

HOUSE AMENDMENTS TO A-ENGROSSED SENATE BILL 309

By COMMITTEE ON JUDICIARY

June 2

1 On page 1 of the printed corrected A-engrossed bill, line 2, after “ORS” delete the rest of the
2 line and insert “165.540.”

3 Delete lines 4 through 20 and delete pages 2 through 6 and insert:

4 **“SECTION 1. (1) A custodial interview conducted by a peace officer in a law enforcement**
5 **facility shall be electronically recorded if the interview is conducted in connection with an**
6 **investigation into aggravated murder as defined in ORS 163.095 or a crime listed in ORS**
7 **137.700 or 137.707.**

8 **“(2) Subsection (1) of this section does not apply to:**

9 **“(a) A statement made before a grand jury;**

10 **“(b) A statement made on the record in open court;**

11 **“(c) A custodial interview conducted in another state in compliance with the laws of that**
12 **state;**

13 **“(d) A custodial interview conducted by a federal law enforcement officer in compliance**
14 **with the laws of the United States;**

15 **“(e) A statement that was spontaneously volunteered and did not result from a custodial**
16 **interview;**

17 **“(f) A statement made during arrest processing in response to a routine question;**

18 **“(g) A law enforcement agency that employs five or fewer peace officers;**

19 **“(h) A custodial interview conducted in connection with an investigation carried out by**
20 **a corrections officer, a youth corrections officer or a staff member of the Oregon State**
21 **Hospital in the performance of the officer’s or staff member’s official duties of treatment,**
22 **custody, control or supervision of individuals committed to or confined in a place of**
23 **incarceration or detention; or**

24 **“(i) A custodial interview for which the state demonstrates good cause for the failure to**
25 **electronically record the interview.**

26 **“(3)(a) If the state offers an unrecorded statement made under the circumstances de-**
27 **scribed in subsection (1) of this section in a criminal proceeding alleging the commission of**
28 **aggravated murder or a crime listed in ORS 137.700 or 137.707 and the state is unable to**
29 **demonstrate, by a preponderance of the evidence, that an exception described in subsection**
30 **(2) of this section applies, upon the request of the defendant, the court shall instruct the jury**
31 **regarding the legal requirement described in subsection (1) of this section and the superior**
32 **reliability of electronic recordings when compared with testimony about what was said and**
33 **done.**

34 **“(b) The court may not exclude the defendant’s statement or dismiss criminal charges**
35 **as a result of a violation of this section.**

1 “(c) If each of the statements made by the defendant that the state offers into evidence
2 is recorded, the court may not give a cautionary jury instruction regarding the content of
3 the defendant’s statements.

4 “(4) A law enforcement agency that creates an electronic recording of a custodial inter-
5 view shall preserve the recording until the defendant’s conviction for the offense is final and
6 all direct, post-conviction relief and habeas corpus appeals are exhausted, or until the pros-
7 ecution of the offense is barred by law.

8 “(5) The state shall provide an electronic copy of a defendant’s custodial interview to a
9 defendant in accordance with ORS 135.805 to 135.873. Providing an electronic copy of the
10 custodial interview to the defendant constitutes compliance with ORS 135.815 (1)(b), and the
11 state is not required to provide the defendant with a transcript of the contents of the
12 interview. Unless the court orders otherwise, the defendant’s attorney may not copy, dis-
13 seminate or republish the electronic copy of the custodial interview, except to provide a copy
14 to an agent of the defendant’s attorney for the limited purpose of case preparation.

15 “(6) An electronic recording of a custodial interview, and any transcription of the re-
16 cording, that is certified as containing a complete recording, or a complete transcription, of
17 the entirety of the custodial interview, from the advisement of constitutional rights to the
18 conclusion of the custodial interview, is admissible in any pretrial or post-trial hearing for
19 the purpose of establishing the contents of a statement made in the recording and the iden-
20 tity of the person who made the statement, if the statement is otherwise admissible. A cer-
21 tification that complies with this subsection satisfies the requirements of ORS 40.505 and
22 132.320 for the recording or transcription. This subsection does not prohibit a party from
23 calling a witness to testify regarding the custodial interview.

24 “(7) As used in this section:

25 “(a) ‘Custodial interview’ means an interview in which the person questioned is in cus-
26 tody and is required to be advised of the person’s constitutional rights.

27 “(b) ‘Good cause’ includes, but is not limited to, situations in which:

28 “(A) The defendant refused, or expressed an unwillingness, to have the custodial inter-
29 view electronically recorded;

30 “(B) The failure to electronically record the custodial interview was the result of equip-
31 ment failure and a replacement device was not immediately available;

32 “(C) The person operating the recording equipment believed, in good faith, that the
33 equipment was recording the custodial interview;

34 “(D) Electronically recording the custodial interview would jeopardize the safety of any
35 person or the identity of a confidential informant;

36 “(E) Exigent circumstances prevented the recording of the custodial interview; or

37 “(F) The peace officer conducting the custodial interview reasonably believed, at the time
38 the custodial interview began, that the custodial interview was conducted in connection with
39 a crime other than aggravated murder as defined in ORS 163.095 or a crime listed in ORS
40 137.700 or 137.707.

41 “(c) ‘Law enforcement facility’ means a courthouse, building or premises that is a place
42 of operation for a municipal police department, county sheriff’s office or other law enforce-
43 ment agency at which persons may be detained in connection with a juvenile delinquency
44 petition or criminal charge.

