

SENATE BILL NO. 2125

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.~~ for an
2 Act to provide for a legislative management study of the feasibility and desirability of adopting
3 the Uniform Electronic Recording of Custodial Interrogations Act.

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

5 ~~**SECTION 1.**~~

6 ~~**Definitions:**~~

7 ~~In this Act:~~

8 ~~1. "Custodial interrogation" means questioning or other conduct by a law enforcement~~
9 ~~officer which is reasonably likely to elicit an incriminating response from an individual~~
10 ~~and occurs when reasonable individuals in the same circumstances would consider~~
11 ~~themselves in custody.~~

12 ~~2. "Electronic recording" means an audio recording or an audio and video recording that~~
13 ~~accurately records a custodial interrogation.~~

14 ~~3. "Law enforcement agency" means a governmental entity or person authorized by a~~
15 ~~governmental entity or by state law to enforce criminal laws or investigate suspected~~
16 ~~criminal activity. The term includes a nongovernmental entity that has been delegated~~
17 ~~the authority to enforce criminal laws or investigate suspected criminal activity.~~

18 ~~4. "Law enforcement officer" means:~~

19 ~~a. An individual:~~

20 ~~(1) Employed by a law enforcement agency; and~~

21 ~~(2) Whose responsibilities include enforcing criminal laws or investigating~~
22 ~~criminal activity; or~~

23 ~~b. An individual acting at the request or direction of an individual described in~~
24 ~~subdivision a.~~

1 ~~5. "Place of detention" means a fixed location under the control of a law enforcement~~
2 ~~agency where individuals are questioned about an alleged crime or delinquent act.~~
3 ~~The term includes a jail, police or sheriff's station, holding cell, and correctional or~~
4 ~~detention facility.~~

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

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

10 ~~**SECTION 2.**~~

11 ~~**Electronic recording requirement.**~~

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

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

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

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

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

31 ~~**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)].~~

28 **SECTION 1. LEGISLATIVE MANAGEMENT STUDY - UNIFORM ELECTRONIC**
29 **RECORDING OF CUSTODIAL INTERROGATIONS ACT.** During the 2011-12 interim, the
30 legislative management shall consider studying the feasibility and desirability of adopting the
31 Uniform Electronic Recording of Custodial Interrogations Act. The legislative management shall

Sixty-second
Legislative Assembly

- 1 report its findings and recommendations, together with any legislation necessary to implement
- 2 the recommendations, to the sixty-third legislative assembly.