

Introduced by

Government and Veterans Affairs Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to adopt the Uniform Electronic Record of Custodial Interrogations Act.

2 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

3 **SECTION 1.**

4 **Definitions.**

5 In this Act:

- 6 1. "Custodial interrogation" means questioning or other conduct by a law enforcement  
7 officer which is reasonably likely to elicit an incriminating response from an individual  
8 and occurs when reasonable individuals in the same circumstances would consider  
9 themselves in custody.
- 10 2. "Electronic recording" means an audio recording or an audio and video recording that  
11 accurately records a custodial interrogation.
- 12 3. "Law enforcement agency" means a governmental entity or person authorized by a  
13 governmental entity or by state law to enforce criminal laws or investigate suspected  
14 criminal activity. The term includes a nongovernmental entity that has been delegated  
15 the authority to enforce criminal laws or investigate suspected criminal activity.
- 16 4. "Law enforcement officer" means:
- 17 a. An individual:
- 18 (1) Employed by a law enforcement agency; and
- 19 (2) Whose responsibilities include enforcing criminal laws or investigating  
20 criminal activity; or
- 21 b. An individual acting at the request or direction of an individual described in  
22 subdivision a.
- 23 5. "Place of detention" means a fixed location under the control of a law enforcement  
24 agency where individuals are questioned about an alleged crime or delinquent act.

1           The term includes a jail, police or sheriff's station, holding cell, and correctional or  
2           detention facility.

3           6. "State" means a state of the United States, the District of Columbia, Puerto Rico, the  
4           United States Virgin Islands, or any territory or insular possession subject to the  
5           jurisdiction of the United States.

6           7. "Statement" means a communication whether it is oral, written, electronic, nonverbal,  
7           or in sign language.

8           **SECTION 2.**

9           **Electronic recording requirement.**

10          1. Except as otherwise provided by sections 4 through 9 of this Act, a custodial  
11          interrogation, including the giving of any required warning, advice of the rights of the  
12          individual being questioned, and the waiver of any rights by the individual, must be  
13          electronically recorded in its entirety if the interrogation relates to a felony or relates to  
14          a delinquent act as defined in section 27-20-02. A custodial interrogation at a place of  
15          detention must be recorded by both audio and video means.

16          2. If a law enforcement officer conducts a custodial interrogation to which subsection 1  
17          applies without electronic recording, the officer shall prepare a written report  
18          explaining the reason for not complying with this section and summarizing the  
19          custodial interrogation process and the individual's statements.

20          3. A law enforcement officer shall prepare the report required by subsection 2 as soon as  
21          practicable after completing the interrogation.

22          4. As soon as practicable, a law enforcement officer conducting a custodial interrogation  
23          outside a place of detention shall prepare a written report explaining the decision to  
24          interrogate outside a place of detention and summarizing the custodial interrogation  
25          process and the individual's statements made outside a place of detention.

26          5. This section does not apply to a spontaneous statement made outside the course of a  
27          custodial interrogation or a statement made in response to questions asked routinely  
28          during the processing of the arrest of an individual.

29          **SECTION 3.**

1        **Notice and consent not required.**

2        Notwithstanding any other provision of law, a law enforcement officer conducting a custodial  
3 interrogation is not required to obtain the individual's consent to the recording nor to inform the  
4 individual being interrogated that an electronic recording is being made of the interrogation. This  
5 Act does not permit a law enforcement officer or a law enforcement agency to record a private  
6 communication between an individual and the individual's legal counsel.

7        **SECTION 4.**

8        **Exception for exigent circumstances.**

9        A custodial interrogation to which section 2 of this Act otherwise applies need not be  
10 electronically recorded if recording is not feasible because of exigent circumstances. The law  
11 enforcement officer conducting the interrogation shall electronically record an explanation of the  
12 exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable  
13 thereafter.

