

## SENATE AMENDMENTS TO SENATE BILL 309

By COMMITTEE ON JUDICIARY

April 29

1 In line 2 of the printed bill, before the period insert “; creating new provisions; and amending  
2 ORS 40.465, 165.540 and 419C.270”.

3 Delete lines 4 through 14 and insert:

4 “**SECTION 1.** ORS 40.465 is amended to read:

5 “40.465. (1) ‘Unavailability as a witness’ includes situations in which the declarant:

6 “(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the  
7 subject matter of a statement;

8 “(b) Persists in refusing to testify concerning the subject matter of a statement despite an order  
9 of the court to do so;

10 “(c) Testifies to a lack of memory of the subject matter of a statement;

11 “(d) Is unable to be present or to testify at the hearing because of death or then existing phys-  
12 ical or mental illness or infirmity; or

13 “(e) Is absent from the hearing and the proponent of the declarant’s statement has been unable  
14 to procure the declarant’s attendance (or in the case of an exception under subsection (3)(b), (c) or  
15 (d) of this section, the declarant’s attendance or testimony) by process or other reasonable means.

16 “(2) A declarant is not unavailable as a witness if the declarant’s exemption, refusal, claim of  
17 lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of  
18 the declarant’s statement for the purpose of preventing the witness from attending or testifying.

19 “(3) The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

20 “(a) Testimony given as a witness at another hearing of the same or a different proceeding, or  
21 in a deposition taken in compliance with law in the course of the same or another proceeding, if the  
22 party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor  
23 in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or re-  
24 direct examination.

25 “(b) A statement made by a declarant while believing that death was imminent, concerning the  
26 cause or circumstances of what the declarant believed to be impending death.

27 “(c) A statement which was at the time of its making so far contrary to the declarant’s  
28 pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal li-  
29 ability, or to render invalid a claim by the declarant against another, that a reasonable person in  
30 the declarant’s position would not have made the statement unless the person believed it to be true.  
31 A statement tending to expose the declarant to criminal liability and offered to exculpate the ac-  
32 cused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of  
33 the statement.

34 “(d)(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legiti-  
35 macy, relationship by blood or adoption or marriage, ancestry, or other similar fact of personal or

1 family history, even though the declarant had no means of acquiring personal knowledge of the  
2 matter stated; or

3 “(B) A statement concerning the foregoing matters, and death also, of another person, if the  
4 declarant was related to the other by blood, adoption, or marriage or was so intimately associated  
5 with the other’s family as to be likely to have accurate information concerning the matter declared.

6 “(e) A statement made at or near the time of the transaction by a person in a position to know  
7 the facts stated therein, acting in the person’s professional capacity and in the ordinary course of  
8 professional conduct.

9 “(f) A statement offered against a party who intentionally or knowingly engaged in criminal  
10 conduct that directly caused the death of the declarant, or directly caused the declarant to become  
11 unavailable as a witness because of incapacity or incompetence.

12 “(g) A statement offered against a party who engaged in, directed or otherwise participated in  
13 wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did  
14 cause the declarant to be unavailable.

15 “(h) A statement not specifically covered by any of the foregoing exceptions but having equiv-  
16 alent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement  
17 is offered as evidence of a material fact; (B) the statement is more probative on the point for which  
18 it is offered than any other evidence which the proponent can procure through reasonable efforts;  
19 and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be  
20 served by admission of the statement into evidence. However, a statement may not be admitted un-  
21 der this paragraph unless the proponent of it makes known to the adverse party the intention to  
22 offer the statement and the particulars of it, including the name and address of the declarant, suf-  
23 ficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that  
24 the statement is probative of the issues at hand, to provide the adverse party with a fair opportunity  
25 to prepare to meet it.

26 “(i) **A statement made by an interpreter that constitutes a translation of the words or**  
27 **signs of another person if the interpreter has sufficient understanding of the language of the**  
28 **other person, and sufficient understanding of English to accurately translate the words or**  
29 **signs of the other person into English.**

30 “**SECTION 2. (1) A custodial interview conducted by a law enforcement agency in a law**  
31 **enforcement facility shall be electronically recorded if the interview is conducted in con-**  
32 **nection with an investigation into a person felony.**

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

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

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

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

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

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

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

43 “(g) **A custodial interview for which the state demonstrates good cause for the failure**  
44 **to electronically record the interview; or**

45 “(h) **A law enforcement agency that employs five or fewer police or reserve officers as**

1 those terms are defined in ORS 181.610.

2 “(3) If the state offers an unrecorded statement made under the circumstances described  
3 in subsection (1) of this section in a criminal proceeding alleging the commission of a person  
4 felony and the state is unable to demonstrate, by a preponderance of the evidence, that an  
5 exception described in subsection (2) of this section applies, upon the request of the defend-  
6 ant, the court shall instruct the jury regarding the legal requirement described in subsection  
7 (1) of this section and the superior reliability of electronic recordings when compared with  
8 testimony about what was said and done.

