

SENATE BILL 511

By Faulk

AN ACT to amend Tennessee Code Annotated, Title 37;
Title 38; Title 39 and Title 40, relative to the
Uniform Electronic Recordation of Custodial
Interrogations Act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 38, is amended by adding the following as a new chapter:

38-15-101. This chapter shall be known and cited as the “Uniform Electronic Recordation of Custodial Interrogations Act.”

38-15-102. As used in this chapter, unless the context otherwise requires:

(1) “Custodial interrogation” means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occurs when reasonable individuals in the same circumstances would consider themselves in custody;

(2) “Electronic recording” means an audio recording or audio and video recording that accurately records a custodial interrogation. “Record electronically” and “recorded electronically” have a corresponding meaning;

(3) “Law enforcement agency” means a governmental entity or person authorized by a governmental entity or state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity. The term does not include a law enforcement officer;

(4) “Law enforcement officer” means:

(A) A individual employed by a law enforcement agency whose responsibilities include enforcing criminal laws or investigating suspected criminal activity; or

(B) A individual acting at the request or direction of an individual described in subdivision (4)(A);

(5) "Person" means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

(6) "Place of detention" means a fixed location under the control of a law enforcement agency where individuals are questioned about alleged crimes or delinquent acts. The term includes a jail, police or sheriff's station, holding cell, and correctional or detention facility;

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States; and

(8) "Statement" means a communication, whether oral, written, electronic or nonverbal.

38-15-103.

(a) Except as otherwise provided by §§ 38-15-105 through 38-15-110, a custodial interrogation at a place of detention, including the giving of any required warning, advice of the rights of the individual being questioned, and the waiver of any rights by the individual, must be recorded electronically in its entirety by both audio and video means if the interrogation relates to a felony, a crime as defined by § 29-13-402, or a delinquent act as defined by § 37-1-102.

(b) If a law enforcement officer conducts a custodial interrogation to which subsection (a) applies without electronically recording it in its entirety, the officer shall prepare a written or electronic report explaining the reason for not complying with this section and summarizing the custodial interrogation process and the individual's statements.

(c) A law enforcement officer shall prepare the report required by subsection (b) as soon as practicable after completing the interrogation.

(d) This section does not apply to a spontaneous statement made outside the course of a custodial interrogation or a statement made in response to a question asked routinely during the processing of the arrest of an individual.

38-15-104. Notwithstanding any other law, a law enforcement officer conducting a custodial interrogation is not required to obtain consent to electronic recording from the individual being interrogated or to inform the individual that an electronic recording is being made of the interrogation. This chapter does not permit a law enforcement officer or a law enforcement agency to record a private communication between an individual and the individual's lawyer.

38-15-105. A custodial interrogation to which § 38-15-103 otherwise applies need not be recorded electronically if recording is not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall record electronically an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable after the interrogation is completed.

38-15-106.

(a) A custodial interrogation to which § 38-15-103 otherwise applies need not be recorded electronically if the individual to be interrogated indicates that the individual will

not participate in the interrogation if it is recorded electronically. If feasible, the agreement to participate without recording must be recorded electronically.

(b) If, during a custodial interrogation to which § 38-15-103 otherwise applies, the individual being interrogated indicates that the individual will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be recorded electronically. If feasible, the individual's agreement to participate without further recording must be recorded electronically.

(c) A law enforcement officer, with intent to avoid the requirement of electronic recording in § 38-15-103, may not encourage an individual to request that a recording not be made.

38-15-107. If a custodial interrogation occurs in another state in compliance with that state's law or is conducted by a federal law enforcement agency in compliance with federal law, the interrogation need not be recorded electronically unless the interrogation is conducted with intent to avoid the requirement of electronic recording in § 38-15-103.

38-15-108.

(a) A custodial interrogation to which § 38-15-103 otherwise applies need not be recorded electronically if the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer reasonably to believe that the individual being interrogated may have committed an act for which § 38-15-103 requires that a custodial interrogation be recorded electronically.

(b) If, during a custodial interrogation under subsection (a), the individual being interrogated reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that an act has been committed for which

§ 38-15-103 requires that a custodial interrogation be recorded electronically, continued custodial interrogation concerning that act must be recorded electronically, if feasible.

38-15-109. A custodial interrogation to which § 38-15-103 otherwise applies need not be recorded electronically if a law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. If feasible and consistent with the safety of a confidential informant, an explanation of the basis for the belief that electronic recording would disclose the informant's identity must be recorded electronically at the time of the interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be made as soon as practicable after the interrogation is completed.

38-15-110.

