SPONSOR: Rep. Minor-Brown & Rep. Chukwuocha & Rep. Lambert
& Sen. Pinkney & Sen. Brown
Reps. Baumbach, Bentz, Cooke, K. Johnson, Lynn,
S. Moore, Morrison, Wilson-Anton; Sens. Sokola,
Townsend

HOUSE OF REPRESENTATIVES
151st GENERAL ASSEMBLY

HOUSE BILL NO. 215

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 though 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 defined as § 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) "Delinquent act" means an act committed by a child that, if committed by an adult, would constitute a crime.

(4) "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.

(5) "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. "Law-enforcement agency" does not include a law enforcement officer.

(6) "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 (6)a. of this section.

(7) "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.

(8)a. "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.

b. "Place of detention" includes a jail, police station, holding cell, correctional or detention facility, police vehicle, and, for a child, school.

(9) "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.

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

§ 2003. Electronic recording requirement.

(a) Except as otherwise provided by §§ 2005 through 2009 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 or delinquent act. A custodial interrogation must be recorded as follows:

(1) If the custodial detention occurs at a jail, police station, holding cell, or correctional or detention facility, by audio and video means.

(2) If the custodial detention occurs in a police vehicle, at a school for a child, or at any other place of detention, by audio means at a minimum.

(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 or electronic report explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process and the individual's statements 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 or a child and the child's parent or guardian.

§ 2005. Exception for exigent circumstances.

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

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

(a) A custodial interrogation to which § 2003 of this title otherwise applies need not be recorded electronically if the individual to be interrogated indicates that the individual will not participate in the interrogation if it is recorded electronically. The individual's agreement to participate without recording must be recorded electronically and waived in a written document that is signed by the individual.

(b) If, during a custodial interrogation to which § 2003 of this title otherwise applies, the individual being interrogated indicates that the individual will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be recorded electronically. The individual's agreement to participate without recording must be recorded electronically and waived in a written document that is signed by the individual.

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

§ 2007. Exception for interrogation conducted by other jurisdiction.

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

§ 2008. Exception for safety of individual or protection of identity.

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

§ 2009. Exception for equipment malfunction.

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

(b) If both audio and video recording of a custodial interrogation are otherwise required by § 2003 of this title, recording may be by audio alone if a technical problem in the video recording equipment prevents video recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(c) If both audio and video recording of a custodial interrogation are otherwise required by § 2003 of this title, recording may be by video alone if a technical problem in the audio recording equipment prevents audio recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(d) If a law enforcement officer conducts a custodial interrogation under this section, the law enforcement officer shall prepare a written or electronic report explaining the reasoning for the malfunction, to the best of the officer's knowledge, and summarizing the custodial interrogation process and the individual's statements. The law enforcement officer shall prepare the report as soon as practicable after completing the interrogation.

§ 2010. Presumption of inadmissibility; burden of persuasion.

A statement that is not recorded electronically as required under § 2003 of this title is inadmissible unless the prosecution proves by clear and convincing evidence that an exception in §§ 2005 through 2009 of this title applies to justify the failure to record electronically.

§ 2011. Notice of intent to introduce unrecorded statement.

If the prosecution intends to introduce in its case in chief a statement made by an individual during a custodial interrogation to which § 2003 of this title applies which was not recorded electronically, the prosecution shall serve the individual with written notice of that intent and of any exception on which the prosecution intends to rely. The prosecution must serve the notice no later than when the statement is provided to the individual as part of discovery.

§ 2012. Procedural remedies.

If the court admits into evidence a statement made by an individual during a custodial interrogation that was not recorded electronically in compliance with § 2003 of this title, the court, on request of the individual, shall give a cautionary instruction to the jury.

§ 2013. Handling and preserving an electronic recording.

Each law enforcement agency in this State shall establish and enforce procedures to ensure that the electronic recording of all or part of a custodial interrogation and a report or other document required to be prepared under this chapter is identified, accessible, and preserved consistent with the law of this State governing the preservation of evidence in criminal and delinquency cases.

§ 2014. Rules relating to electronic recording.

(a) The Council on Police Training 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.

§ 2015. 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 § 2014 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.

§ 2016. 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.

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

§ 2017. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

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

SYNOPSIS

Confessions are powerful evidence of guilt. Therefore, 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.

Specifically, this Act mandates electronic recording of the custodial interrogation process by law enforcement when the interrogation relates to a crime allegedly committed by an adult or a delinquent act allegedly committed by a child. The type of recording required, either audio or audio and video, depends on the location of the custodial interrogation.

Recognizing that a blanket requirement of recording electronically all interrogations is not feasible, this Act provides 5 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 or interrogator's supervisor reasonably believes electronic recording would reveal a confidential informant's identity or jeopardize the safety of the officer, the individual interrogated, or another individual, and (5) 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 clear and convincing 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.

Additionally, this Act provides civil immunity for both law enforcement officers and law enforcement agencies.

Finally, this Act requires the Council on Police Training to adopt rules to implement this Act, which are to be enforced by each law enforcement agency.