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

13 “(5) The state shall provide an electronic copy of a defendant’s recorded statement to a  
14 defendant in accordance with ORS 135.805 to 135.873. Providing an electronic copy of the  
15 custodial interview to the defendant constitutes compliance with ORS 135.815 (1)(b) and the  
16 state is not required to provide the defendant with a transcript of the contents of the re-  
17 corded statement.

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

27 “(7) As used in this section:

28 “(a) ‘Custodial interview’ means questioning by a law enforcement officer that requires  
29 the officer to advise the person being interviewed of the person’s constitutional rights.

30 “(b) ‘Good cause’ includes situations in which:

31 “(A) The defendant refused to have the custodial interview electronically recorded;

32 “(B) The failure to electronically record the custodial interview was the result of equip-  
33 ment failure and:

34 “(i) A replacement device was not immediately available; or

35 “(ii) The law enforcement officer operating the equipment believed, in good faith, that the  
36 equipment was operating properly;

37 “(C) Electronically recording the custodial interview would jeopardize the safety of any  
38 person or the identity of a confidential informant;

39 “(D) Exigent circumstances prevented the recording of the custodial interview; or

40 “(E) The law enforcement officer conducting the custodial interview reasonably believed,  
41 at the time the custodial interview began, that the custodial interview was conducted in  
42 connection with a crime other than a person felony.

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

1 **petition or criminal charge.**

2 **“(d) ‘Person felony’ has the meaning given that term in the rules of the Oregon Criminal**  
3 **Justice Commission.**

4 **“SECTION 3.** ORS 165.540 is amended to read:

5 **“165.540. (1)** Except as otherwise provided in ORS 133.724 or 133.726 or subsections (2) to (7)  
6 of this section, a person may not:

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

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

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

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

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

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

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

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

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

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

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

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

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

43 **“(b) A person who, pursuant to section 2 of this 2009 Act, records an interview conducted**  
44 **by a law enforcement agency in a law enforcement facility;**

45 **“[(b)] (c)** A law enforcement officer who is in uniform and displaying a badge and who is oper-

1 ating a vehicle-mounted video camera that records the scene in front of, within or surrounding a  
2 police vehicle, unless the officer has reasonable opportunity to inform participants in the conversa-  
3 tion that the conversation is being obtained; or

4 “[c] (d) A law enforcement officer who, acting in the officer’s official capacity, deploys an  
5 Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable  
6 of recording audio or video, for the duration of that deployment.

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

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

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

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

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

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

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

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

23 “(9) As used in this section:

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

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

29 “**SECTION 4.** ORS 419C.270 is amended to read:

30 “419C.270. In all proceedings brought under ORS 419C.005, the following rules of criminal pro-  
31 cedure apply:

32 “(1) ORS 133.673, 133.693 and 133.703;

33 “(2) ORS 135.455, 135.465 and 135.470;

34 “(3) ORS 135.610, 135.630 (3) to (6), 135.640 and 135.670;

35 “(4) ORS 135.711, 135.713, 135.715, 135.717, 135.720, 135.725, 135.727, 135.730, 135.733, 135.735,  
36 135.737, 135.740 and 135.743;

37 “(5) ORS 135.805 and 135.815 (1)(a) to (e) and (2);

38 “(6) ORS 135.825, 135.835, 135.845 and 135.855 to 135.873; *[and]*

39 “(7) ORS 136.432; **and**

40 “(8) **Section 2 of this 2009 Act.**

41 “**SECTION 5.** (1) **The amendments to ORS 40.465 by section 1 of this 2009 Act apply to**  
42 **statements offered as evidence on or after the effective date of this 2009 Act.**

43 “(2) **Section 2 of this 2009 Act and the amendments to ORS 419C.270 by section 4 of this**  
44 **2009 Act apply to custodial interviews conducted on or after the effective date of this 2009**  
45 **Act, if the person interviewed is:**

1       “(a) A minor who is subsequently charged with, or alleged to have committed an act that  
2 if committed by an adult would constitute, a person felony;

3       “(b) A nonnative English speaker who requires the services of a translator or interpreter  
4 and is subsequently charged with a person felony; or

5       “(c) Subsequently charged with a crime described in ORS 163.005 and the state is unable  
6 to demonstrate, by a preponderance of the evidence, that at the time the interview began,  
7 the law enforcement officer conducting the interview reasonably believed that the interview  
8 was conducted in connection with an investigation into a crime other than a crime described  
9 in ORS 163.005.

10       “(3) Except as provided in subsection (2) of this section, section 2 of this 2009 Act and  
11 the amendments to ORS 419C.270 by section 4 of this 2009 Act apply to custodial interviews  
12 conducted on or after July 1, 2011.

13       “(4) The amendments to ORS 165.540 by section 3 of this 2009 Act apply to custodial  
14 interviews conducted on or after the effective date of this 2009 Act.”.

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