45 “SECTION 2. ORS 165.540 is amended to read:

1 “165.540. (1) Except as otherwise provided in ORS 133.724 or 133.726 or subsections (2) to (7)
2 of this section, a person may not:

3 “(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio com-
4 munication to which the person is not a participant, by means of any device, contrivance, machine
5 or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at
6 least one participant.

7 “(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or
8 facilities of a telecommunication or radio communication company over which messages are trans-
9 mitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communi-
10 cation to which the person is not a participant.

11 “(c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device,
12 contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all
13 participants in the conversation are specifically informed that their conversation is being obtained.

14 “(d) Obtain the whole or any part of a conversation, telecommunication or radio communication
15 from any person, while knowing or having good reason to believe that the conversation, telecom-
16 munication or radio communication was initially obtained in a manner prohibited by this section.

17 “(e) Use or attempt to use, or divulge to others, any conversation, telecommunication or radio
18 communication obtained by any means prohibited by this section.

19 “(2)(a) The prohibitions in subsection (1)(a), (b) and (c) of this section do not apply to:

20 “(A) Officers, employees or agents of a telecommunication or radio communication company who
21 perform the acts prohibited by subsection (1)(a), (b) and (c) of this section for the purpose of con-
22 struction, maintenance or conducting of their telecommunication or radio communication service,
23 facilities or equipment.

24 “(B) Public officials in charge of and at jails, police premises, sheriffs’ offices, Department of
25 Corrections institutions and other penal or correctional institutions, except as to communications
26 or conversations between an attorney and the client of the attorney.

27 “(b) Officers, employees or agents of a telecommunication or radio communication company who
28 obtain information under paragraph (a) of this subsection may not use or attempt to use, or divulge
29 to others, the information except for the purpose of construction, maintenance, or conducting of
30 their telecommunication or radio communication service, facilities or equipment.

31 “(3) The prohibitions in subsection (1)(a), (b) or (c) of this section do not apply to subscribers
32 or members of their family who perform the acts prohibited in subsection (1) of this section in their
33 homes.

34 “(4) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or ob-
35 taining of the contents of any radio or television broadcast transmitted for the use of the general
36 public.

37 “(5) The prohibitions in subsection (1)(c) of this section do not apply to:

38 “(a) A person who records a conversation during a felony that endangers human life;

39 “(b) **A person who, pursuant to section 1 of this 2009 Act, records an interview conducted**
40 **by a peace officer in a law enforcement facility;**

41 “[(b)] (c) A law enforcement officer who is in uniform and displaying a badge and who is oper-
42 ating a vehicle-mounted video camera that records the scene in front of, within or surrounding a
43 police vehicle, unless the officer has reasonable opportunity to inform participants in the conversa-
44 tion that the conversation is being obtained; or

45 “[(c)] (d) A law enforcement officer who, acting in the officer’s official capacity, deploys an

1 Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable
2 of recording audio or video, for the duration of that deployment.

3 “(6) The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept
4 or attempt to intercept with an unconcealed recording device the oral communications that are part
5 of any of the following proceedings:

6 “(a) Public or semipublic meetings such as hearings before governmental or quasi-governmental
7 bodies, trials, press conferences, public speeches, rallies and sporting or other events;

8 “(b) Regularly scheduled classes or similar educational activities in public or private insti-
9 tutions; or

10 “(c) Private meetings or conferences if all others involved knew or reasonably should have
11 known that the recording was being made.

12 “(7) The prohibitions in subsection (1)(a), (c), (d) and (e) of this section do not apply to any:

13 “(a) Radio communication that is transmitted by a station operating on an authorized frequency
14 within the amateur or citizens bands; or

15 “(b) Person who intercepts a radio communication that is transmitted by any governmental, law
16 enforcement, civil defense or public safety communications system, including police and fire, readily
17 accessible to the general public provided that the interception is not for purposes of illegal activity.

18 “(8) Violation of subsection (1) or (2)(b) of this section is a Class A misdemeanor.

19 “(9) As used in this section:

20 “(a) ‘Electro-Muscular Disruption Technology device’ means a device that uses a high-voltage,
21 low power charge of electricity to induce involuntary muscle contractions intended to cause tem-
22 porary incapacitation. ‘Electro-Muscular Disruption Technology device’ includes devices commonly
23 known as tasers.

24 “(b) ‘Law enforcement officer’ has the meaning given that term in ORS 133.726.

25 **“SECTION 3. (1) Section 1 of this 2009 Act applies to custodial interviews conducted on
26 or after July 1, 2010, if the person interviewed is:**

27 **“(a) A minor who is subsequently charged with aggravated murder or a crime listed in
28 ORS 137.700 or 137.707.**

29 **“(b) A nonnative English speaker who requires the services of a translator or interpreter
30 and is subsequently charged with aggravated murder or a crime listed in ORS 137.700 or
31 137.707.**

32 **“(c) Subsequently charged with aggravated murder, murder, aggravated vehicular
33 homicide or manslaughter in the first or second degree and the state is unable to demon-
34 strate, by a preponderance of the evidence, that at the time the interview began, the peace
35 officer conducting the interview reasonably believed that the interview was conducted in
36 connection with an investigation into a crime other than aggravated murder, murder, ag-
37 gravated vehicular homicide or manslaughter in the first or second degree.**

38 **“(2) Except as provided in subsection (1) of this section, section 1 of this 2009 Act applies
39 to custodial interviews of persons subsequently charged with aggravated murder or a crime
40 listed in ORS 137.700 or 137.707 conducted on or after July 1, 2011.**

41 **“(3) The amendments to ORS 165.540 by section 2 of this 2009 Act apply to custodial
42 interviews conducted on or after the effective date of this 2009 Act.”.**