

---

**BILL REQUEST - CODE REVISER'S OFFICE**

---

BILL REQ. #: Z-0628.1/20 ROUGH DRAFT

ATTY/TYPIST: KS:akl

BRIEF DESCRIPTION: Enacting the uniform electronic recordation of  
custodial interrogations act.

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

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

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

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

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

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

18 (3) "Law enforcement agency" means a governmental entity or  
19 person authorized by a governmental entity or state law to enforce  
20 criminal laws or investigate suspected criminal activity. The term

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

4 (4) "Law enforcement officer" means:

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

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

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

15 (6) "Place of detention" means a fixed location under the control  
16 of a law enforcement agency where individuals are questioned about  
17 alleged crimes or [insert the state's term for delinquent acts]. The  
18 term includes a jail, police or sheriff's station, holding cell,  
19 correctional or detention facility, police vehicle, and in the case  
20 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 [at a place of detention], including the  
30 giving of any required warning, advice of the rights of the  
31 individual being questioned, and the waiver of any rights by the  
32 individual, must be recorded electronically in its entirety [by both  
33 audio and video means] if the interrogation subject is a juvenile or  
34 if the interrogation relates to a felony crime described in [insert  
35 applicable section numbers of the state's criminal and juvenile  
36 codes]. [A custodial interrogation at a place of detention must be  
37 recorded by both audio and video means.]

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.** NOTICE AND CONSENT NOT REQUIRED.  
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 act, 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 [insert  
6 citation to statute or rule of procedure], shall serve the defendant  
7 with written notice of that intent and of any exception on which the  
8 prosecution intends to 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 [as a factor] in determining whether a statement made during  
14 the interrogation is admissible, including whether it was voluntarily  
15 made [or is reliable].

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, on request of the  
19 defendant, shall give a cautionary instruction to the jury.

20        NEW SECTION.    **Sec. 14.**    HANDLING AND PRESERVING ELECTRONIC  
21 RECORDING. Each law enforcement agency in this state shall establish  
22 and enforce procedures to ensure that the electronic recording of all  
23 or part of a custodial interrogation is identified, accessible, and  
24 preserved as required by [cites statutes, court rules, or other state  
25 authority generally governing the method of preserving evidence in  
26 criminal cases].

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

30        [(b) [insert name of the appropriate state authority] shall adopt  
31 rules to implement this chapter which each law enforcement agency  
32 that is a governmental entity of this state shall enforce.]

33        [(c) [insert name of the state agency charged with monitoring law  
34 enforcement's compliance with this act] shall adopt rules to  
35 implement this chapter and monitor enforcement of the rules by each  
36 law enforcement agency that is a governmental entity of this state.]

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

3 (a) How an electronic recording of a custodial interrogation must  
4 be made;

5 (b) The collection and review of electronic recordings, or the  
6 absence thereof, by supervisors in [the] [each] law enforcement  
7 agency;

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

10 (d) A process for explaining noncompliance with procedures and  
11 imposing administrative sanctions for a failure to comply that is not  
12 justified;

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

16 (f) A process for monitoring the chain of custody of an  
17 electronic recording; and

18 (g) [insert other topic].

19 [(3) The rules adopted under subsection (2)(a) of this section  
20 for video recording must contain standards for the angle, focus, and  
21 field of vision of a recording device which reasonably promote  
22 accurate recording of a custodial interrogation [at a place of  
23 detention] and reliable assessment of its accuracy and completeness.]

24 [(4) Each law enforcement agency that is a governmental entity in  
25 this state shall adopt and enforce rules providing for administrative  
26 discipline of a law enforcement officer found by a court or the  
27 agency to have violated this chapter. [The rules must provide a range  
28 of disciplinary sanctions reasonably designed to promote compliance  
29 with this chapter.]]

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

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

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

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

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

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

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

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

25        NEW SECTION.    **Sec. 21.**    SEVERABILITY. If any provision of this  
26 act or its application to any person or circumstance is held invalid,  
27 the remainder of the act or the application of the provision to other  
28 persons or circumstances is not affected.

29        NEW SECTION.    **Sec. 22.**    CODIFICATION. Sections 1 through 20 of  
30 this act constitute a new chapter in Title 10 RCW.

31        NEW SECTION.    **Sec. 23.**    EFFECTIVE DATE. This act takes effect  
32 January 1, 2021.

--- END ---