

Enrolled
House Bill 3261

Sponsored by Representatives GORSEK, PILUSO; Representatives BYNUM, GREENLICK, POWER, SANCHEZ, Senators DEMBROW, GELSER, MANNING JR, MONNES ANDERSON

CHAPTER

AN ACT

Relating to law enforcement interviews of persons under 18 years of age; creating new provisions; and amending ORS 133.400, 165.540 and 419C.270.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 133.400 is amended to read:

133.400. (1) A custodial interview conducted by a peace officer in a law enforcement facility shall be electronically recorded if the interview is conducted[:]

[(a)] in connection with an investigation into aggravated murder as defined in ORS 163.095 or a crime listed in ORS 137.700 or 137.707[; or].

[(b) *With a person under 18 years of age in connection with an investigation into a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult, would constitute a felony.*]

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

- (a) A statement made before a grand jury;
- (b) A statement made on the record in open court;
- (c) A custodial interview conducted in another state in compliance with the laws of that state;
- (d) A custodial interview conducted by a federal law enforcement officer in compliance with the laws of the United States;
- (e) A statement that was spontaneously volunteered and did not result from a custodial interview;
- (f) A statement made during arrest processing in response to a routine question;
- (g) A law enforcement agency that employs five or fewer peace officers;
- (h) A custodial interview conducted in connection with an investigation carried out by a corrections officer, a youth corrections officer or a staff member of the Oregon State Hospital in the performance of the officer's or staff member's official duties of treatment, custody, control or supervision of individuals committed to or confined in a place of incarceration or detention; or
- (i) A custodial interview for which the state demonstrates good cause for the failure to electronically record the interview.

(3)(a) If the state offers an unrecorded statement made under the circumstances described in subsection [(1)(a)] (1) of this section in a criminal proceeding alleging the commission of aggravated murder or a crime listed in ORS 137.700 or 137.707[; or under the circumstances described in subsection (1)(b) of this section in a criminal proceeding alleging the commission of a felony,] and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, upon the request of the defendant, the court shall instruct the jury

regarding the legal requirement described in subsection (1) of this section and the superior reliability of electronic recordings when compared with testimony about what was said and done.

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

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

[(4) If the state offers an unrecorded statement made under the circumstances described in subsection (1)(b) of this section in a juvenile delinquency proceeding alleging the commission of an act that, if committed by an adult, would constitute a felony, and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, the court shall consider the superior reliability of electronic recordings when compared with testimony about what was said and done when determining the evidentiary value of the statement.]

[(5)] (4) A law enforcement agency that creates an electronic recording of a custodial interview shall preserve the recording until the defendant's conviction [*or youth's adjudication*] for the offense is final and all direct, post-conviction relief and habeas corpus appeals are exhausted, or until the prosecution of the offense is barred by law.

[(6)] (5) The state shall provide an electronic copy of a defendant's [*or youth's*] custodial interview to a defendant [*or youth*] in accordance with ORS 135.805 to 135.873. Providing an electronic copy of the custodial interview to the defendant [*or youth*] constitutes compliance with ORS 135.815 (1)(b), and the state is not required to provide the defendant [*or youth*] with a transcript of the contents of the interview. Unless the court orders otherwise, the defendant's [*or youth's*] attorney may not copy, disseminate or republish the electronic copy of the custodial interview, except to provide a copy to an agent of the defendant's [*or youth's*] attorney for the limited purpose of case preparation.

[(7)] (6) An electronic recording of a custodial interview, and any transcription of the recording, that is certified as containing a complete recording, or a complete transcription, of the entirety of the custodial interview, from the advisement of constitutional rights to the conclusion of the custodial interview, is admissible in any pretrial or post-trial hearing for the purpose of establishing the contents of a statement made in the recording and the identity of the person who made the statement, if the statement is otherwise admissible. A certification that complies with this subsection satisfies the requirements of ORS 40.505 and 132.320 for the recording or transcription. This subsection does not prohibit a party from calling a witness to testify regarding the custodial interview.