(a) All or part of a custodial interrogation to which § 38-15-103 otherwise applies need not be recorded electronically to the extent that recording is not feasible because the available electronic recording equipment fails, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(b) If both audio and video recording of a custodial interrogation are otherwise required by § 38-15-103, recording may be by audio alone if a technical problem in the video recording equipment prevents video recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(c) If both audio and video recording of a custodial interrogation are otherwise required by § 35-15-103, recording may be by video alone if a technical problem in the audio recording equipment prevents audio recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

38-15-111. If the prosecution relies on an exception in §§ 38-15-105 - 38-15-110 to justify a failure to record electronically a custodial interrogation, the prosecution must prove by a preponderance of the evidence that the exception applies.

38-15-112. If the prosecution intends to introduce in its case in chief a statement made during a custodial interrogation to which § 38-15-103 applies which was not recorded electronically, the prosecution, not later than the time authorized by Rule 12 of the Rules of Criminal Procedure, shall serve the defendant with written notice of that intent and of any exception on which the prosecution intends to rely.

38-15-113.

(a) Unless the court finds that an exception in §§ 38-15-105 through 38-15-110 applies, the court shall consider the failure to record electronically all or part of a custodial interrogation to which § 38-15-103 applies as a factor in determining whether a statement made during the interrogation is admissible, including whether it was voluntarily made or is reliable.

(b) If the court admits into evidence a statement made during a custodial interrogation that was not recorded electronically in compliance with § 38-15-103, the court, on request of the defendant, shall give a cautionary instruction to the jury.

38-15-114. (a) Each law enforcement agency in this state shall establish and enforce procedures to ensure that the electronic recording of all or part of a custodial interrogation is identified, accessible and preserved subject to the requirements of subsection (b).

(b) Unless otherwise ordered by a court of competent jurisdiction or required by a rule of court, the original of each electronic recording of a custodial interrogation required pursuant to this chapter shall be clearly identified and catalogued by the law enforcement agency that made the recording and shall be preserved by such agency in the following manner:

(1) If a delinquency petition or criminal proceeding is instituted against a person who was the subject of an electronically recorded custodial interrogation, the recording shall be preserved until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired; and

(2) If no delinquency petition or criminal proceeding is instituted against a person who was the subject of an electronically recorded custodial interrogation, the recording shall be preserved until all applicable statutes of limitations bar prosecution of, or further proceedings against, the person.

38-15-115.

(a) The Tennessee peace officer standards and training commission shall adopt rules to implement this chapter, which each law enforcement agency that is a governmental entity of this state shall enforce. The commission shall promulgate rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(b) The rules adopted under subsection (a) must address the following topics:

(1) How an electronic recording of a custodial interrogation must be made;

(2) The collection and review of electronic recordings, or the absence thereof, by supervisors in each law enforcement agency;

(3) The assignment of supervisory responsibilities and a chain of command to promote internal accountability;

(4) A process for explaining noncompliance with procedures and imposing administrative sanctions for a failure to comply that is not justified;

(5) A supervisory system expressly imposing on individuals in specific positions a duty to ensure adequate staffing, education, training and material resources to implement this chapter;

(6) A process for monitoring the chain of custody of an electronic recording; and

(7) Other matters reasonably deemed relevant to electronic recording of custodial interrogatories.

(c) Each law enforcement agency that is a governmental entity in this state shall adopt and enforce rules providing for administrative discipline of a law enforcement officer found by a court or the agency to have violated this chapter. The rules must provide a range of disciplinary sanctions reasonably designed to promote compliance with this chapter.

38-15-116.

(a) A law enforcement agency that is a governmental entity in this state which has implemented procedures reasonably designed to enforce the rules adopted pursuant to § 38-15-115 and ensure compliance with this chapter is not subject to civil liability for damages arising from a violation of this chapter.

(b) This chapter does not create a right of action against a law enforcement officer.

38-15-117.

(a) In any pretrial or post trial proceeding, an electronic recording of a custodial interrogation is self-authenticating if it is accompanied by a certificate of authenticity sworn under oath or affirmation by an appropriate law enforcement officer.

(b) This chapter does not limit the right of an individual to challenge the authenticity of an electronic recording of a custodial interrogation under law of this state other than this chapter.

38-15-118.

(a) This chapter does not create a right of an individual to require a custodial interrogation to be recorded electronically.

(b) This chapter does not require preparation of a transcript of an electronic recording of a custodial interrogation.

38-15-119. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

38-15-120. This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 3. This act shall take effect January 1, 2012, the public welfare requiring it.