

ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

Guidelines for police agencies in documenting interrogations of suspects in certain crimes.

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New York State Division of Criminal Justice Services.
Points of view in this document are those of the author and
do not necessarily represent the official position or policies
of the Division of Criminal Justice Services.

The contents of this policy are provided for agencies to consider in the
development of their own policy. As with any policy, it is recommended
that you consult with your own policy making body and legal counsel
before implementing the same.

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During 2009, an advisory panel of subject matter experts was convened to identify best practices in the electronic recording and preservation of custodial interviews. The following guidelines are derived from the collective work of the Advisory Panel. These guidelines were developed with an awareness of the necessity for definitive guidance within the subject area while recognizing the variables and contingencies faced by law enforcement during the investigation of serious crimes.

Depending upon the type of equipment and facilities used by a particular department, portions of these guidelines may not be applicable without modification. Policy-makers are encouraged to confer with their prosecutor and modify these guidelines to conform to their particular situation while being mindful of the intent of these procedures.

While these guidelines endorse the practice of recording custodial interviews, it also recognizes the dynamics of police work, field operations and suspect encounters. Therefore, these guidelines provide latitude for officers in conducting interrogations at opportune times that may not lend themselves to the availability of recording equipment.

The New York State Association of Chiefs of Police extends its thanks to the members of the Advisory Panel for their assistance in this project. Their experience in recording custodial interviews and using the recordings provides an opportunity for other agencies to draw from the development of recording protocols from agencies throughout New York State.

I. PURPOSE

The purpose of this policy is to establish guidelines for the electronic recording of custodial interviews and the associated use, management, storage and retrieval of such recordings. The Department recognizes that having a recording of a defendant, in addition to written or noted statements, greatly enhances a criminal case and affords an extra dimension to the statements and admissions of a defendant. This policy is not intended to provide guidance on when the right to counsel attaches as each case may be somewhat different.

II. POLICY

The use of electronic recording during custodial interviews is intended to enhance the investigative process and assist in the prosecution of criminal cases. The recording of custodial interviews will assist the department in demonstrating the interview process, preserving the statements of the accused, and defending against claims such as deprivation of the right to counsel and the right against self-incrimination. This policy is mindful of the benefits of recordings balanced with the overwhelming public policy demands upon the police in solving crimes.

III. DEFINITIONS

- A. **Custodial interview:** Questioning of a subject initiated by a law enforcement officer under circumstances in which the subject is under arrest or would be deemed to be in custody and not free to leave at the time of questioning. [Note: In cases of persons arrested pursuant to a warrant, the right to counsel has already attached and no interview may be conducted without counsel, nor can a waiver of counsel occur outside of counsel's presence or until the subject has conferred with counsel.]
- B. **Electronic recording:** The processing of audio and video signals using technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities in the making of a record of an interview.
- C. **Recorded media:** The audio and video signals which are recorded upon a particular medium such as analog recording tape, digital tape, other portable digital storage media and the like.
- D. **Members:** All sworn police officers of the <_____> Department.
- E. **Department:** The <_____> Police Department.
- F. **Recording room:** For the purpose of this policy, includes any designated room outfitted with audio-video recording equipment, and any police vehicle similarly equipped.

G. **Recap interview:** For the purpose of this policy, when statements and admissions are initially made outside the presence of electronic recording equipment, members are encouraged to conduct an interview in a recording room in order to summarize the previous recorded statements of the subject.

H. ***Serious crime:** Means all forms of murder, homicide and manslaughter as defined in Article 125 of the New York State Penal Law, all class B and C felonies, Predatory Sexual Assault Against A Child (PL §130.96), Sexual Abuse in the First Degree (PL §130.65), attempts to commit the same, and corresponding juvenile offenses.

***Serious crime:** Includes all class A, B and C <and D> felonies and attempts to commit the same, whether by an adult or juvenile.

***Major crime:** Homicide, sexual assault, armed robbery, and other Part I Crimes as defined in the FBI Uniform Crime Reports. Other crimes as defined by the department <herein> <or as may be designated by General Order from time to time>, whether committed by adults or juveniles.