[(8)] (7) As used in this section:

(a) "Custodial interview" means an interview in which the person questioned is in custody and is required to be advised of the person's constitutional rights.

(b) "Good cause" includes, but is not limited to, situations in which:

(A) The defendant [*or youth*] refused, or expressed an unwillingness, to have the custodial interview electronically recorded;

(B) The failure to electronically record the custodial interview was the result of equipment failure and a replacement device was not immediately available;

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

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

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

(F) The peace officer conducting the custodial interview reasonably believed, at the time the custodial interview began, that the custodial interview[:]

[(i)] was conducted in connection with a crime other than aggravated murder as defined in ORS 163.095 or a crime listed in ORS 137.700 or 137.707[; *or*].

[(ii) Was conducted in connection with a crime other than a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult, would constitute a felony, if the person is under 18 years of age.]

(c) "Law enforcement facility" means a courthouse, building or premises that is a place of operation for a municipal police department, county sheriff's office or other law enforcement agency at which persons may be detained in connection with a juvenile delinquency petition or criminal charge.

[(d) "Youth" means a person under 18 years of age who is suspected or alleged to have committed an act that, if committed by an adult, would constitute a felony.]

SECTION 2. (1)(a) A custodial interview inside a law enforcement facility that is conducted by a peace officer, a school resource officer or a special campus security officer shall be electronically recorded if the custodial interview is conducted with a person under 18 years of age in connection with an investigation into a misdemeanor or a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult, would constitute a misdemeanor or a felony.

(b) A custodial interview anywhere outside of a law enforcement facility that is conducted by a peace officer, a school resource officer or a special campus security officer shall be electronically recorded if:

(A) The custodial interview is conducted with a person under 18 years of age in connection with an investigation into a misdemeanor or a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult, would constitute a misdemeanor or a felony; and

(B) A video camera is worn upon the officer's person.

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

(a) A statement made before a grand jury;

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

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

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

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

(f) A statement made during custody processing in response to a routine question;

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

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

(i) A custodial interview for which the state demonstrates good cause for the failure to electronically record the custodial interview; or

(j) A custodial interview if the defendant's or youth's age was unknown to the officer or would not have been objectively apparent to a reasonable officer.

(3)(a) If the state offers an unrecorded statement made under the circumstances described in subsection (1) of this section in a criminal proceeding alleging the commission of a misdemeanor or a felony, or an allegation that a person being interviewed committed an act that, if committed by an adult, would constitute a misdemeanor or a felony, and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirement described in subsection (1) of this section and the superior reliability of electronic recordings when compared with testimony about what was said and done.

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

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

(4) If the state offers an unrecorded statement made under the circumstances described in subsection (1) of this section in a juvenile delinquency proceeding alleging the commission of an act that, if committed by an adult would constitute a misdemeanor or a felony, and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, the court shall consider the superior reliability of electronic recordings when compared with testimony about what was said and done when determining the evidentiary value of the statement.

(5) A law enforcement agency that creates an electronic recording of a custodial interview shall preserve the recording until the defendant's conviction or youth's adjudication for the offense is final and all direct, post-conviction relief and habeas corpus appeals are exhausted, or until the prosecution of the offense is barred by law.

(6) The state shall provide an electronic copy of a defendant's or youth's custodial interview to a defendant or youth in accordance with ORS 135.805 to 135.873. Providing an electronic copy of the custodial interview to the defendant or youth constitutes compliance with ORS 135.815 (1)(b), and the state is not required to provide the defendant or youth with a transcript of the contents of the custodial interview. Unless the court orders otherwise, the defendant's or youth's attorney may not copy, disseminate or republish the electronic copy of the custodial interview, except to provide a copy to an agent of the defendant's or youth's attorney for the limited purpose of case preparation.

(7) An electronic recording of a custodial interview, and any transcription of the recording, that is certified as containing a complete recording, or a complete transcription, of the entirety of the custodial interview, from the advisement of constitutional rights to the conclusion of the custodial interview, is admissible in any preadjudication or post-adjudication hearing for the purpose of establishing the contents of a statement made in the recording and the identity of the person who made the statement, if the statement is otherwise admissible. A certification that complies with this subsection satisfies the requirements of ORS 40.505 and 132.320 for the recording or transcription. This subsection does not prohibit a party from calling a witness to testify regarding the custodial interview.

