

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1223

Chapter 329, Laws of 2021

67th Legislature
2021 Regular Session

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

EFFECTIVE DATE: July 25, 2021—Except for sections 1 through 20,
which take effect January 1, 2022.

Passed by the House April 14, 2021
Yeas 56 Nays 41

LAURIE JINKINS

**Speaker of the House of
Representatives**

Passed by the Senate April 10, 2021
Yeas 28 Nays 20

DENNY HECK

President of the Senate

Approved May 18, 2021 11:54 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1223** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 18, 2021

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1223

AS AMENDED BY THE SENATE

Passed Legislature - 2021 Regular Session

State of Washington

67th Legislature

2021 Regular Session

By House Transportation (originally sponsored 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 02/22/21.

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.

(3) "Law enforcement agency" means a general authority Washington law enforcement agency or limited authority Washington law enforcement agency as those terms are defined in RCW 10.93.020.

(4) "Law enforcement officer" means a general authority Washington peace officer or limited authority Washington peace officer as those terms are defined in RCW 10.93.020.

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

(6) "Place of detention" means a fixed location under the control of a law enforcement agency where individuals are questioned about alleged crimes or status offenses. The term includes a jail, police or sheriff's station, holding cell, correctional or detention facility, police vehicle, and in the case of juveniles, schools.

(7) "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.

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

NEW SECTION. **Sec. 3.** ELECTRONIC RECORDING REQUIREMENT. (1) Except as otherwise provided by sections 5 through 10 of this act, a custodial interrogation, 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 subject is a juvenile or if the interrogation relates to a felony crime. A custodial interrogation at a jail, police or sheriff's station, holding cell, or correctional or detention facility must be recorded by audio and video means. A custodial interrogation at any other place of detention must be recorded by audio means at minimum.

(2) If a law enforcement officer conducts a custodial interrogation to which subsection (1) 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.

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

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

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

14 NEW SECTION. **Sec. 4.** CONSENT NOT REQUIRED—NOTICE.
15 Notwithstanding RCW 9.73.030 and 9.73.090, a law enforcement officer
16 conducting a custodial interrogation is not required to obtain
17 consent to electronic recording from the individual being
18 interrogated, but must inform the individual that an electronic
19 recording is being made of the interrogation. This chapter does not
20 permit a law enforcement officer or a law enforcement agency to
21 record a private communication between an individual and the
22 individual's lawyer.

23 NEW SECTION. **Sec. 5.** EXCEPTION FOR EXIGENT CIRCUMSTANCES. A
24 custodial interrogation to which section 3 of this act otherwise
25 applies need not be recorded electronically if recording is not
26 feasible because of exigent circumstances. The law enforcement
27 officer conducting the interrogation shall record electronically an
28 explanation of the exigent circumstances before conducting the
29 interrogation, if feasible, or as soon as practicable after the
30 interrogation is completed.

31 NEW SECTION. **Sec. 6.** EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE
32 RECORDED ELECTRONICALLY. (1) A custodial interrogation to which
33 section 3 of this act otherwise applies need not be recorded
34 electronically if the individual to be interrogated indicates that
35 the individual will not participate in the interrogation if it is
36 recorded electronically. If feasible, the agreement to participate
37 without recording must be recorded electronically.

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

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

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

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

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

34 NEW SECTION. **Sec. 9.** EXCEPTION FOR SAFETY OF INDIVIDUAL OR
35 PROTECTION OF IDENTITY. A custodial interrogation to which section 3
36 of this act otherwise applies need not be recorded electronically if
37 a law enforcement officer conducting the interrogation or the

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

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

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

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

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

34 NEW SECTION. **Sec. 12.** NOTICE OF INTENT TO INTRODUCE UNRECORDED
35 STATEMENT. If the prosecution intends to introduce in its case in
36 chief a statement made during a custodial interrogation to which
37 section 3 of this act applies which was not recorded electronically,

1 the prosecution, not later than the time specified by the local rules
2 governing discovery, shall serve the defendant with written notice of
3 that intent and of any exception on which the prosecution intends to
4 rely.

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

12 (2) If the court admits into evidence a statement made during a
13 custodial interrogation that was not recorded electronically in
14 compliance with section 3 of this act, the court shall afford the
15 defendant the opportunity to present to the jury the fact that the
16 statement was not recorded electronically in compliance with section
17 3 of this act.

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.** POLICIES AND PROCEDURES RELATING TO
25 ELECTRONIC RECORDING. (1) Each law enforcement agency that is a
26 governmental entity of this state shall adopt and enforce policies
27 and procedures to implement this chapter.

28 (2) The policies and procedures adopted under subsection (1) of
29 this section must address the following topics:

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

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

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

1 (d) A process for explaining noncompliance with procedures and
2 imposing administrative sanctions for a failure to comply that is not
3 justified;

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

7 (f) A process for preserving the chain of custody of an
8 electronic recording.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 (3) Where consent by all parties is needed pursuant to this
38 chapter, consent shall be considered obtained whenever one party has

1 announced to all other parties engaged in the communication or
2 conversation, in any reasonably effective manner, that such
3 communication or conversation is about to be recorded or transmitted:
4 PROVIDED, That if the conversation is to be recorded that said
5 announcement shall also be recorded.

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

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

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

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

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

Passed by the House April 14, 2021.
Passed by the Senate April 10, 2021.
Approved by the Governor May 18, 2021.
Filed in Office of Secretary of State May 18, 2021.

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