**Policy makers need to determine the threshold criteria for when a recording is to be made in their jurisdiction. While major and serious crimes should be included, the listing should be clear and concise for all members of the agency. It is recommended that policy makers confer with their District Attorneys' Offices in developing this listing.*

IV. PROCEDURES

General Guidelines for Recording:

A. RECORDING REQUIRED - Members shall make an electronic recording of a custodial interview when the subject to be interviewed is reasonably suspected in the commission of <a class D felony or greater> <a serious crime as defined herein> provided that equipment and trained personnel are available to operate the recording equipment.

EXCEPTIONS to this requirement include circumstances whereby:

- a. Electronic recording is not feasible (equipment malfunctions, multiple suspects and simultaneous interviews, equipment already in use, etc.);
- b. Spontaneous statements are made which are not in response to police questioning, or which occur outside of the custodial interview;
- c. Statements made by a subject in response to questions routinely asked during the arrest and booking process;
- d. Statements made by a subject in response to questioning whereby the interviewer is unaware that a serious crime <or qualifying crime otherwise requiring recording> has occurred;
- e. Statements made during a custodial interview at another location (out of state, correctional facility) which is not equipped with recording equipment, and the reasons for using such other location is not to circumvent this policy;

- f. Statements by a subject who has indicated that he/she will only participate in the interview if it is not recorded; or
 - g. The failure to record was due to inadvertent error or oversight and was not the result of intentional conduct of a member.
- B. The member conducting or assisting with the interview shall be responsible for the operation of the recording device used during the interview and will monitor the same to ensure that the recording is not interrupted.
- C. New and unused recording media will be used.
- D. OFFICER DISCRETION - Members are encouraged to conduct interviews and interrogations at the time when they believe the circumstances are opportune for eliciting information from a subject. This policy is not intended to discourage field interrogations (i.e. at hospitals, jails, police vehicles, other locations where recording is not practicable). In the event statements and admissions are developed outside of the recording room(s), when feasible, members should continue to the interview in a recording room for the purposes of a recap interview as defined herein.
- E. RECORDING IN ENTIRETY - To maximize the effectiveness of electronic recording and the integrity of audio-video documentation, members shall adhere to the following:
- a. Interviews will be recorded in their entirety.
 - b. Recording should begin with the interviewer's entrance into the interview room. In order to maintain the integrity of other investigations and/or to protect confidential information that may bear upon such matters as the safety of witnesses, the interviewing officer shall deactivate the recording equipment immediately upon the exit of all parties from the interview room upon the conclusion of the interview session.

Nothing in this policy prohibits the use of electronic recording equipment for any other interview at the discretion of the member *<and subject to the approval of – specify rank or unit>*.

The Interview:

- F. COVERT RECORDING - The member conducting the interview is not required to inform the subject that he/she is being recorded and is not required to discuss the topic of recording unless the subject asks whether the interview is being recorded.
- G. IDENTIFICATION OF PARTIES - All persons within the interview room should be identified on the recording, whether by the interviewing member or by the subjects themselves.
- H. TIME AUTHENTICATION - The interviewing member should state the date and time at the onset of the interview, and again at the conclusion of the interview.

- I. WRITTEN STATEMENTS - After the subject of the interview has provided all pertinent information, the member shall obtain a written statement from the subject. This procedure will also be recorded.
- J. ATTORNEY CONSULTATIONS - The recording shall be continuous and uninterrupted during the interview process, unless an attorney elects to confer privately with the subject. In such cases, the member responsible for the recording shall advise the attorney of the use of recording equipment, and offer: to deactivate the audio, or to provide an alternate room for the conference, or to turn off the recording equipment during the conference between the attorney and the subject. If there is an interruption in the recording in order to accommodate the subject and attorney, note the date and time prior to stopping the equipment and again re-state the date and time when the equipment is again turned on.
- K. REPRESENTATION BY COUNSEL - If during the interview, or prior to its commencement, the department receives notice from an attorney that they have entered the case on behalf of the subject, the subject will be immediately advised of this while the recording equipment is functioning and the date/time noted.
 - a. The right to counsel attaches once an attorney has communicated with the police for the purpose of representing the defendant (People v. Arthur, 22 N.Y.2d 325) even where counsel was retained by the defendant's family and without his knowledge (People v. Garofolo, 46 N.Y.2d 592). Therefore, the statement that the subject should be asked if he wants that attorney to represent him is not entirely accurate since a waiver generally cannot be made outside of the presence of counsel once counsel has attached, although, if the subject consults with the attorney by another means than face to face, a waiver will generally be valid (“Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer” (People v. Hobson, 39 N.Y.2d 479 [1976]; “[T]he physical presence of an attorney is not required for a suspect to effectuate a valid waiver of the right to counsel where, as here, the police are assured by the attorney that the decision to waive counsel was made in consultation with the attorney” People v. Booker, 53 A.D.3d 697,862 N.Y.S.2d 139 [3d Dept., 2008]).
 - b. If a written statement had been partially completed at the time of the attorney notice, then the statement as it exists at that point in time should be printed and attached to an oral admission report. The member may then proceed and finish the written statement while recording.
- L. EAVESDROPPING: Members are directed to be aware of Article 250 of the Penal Law and must avoid any circumstance in which conversations are recorded in which no party thereto is aware of the same. To legally record a conversation, at least one party must be aware and have consented to the recording. *<Insert steps to be taken with the departmental recording equipment to provide for muted audio in such cases, or in the*