14       **SECTION 5.**

15       **Exception for individual's refusal to be electronically recorded.**

- 16       1. A custodial interrogation to which section 2 of this Act otherwise applies need not be  
17 electronically recorded if the individual to be interrogated indicates that the individual  
18 will not participate in the interrogation if it is electronically recorded. If feasible, the  
19 agreement to participate without recording must be electronically recorded.
- 20       2. If, during a custodial interrogation to which section 2 of this Act otherwise would apply,  
21 the individual being interrogated indicates that the individual will not participate in  
22 further interrogation unless electronic recording ceases, the remainder of the custodial  
23 interrogation need not be electronically recorded. If feasible, the individual's  
24 agreement to participate without further recording must be electronically recorded.
- 25       3. A law enforcement officer may not encourage, with intent to avoid the requirement of  
26 electronic recording, an individual to request that a recording not be made.

27       **SECTION 6.**

28       **Exception for interrogation conducted by other jurisdictions.**

29       If a custodial interrogation occurs in another state in compliance with that state's law or is  
30 conducted by a federal law enforcement agency in compliance with federal law, the

1 interrogation need not be electronically recorded unless the interrogation is conducted with  
2 intent to avoid the requirement of electronic recording in section 2 of this Act.

3 **SECTION 7.**

4 **Exception based on belief that recording is not required.**

- 5 1. A custodial interrogation to which section 2 of this Act otherwise applies need not be  
6 electronically recorded if the interrogation occurs when no law enforcement officer  
7 conducting the interrogation has knowledge of facts in circumstances that would lead  
8 an officer reasonably to believe that the individual being interrogated may have  
9 committed a felony or delinquent act for which section 2 of this Act requires that a  
10 custodial interrogation be recorded.
- 11 2. If, during a custodial interrogation, the individual reveals facts and circumstances  
12 giving a law enforcement officer conducting the interrogation reason to believe that a  
13 felony or delinquent act has been committed for which section 2 of this Act requires  
14 that a custodial interrogation be electronically recorded, continued custodial  
15 interrogation concerning that felony or delinquent act must be electronically recorded,  
16 if feasible.

17 **SECTION 8.**

18 **Exception for safety of individual or protection of identity.**

19 A custodial interrogation to which section 2 of this Act otherwise applies need not be  
20 electronically recorded if a law enforcement officer conducting the interrogation or the officer's  
21 superior reasonably believes that electronic recording would disclose the identity of a  
22 confidential informant or jeopardize the safety of an officer, the individual being interrogated, or  
23 another individual. If feasible and consistent with the safety of a confidential informant, an  
24 explanation of the basis for the belief that electronic recording would disclose the informant's  
25 identity must be electronically recorded at the time of the interrogation. If contemporaneous  
26 recording of the basis for the belief is not feasible, the recording must be made as soon as  
27 practicable after the interrogation is completed.

28 **SECTION 9.**

29 **Exception for equipment malfunction.**

- 30 1. All or part of a custodial interrogation to which section 2 of this Act otherwise applies  
31 need not be electronically recorded to the extent that recording is not feasible because

1           the available electronic recording equipment fails, despite reasonable maintenance of  
2           the equipment, and timely repair or replacement is not feasible.

3           2. If both audio and video recording of a custodial interrogation are otherwise required by  
4           section 2 of this Act, recording may be by audio alone if a technical problem in video  
5           recording equipment prevents video recording, despite reasonable maintenance of the  
6           equipment, and timely repair or replacement is not feasible.

7           3. If both audio and video recording of a custodial interrogation are otherwise required by  
8           section 2 of this Act, recording may be by video alone if a technical problem in the  
9           audio recording equipment prevents audio recording, despite reasonable maintenance  
10          of the equipment, and timely repair or replacement is not feasible.

11           **SECTION 10.**

12           **Burden of persuasion.**

13           If the prosecution relies on an exception in sections 4 through 9 of this Act to justify a failure  
14          to make an electronic recording of a custodial interrogation, the prosecution must prove by a  
15          preponderance of the evidence that the exception applies.

16           **SECTION 11.**

17           **Notice of intent to introduce unrecorded statement.**

18           If the prosecution intends to introduce in its case in chief a statement made during a  
19          custodial interrogation to which subsection 1 of section 2 of this Act applies which was not  
20          electronically recorded, the prosecution, not later than the time specified by the North Dakota  
21          Rules of Criminal Procedure, shall serve the defendant with written notice of that intent and of  
22          any exception on which the prosecution intends to rely.

