



SPONSOR: Sen. Brown & Rep. Minor-Brown & Rep. Dorsey Walker
Sen. Townsend; Rep. Baumbach

DELAWARE STATE SENATE
150th GENERAL ASSEMBLY

SENATE BILL NO. 130

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

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

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

Chapter 20. Uniform Electronic Recordation of Custodial Interrogations Act.

§ 2001. Short title.

This chapter may be cited as the “Uniform Electronic Recordation of Custodial Interrogations Act.”

§ 2002. Definitions.

For purposes of this chapter:

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

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

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

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

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

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

b. An individual acting at the request or direction of an individual described in paragraph (5)a. of this section.

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

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

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

(9) "Statement" means a communication whether oral, written, electronic, or nonverbal.

§ 2003. Electronic recording requirement.

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

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

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

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

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

§ 2004. Notice and consent not required.

Notwithstanding Chapter 24 of this title, a law enforcement officer conducting a custodial interrogation is not required to obtain consent to electronic recording from the individual being interrogated or to inform the individual that an electronic recording is being made of the interrogation. This chapter does not permit a law enforcement officer or a law enforcement agency to record a private communication between an individual and the individual's lawyer.

§ 2005. Exception for exigent circumstances.

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

56 § 2006. Exception for individual's refusal to be recorded electronically.

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

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

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

66 § 2007. Exception for interrogation conducted by other jurisdiction.

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

70 § 2008. Exception based on belief recording not required.

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

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

79 § 2009. Exception for safety of individual or protection of identity.

80 A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if a law
81 enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording

82 would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being
83 interrogated, or another individual. If feasible and consistent with the safety of a confidential informant, an explanation of
84 the basis for the belief that electronic recording would disclose the informant's identity must be recorded electronically at
85 the time of the interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be
86 made as soon as practicable after the interrogation is completed.

87 § 2010. Exception for equipment malfunction.

88 All or part of a custodial interrogation to which § 2003 of this title otherwise applies need not be recorded
89 electronically to the extent that recording is not feasible because the available electronic recording equipment fails, despite
90 reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

91 § 2011. Burden of persuasion.

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

95 § 2012. Notice of intent to introduce unrecorded statement.

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

101 § 2013. Procedural remedies.

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

105 (b) If the court admits into evidence a statement made during a custodial interrogation that was not recorded
106 electronically in compliance with § 2003 of this title, the court, on request of the defendant, shall give a cautionary
107 instruction to the jury.

108 § 2014. Handling and preserving an electronic recording.

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

§ 2015. Rules relating to electronic recording.

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

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

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

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

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

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

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

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

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

§ 2016. Limitation of liability.

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

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

§ 2017. Self-authentication.

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

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

§ 2018. No right to electronic recording or transcript.

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

142 (b) This chapter does not require preparation of a transcript of an electronic recording of a custodial interrogation.
143 § 2019. Uniformity of application and construction.
144 In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the
145 law with respect to its subject matter among states that enact it.

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

SYNOPSIS

Confessions are powerful evidence of guilt. This Act adopts the Uniform Law Commission's Uniform Electronic Recordation of Custodial Interrogations Act to promote truth-finding, promote efficiency, and protect constitutional values. The scope of recording required under the Uniform Act, and the exceptions to the recording requirement, are consistent with the requirements set by the Attorney General in the Attorney General's Custodial Interrogation Model Policy, available at: <https://attorneygeneral.delaware.gov/law-enforcement/custodial-interrogation-policy-2018/>.

Specifically, this Act mandates audio recording or audio and video recording of the custodial interrogation process by law enforcement when the interrogation relates to a crime, as crime is defined under the Delaware Criminal Code.

Recognizing that a blanket requirement of recording electronically all interrogation is not feasible, this Act provides 6 exceptions to the recording mandate: (1) exigent circumstances, (2) an individual's refusal to be recorded, (3) interrogations occurring in other jurisdictions, (4) when the interrogator reasonably believes that the offense involved is not one the Act mandates must be recorded, (5) when the interrogator or interrogator's supervisor reasonably believes electronic recording would reveal a confidential informant's identity or jeopardize the safety of the officer, the person interrogated, or another individual, and (6) equipment malfunctions.

Further, this Act requires the prosecution to notify the defense of an intention to introduce an unrecorded statement and of the exception that permitted the lack of recording. This Act requires the prosecution to prove by a preponderance of the evidence that an exception applies. This Act also prescribes remedies for violations of the electronic recording requirement, including the giving of a cautionary instruction to the jury.

Finally, this Act requires the Attorney General to adopt rules to implement this Act, which are to be enforced by each law enforcement agency.

Author: Senator Brown