alternative, turning off the equipment. In such cases where there is a lapse in recording to accommodate such a situation, members must document the off and on times.>

Post Interview.

- M. The member(s) conducting the interview *<or designee>*, shall:
- a. PREPARATION OF 710.30 NOTICE: Complete a 710.30 CPL Notice of Oral Admissions, indicate that an electronic recording was made, or conversely, was not made, of a custodial interview. The substance of all oral admissions must also be documented on the 710.30 CPL form from all involved members regardless of whether there was a subsequent recorded and/or written statement. Note: Failure to notify the prosecutor of the recorded interview could prevent its use in court.
 - b. INTEGRITY OF RECORDINGS: Label all applicable documents and recorded media according to departmental policy. *<The ___>* will make [3] copies of the recorded media and label them accordingly. The original recorded media: will be marked as “Original” and will be submitted to *<designated person or evidence custodian>* using *<cite the forms used by the agency>* and secured in evidence. The copies of the recoded media will be marked “Copy” and [designate how routed] – note that *<2>*copies are intended for distribution to the District Attorney, one of which will be a defense copy; and one [1] copy will remain in the Departmental case file for access by members.
 - c. WRITE-PROTECTION – The department will not use rewritable discs for the master recording of an interview. The original recorded interview will be protected from re-recording and will serve as the master. Copies may be saved in another format so as to enable the prosecutor to create shorter segments for presentation, and for other authorized purposes. The master recording will be preserved as the authoritative original in the event a dispute should arrive as to authenticity of any copies.
- N. WRITTEN STATEMENT REQUIRED IN *<CERTAIN>* CASES: In *<all cases>* *<serious crimes>* *<other>*, members will prepare a written statement detailing the interview. [*or, identify procedure for transcribing recording, i.e. forward to District Attorney’s support staff within ___ hours for transcription*]
- O. Preservation of Evidence and Discovery Requests.
- a. No person shall alter the original electronic recording media.
 - b. Dissemination of recorded media outside of the Department is prohibited unless specifically authorized by *<rank or title>*. Requests for copies of recordings by defense counsel or other counsel will be subject to the approval of the District Attorney’s Office.
 - c. CHAIN OF CUSTODY: To ensure a chain of custody, the original electronic recording media will be secured in the evidence room *<or other secure location designated for electronic media>*.

- d. RETENTION: Retention – electronic recordings will *<be held indefinitely>* *< be held in accordance with Schedule MU-1>* and *<will not be destroyed until any and all appeals related to such case have been exhausted>* and *<will not be destroyed unless authorized by court order, unless authorized by the chief of police and the district attorney or other prosecutor involved in such case>*
 - e. Members seeking to view electronic recordings who are not involved with the case must submit a request to *<position/rank/office>*
 - f. Members seeking to view and/or use electronic recordings for training purposes must submit a request to *<position/rank/office>* for approval.
- P. MAINTENANCE OF EQUIPMENT:
- a. The *<position, office or title>* will be responsible for maintaining the electronic recording equipment and will ensure that there is an adequate supply of recording media at all times.
 - b. Routinely clean the equipment according to the manufacturer’s guidelines.
 - c. In the event the equipment requires service or repair, notify *[position, office or title]* promptly.