23           **SECTION 12.**

24           **Procedural remedies.**

25           1. Unless the court finds that an exception in sections 4 through 9 of this Act applies, the  
26           court shall consider the failure to make an electronic recording of all or part of a  
27           custodial interrogation to which section 2 of this Act applies as a factor in determining  
28           whether a statement made during the interrogation is admissible, including whether it  
29           was voluntarily made or is reliable.

- 1       2. If the court admits into evidence a statement made during a custodial interrogation that  
2           was not electronically recorded in compliance with section 2 of this Act, the court, upon  
3           request of the defendant, shall give cautionary instructions to the jury.

4       **SECTION 13.**

5       **Handling and preservation of electronic recording.**

6       Each law enforcement agency shall establish and enforce procedures to ensure that the  
7       electronic recording of any or all of a custodial interrogation is identified, accessible, and  
8       preserved in the manner required by state law and rules of court.

9       **SECTION 14.**

10      **Rules relating to electronic recording.**

- 11      1. The attorney general shall adopt and enforce rules to implement this Act.
- 12      2. The rules adopted under subsection 1 must address the following topics:
- 13          a. The manner in which an electronic recording of a custodial interrogation must be  
14             made;
- 15          b. The collection and review of electronic recording data, or the absence thereof, by  
16             superiors within the law enforcement agency;
- 17          c. The assignment of supervisory responsibilities and a chain of command to  
18             promote internal accountability;
- 19          d. A process for explaining noncompliance with procedures and imposing  
20             administrative sanctions for failures to comply that are not justified;
- 21          e. A supervisory system expressly imposing on specific individuals a duty to ensure  
22             adequate staffing, education, training, and material resources to implement this  
23             Act; and
- 24          f. A process for monitoring the chain of custody of electronic recordings of custodial  
25             interrogations.
- 26      3. The rules adopted under subsection 1 for video recording must contain standards for  
27      the angle, focus, and field of vision of a recording device which reasonably promote  
28      accurate recording of a custodial interrogation at a place of detention and reliable  
29      assessment of its accuracy and completeness.
- 30      4. Each law enforcement agency shall adopt and enforce rules providing for  
31      administrative discipline of a law enforcement officer found by a court or a supervisor

1           of the agency to have violated the terms of this Act. The rules must provide a range of  
2           disciplinary sanctions reasonably designed to promote compliance with this Act.

3           **SECTION 15.**

4           **Limitation of liability.**

5           1. A law enforcement agency that has enforced rules adopted pursuant to section 14 of  
6           this Act which are reasonably designed to ensure compliance with the terms of this Act  
7           is not subject to civil liability for damages arising from a violation of this Act.

8           2. This Act does not create a cause of action against a law enforcement officer.

9           **SECTION 16.**

10          **Self-authentication.**

11          1. In any pretrial or posttrial proceeding, an electronic recording of a custodial  
12          interrogation is self-authenticating if it is accompanied by a certificate of authenticity  
13          sworn under oath or affirmation by an appropriate law enforcement officer.

14          2. This Act does not limit the right of a defendant under law other than this Act to  
15          challenge the authenticity of an electronic recording of a custodial interrogation.

16          **SECTION 17.**

17          **No right to electronic recording and transcript.**

18          1. This Act does not create a right of an individual to require a custodial interrogation to  
19          be electronically recorded.

20          2. This Act does not require preparation of a transcript of an electronic recording of a  
21          custodial interrogation.

22          **SECTION 18.**

23          **Relation to Electronic Signatures in Global and National Commerce Act.**

24          This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and  
25          National Commerce Act [15 U.S.C. 7001 et seq.] but does not modify, limit, or supersede  
26          section 101(c) of that Act [15 U.S.C. 7001(c)] or authorize electronic delivery of any of the  
27          notices described in section 103(b) of that Act [15 U.S.C. 7003(b)].