(8) As used in this section:

(a) "Custodial interview" means an interview in which the person questioned is in custody and is required to be advised of the person's constitutional rights.

(b) "Good cause" includes, but is not limited to, situations in which:

(A) The defendant or youth refused, or expressed an unwillingness, to have the custodial interview electronically recorded;

(B) The failure to electronically record the custodial interview was the result of equipment failure and a replacement device was not immediately available;

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

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

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

(F) The person conducting the custodial interview did not possess a wearable video camera to electronically record the custodial interview outside of a law enforcement facility.

(c) "Law enforcement facility" means a courthouse, building or premises that is a place of operation for a municipal police department, county sheriff's office or other law enforcement agency at which persons may be detained in connection with a juvenile delinquency petition or criminal charge.

- (d) “Peace officer” has the meaning given that term in ORS 133.005.
- (e) “School resource officer” means a peace officer who is assigned to a school.
- (f) “Special campus security officer” means a special campus security officer described in ORS 352.118.

SECTION 3. ORS 165.540 is amended to read:

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

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

(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which the person is not a participant.

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

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

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

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

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

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

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

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

(4) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

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

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

(b) A person who records a conversation in which a law enforcement officer is a participant, if:

(A) The recording is made while the officer is performing official duties;

(B) The recording is made openly and in plain view of the participants in the conversation;

(C) The conversation being recorded is audible to the person by normal unaided hearing; and

(D) The person is in a place where the person lawfully may be;

(c)(A) A person who, pursuant to ORS 133.400, records an interview conducted by a peace officer in a law enforcement facility; **or**

(B) A person who, pursuant to section 2 of this 2019 Act, records a custodial interview, as defined in section 2 of this 2019 Act;

(d) A law enforcement officer who is in uniform and displaying a badge and who is operating:

(A) A vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained; or

(B) A video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty, unless:

(i) The officer has an opportunity to announce at the beginning of the interaction that the conversation is being obtained; and

(ii) The announcement can be accomplished without causing jeopardy to the officer or any other person and without unreasonably impairing a criminal investigation; or

(e) A law enforcement officer who, acting in the officer's official capacity, deploys an Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable of recording audio or video, for the duration of that deployment.

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

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

(b) Regularly scheduled classes or similar educational activities in public or private institutions; or

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

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

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

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

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

(9) The exception described in subsection (5)(b) of this section does not authorize the person recording the law enforcement officer to engage in criminal trespass as described in ORS 164.243, 164.245, 164.255, 164.265 or 164.278 or to interfere with a peace officer as described in ORS 162.247.

(10) As used in this section:

(a) "Electro-Muscular Disruption Technology device" means a device that uses a high-voltage, low power charge of electricity to induce involuntary muscle contractions intended to cause temporary incapacitation. "Electro-Muscular Disruption Technology device" includes devices commonly known as tasers.

(b) "Law enforcement officer" has the meaning given that term in ORS 133.726.

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

419C.270. In all proceedings brought under ORS 419C.005, the following rules of criminal procedure apply:

(1) ORS 133.673, 133.693 and 133.703 **and section 2 of this 2019 Act**;

(2) ORS 135.455, 135.465 and 135.470;

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

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

(5) ORS 135.805 and 135.815 (1)(a) to (e) and (g) and (3);

(6) ORS 135.825, 135.835, 135.845 and 135.855 to 135.873; and

(7) ORS 136.432.

SECTION 5. Section 2 of this 2019 Act and the amendments to ORS 133.400, 165.540 and 419C.270 by sections 1, 3 and 4 of this 2019 Act apply to interviews conducted on or after the effective date of this 2019 Act.

Passed by House April 24, 2019

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 23, 2019

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2019

Approved:

.....M,....., 2019

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2019

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Bev Clarno, Secretary of State