Effective Date:

By order of

Chief of Police

Appendix: Considerations document (2 pages)

CONSIDERATIONS IN THE ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

Ensure that recording rooms that are to be used for juvenile interviews are approved under 305.2(4)(b) FCA.

Identify whether your recording system will be covert or overt.

Consider a recap interview at the end of any lengthy interview.

Identify the procedure for processing any CPL 710.30 notices or Felony Interview Reporting form.

Determine the threshold for recording interviews in your jurisdiction. The model policy provides some suggestions for recording of Part I crimes, “serious crimes”, and certain felonies. This is an area that should be given due consideration by consulting with prosecutors and in view of the resources available to the agency. Ensure that the listing of qualifying crimes requiring recording is posted or otherwise readily available for members.

Determine your protocol for access to recordings. There should be a process or designation of who is able to access and view recordings. There can be many valid reasons for reviewing recordings including criminal investigations, quality control, supervision of tactics and techniques, and training.

Determine whether transcripts of recordings are required in your jurisdiction. If so, identify who is responsible for transcription and the routing of recordings to accomplish the task.

Interrogation Methods: The use of deception, pointed interrogations, accusatory questions and other similar tactics are recognized as appropriate law enforcement techniques in interrogation, provided the tactics are not fundamentally unfair. People v Tarsia, 50 NY2d 1, 11-12 (1980). If such tactics are used in an interrogation of a suspect in custody for a qualifying offense, the interrogation must be recorded according to the guidelines outlined above. [Excerpted from New York State District Attorney’s Association Best Practices Subcommittee document]

CONSIDERATIONS IN THE ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

Some interviewers are apprehensive in responding to inquiries, comments and statements about counsel made by interviewees during recording. The following is a commentary provided by a Best Practices Subcommittee of the New York State District Attorney's Association:

Reading Miranda Warnings and Right to Counsel (in Brief)

1. **Miranda Warnings:** Any custodial interrogation must be preceded by the reading of Miranda warnings. However, this does not preclude preliminary discussions with the subject before the actual interrogation commences. All discussions in the interview room location, including the preliminary discussions, even if they occur before the reading of Miranda warnings, must be recorded.
2. **Unequivocal Invocation of the Right to Silence:** A subject has a 5th Amendment right not to speak with the police. However, the invocation of that right must be unequivocally stated, e.g. "I don't want to say anything." If the subject unequivocally states that he doesn't want to speak with the police then the interview must be ended immediately. However, if the suspect appears uncertain about what to do, e.g. "I don't know if I want to talk to you", then the suspect's position must be clarified. For example, the investigator can say, "You are not required to speak with me, but I am interesting in what you have to say and if you are willing to speak with me, then I need a clearer response," or "Do you need more time to think about what you would like to do?"
3. **Unequivocal Invocation of the Right to Counsel.** A subject's right to counsel must be scrupulously honored. However, if the suspect is unclear or equivocal, then the invocation of the right to counsel is ineffective. The investigator must clarify the suspect's intentions before proceeding with the interview. For example, if the suspect says, "Should I get a lawyer," or "Do I need a lawyer", or "Maybe I should talk to a lawyer", this is not an unequivocal invocation of the right to counsel. However, the suspect's intentions should be clarified, for example, "I cannot advise you about getting a lawyer, but do you need some additional time to consider what to do?", or "Would you like me to read your Miranda warnings to you again, so you are clear on your rights?", or "If you do choose to talk to a lawyer, you will probably not have the opportunity to talk to an investigator, is this what you would like to do?" If the suspect says "I have an attorney," then the investigator must clarify if the attorney is representing the suspect on this case. If the suspect says, "I want an attorney," then the interrogation must cease immediately.
4. **Attorney Visit:** If the subject of a recorded interview has an attorney visit, the subject and attorney shall be offered a separate, private area in which to confer. The recording shall continue during their absence to memorialize the event until such time that the interview is terminated. Alternatively, a record can be made of when the recording was discontinued for the attorney visit. If the interview re-commences after the attorney visit, then the time that the recording began again shall be documented.
5. **Intoxicated or Impaired Suspect:** If the subject shows signs of intoxication, drug use, or other infirmity; such impairment may justify delaying commencement of the interview and the administration of Miranda rights until such time as the officer determines the subject's ability to knowingly waive the rights is apparent.