in compliance with that state's law or is conducted by a federal  
73 law enforcement agency in compliance with federal law, the interrogation need not be recorded electronically unless the  
74 interrogation is conducted with intent to avoid the requirement of electronic recording in § 2003 of this title.

75 § 2008. Exception based on belief recording not required.

76 (a) A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if  
77 the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and  
78 circumstances that would lead an officer reasonably to believe that the child being interrogated may have committed an act  
79 for which § 2003 of this title requires that a custodial interrogation be recorded electronically.

80 (b) If, during a custodial interrogation under subsection (a) of this section, the child being interrogated reveals  
81 facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that an act has been  
82 committed for which § 2003 of this title requires that a custodial interrogation be recorded electronically, continued  
83 custodial interrogation concerning that act must be recorded electronically, if feasible.

84 § 2009. Exception for safety of a child or protection of identity.

85 A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if a law  
86 enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording  
87 would disclose the identity of a confidential informant or jeopardize the safety of an officer, the child being interrogated, or  
88 another individual. If feasible and consistent with the safety of a confidential informant, an explanation of the basis for the  
89 belief that electronic recording would disclose the informant's identity must be recorded electronically at the time of the  
90 interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be made as soon as  
91 practicable after the interrogation is completed.

92 § 2010. Exception for equipment malfunction.

93 All or part of a custodial interrogation to which § 2003 of this title otherwise applies need not be recorded  
94 electronically to the extent that recording is not feasible because the available electronic recording equipment fails, despite  
95 reasonable maintenance of the equipment, and timely repair or replacement is not feasible. If the equipment fails, the law  
96 enforcement officer shall make a reasonable effort to record the interrogation electronically on any available device. The  
97 law enforcement office shall also prepare a written or electronic report explaining the reason for the malfunction and  
98 summarizing the custodial interrogation process and the child's statements. The law enforcement officer shall prepare the  
99 report as soon as practicable after completing the interrogation.

100 § 2011. Burden of persuasion.

101 If the prosecution relies on an exception in §§ 2005 through 2010 of this title to justify a failure to record  
102 electronically a custodial interrogation, the prosecution must prove by a preponderance of the evidence that the exception  
103 applies.

104 § 2012. Notice of intent to introduce unrecorded statement.

105 If the prosecution intends to introduce in its case in chief a statement made by a child during a custodial  
106 interrogation to which § 2003 of this title applies which was not recorded electronically, the prosecution shall serve the  
107 child or child's attorney with written notice of that intent and of any exception on which the prosecution intends to rely.  
108 The prosecution must serve the notice no later than the time a court has provided for the filing of pretrial motions or such  
109 later time as a court may, by rule, direct.

110           § 2013. Procedural remedies.

111           (a) Unless the court finds that an exception in §§ 2005 through 2010 of this title applies, the court shall consider  
112 the failure to record electronically all or part of a custodial interrogation to which § 2003 of this title applies as a factor in  
113 determining whether a statement made during the interrogation is admissible, including whether it was voluntarily made.

114           (b) If the court admits into evidence a statement made by a child during a custodial interrogation that was not  
115 recorded electronically in compliance with § 2003 of this title, the court, on request of the child or the child's attorney, shall  
116 give a cautionary instruction to the jury.

117           § 2014. Handling and preserving an electronic recording.

118           Each law enforcement agency in this State shall establish and enforce procedures to ensure that the electronic  
119 recording of all or part of a custodial interrogation is identified, accessible, and preserved consistent with the law of this  
120 State governing the preservation of evidence in criminal and delinquency cases.

121           § 2015. Rules relating to electronic recording.

122           (a) The Attorney General shall adopt rules to implement this chapter, which each law enforcement agency that is a  
123 governmental entity of this State shall enforce.

124           (b) The rules adopted under subsection (a) of this section must address all of the following topics:

125                 (1) How an electronic recording of a custodial interrogation must be made.

126                 (2) The collection and review of electronic recordings, or the absence thereof, by supervisors in each law  
127 enforcement agency.

128                 (3) The assignment of supervisory responsibilities and a chain of command to promote internal accountability.

129                 (4) A process for explaining noncompliance with procedures and imposing administrative sanctions for a  
130 failure to comply that is not justified.

131                 (5) A supervisory system expressly imposing on individuals in specific positions a duty to ensure adequate  
132 staffing, education, training, and material resources to implement this chapter.

133                 (6) A process for monitoring the chain of custody of an electronic recording.

134           (c) The rules adopted under paragraph (b)(1) of this section for video recording must contain standards for the  
135 angle, focus, and field of vision of a recording device which reasonably promote accurate recording of a custodial  
136 interrogation at a place of detention and reliable assessment of its accuracy and completeness.

137           § 2016. Limitation of liability.

138           (a) A law enforcement agency that is a governmental entity in this State which has implemented procedures  
139 reasonably designed to enforce the rules adopted under § 2015 of this title and ensure compliance with this chapter is not  
140 subject to civil liability for damages arising from a violation of this chapter.

141           (b) This chapter does not create a right of action against a law enforcement officer.

142           § 2017. Self-authentication.

143           (a) In any pretrial or post trial proceeding, an electronic recording of a custodial interrogation is self-authenticating  
144 if it is accompanied by a certificate of authenticity sworn under oath or affirmation by an appropriate law enforcement  
145 officer.

146           (b) This chapter does not limit the right of a child to challenge the authenticity of an electronic recording of a  
147 custodial interrogation under law of this State other than this chapter.

148           § 2018. No right to electronic recording or transcript.

149           (a) This chapter does not create a right of a child to require a custodial interrogation to be recorded electronically.

150           (b) This chapter does not require preparation of a transcript of an electronic recording of a custodial interrogation.

151           Section 2. This Act takes effect 6 months following its enactment into law.

#### SYNOPSIS

This Bill amends Title 11 to require that custodial interrogations of children, at a place of detention, by a law enforcement officer, be electronically recorded. The Bill requires the law enforcement officer to prepare a written explanation if the interrogation is not electronically recorded. No electronic recording is required if the child refuses to be interrogated if the interrogation is recorded. The Bill contain an exception if the safety of the child, law enforcement officer or informant would be jeopardized. The prosecution has the burden of proving one of the Bill's exceptions for the admission of a child's statement that was not electronically recorded. Both law enforcement officer and agency have civil immunity for implementing and enforcing provisions of Bill. This Bill will become effective 6 months after enactment.