

RECORDING OF CUSTODIAL INTERROGATIONS

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 152 (Substitute H-3)
Sponsor: Sen. Tonya Schuitmaker
House Committee: Judiciary
Senate Committee: Judiciary

Complete to 11-25-12

A SUMMARY OF SENATE BILL 152 AS REPORTED BY HOUSE COMMITTEE

The bill would add several new sections to the Code of Criminal Procedure to require that video recordings of interrogations be made in certain criminal investigations, among other things (MCL 760.7 et al.).

Applicability. The bill would require an audiovisual recording of an interrogation of an individual who was in custodial detention in a governmental building regarding a crime that was a major felony. However, the recording requirements would not apply until audiovisual recording equipment was available or accessible, as provided in the bill, or upon the expiration of relevant time periods (see "Compliance with the recording mandate" below).

Specifically, the bill would apply to an interrogation involving questioning in a criminal investigation for a major felony that may elicit a self-incriminating response from an individual and includes a law enforcement official's words or actions that the official should know are reasonably likely to elicit a self-incriminating response from the individual.

"Law enforcement official" would mean a state or local police officer (as defined in the Commission on Law Enforcement Standards Act), a county sheriff or deputy, a prosecuting attorney, a college or university public safety officer, a conservation officer of the Department of Natural Resources and Environment, or an individual acting under the direction of any of these officers. "Major felony" would be a felony punishable by life imprisonment, for life or any term of years, or a 3rd degree criminal sexual conduct offense.

The bill applies only to interrogations conducted when an individual is in "custodial detention." "Custodial detention" would mean an individual was in a place of detention because a law enforcement official had told the individual that he or she was under arrest or because the individual, under the totality of the circumstances, reasonably could have believed that he or she was under a law enforcement official's control and was not free to leave. "Place of detention" would mean a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual could be held in connection with a criminal charge that had been or could be filed against the individual.

Audiovisual recordings. A law enforcement officer interrogating an individual in custodial detention about that individual's involvement in the commission of a major felony would be required to make a time-stamped, audiovisual recording of the entire interrogation – including the notification of Miranda rights to the individual. The recording would have to be produced using equipment and procedures designed to prevent alteration of the recording's audio or visual record.

The Michigan Commission on Law Enforcement Standards (MCOLES) would be required to set quality standards for the audiovisual recording of statements made under the bill's provisions and standards for geographic accessibility of equipment in the state. (Note: the bill does not establish a time period or date by which the standards would be available.) MCOLES would also have to conduct an assessment of the initial cost necessary for law enforcement agencies to purchase the equipment. The first assessment would have to be conducted within 120 days after the bill's effective date. Subsequent assessments regarding the necessary costs of purchasing, upgrading, or replacing the equipment would have to be conducted by MCOLES every two years.

Funding for equipment purchases or upgrades. Based on its initial and subsequent assessments, MCOLES would have to recommend to the Legislature each year an annual appropriation amount. The Legislature would have to annually appropriate funds to MCOLES for distribution by MCOLES to law enforcement agencies throughout the state for the purchase of audiovisual recording equipment. Any funds appropriated for this purpose would be in addition to the appropriation provided to MCOLES and the Department of State Police in the immediately preceding fiscal year and could not be appropriated from the Department of State Police budget or the Michigan Justice Training Fund created in Section 5 of Public Act 302 of 1982.

Compliance with the recording mandate. An agency would have to implement the recording requirements within 120 days after receiving funds from MCOLES or acquiring access to audiovisual recording equipment as directed by the standards set forth by MCOLES. A law enforcement agency that already had audiovisual recording equipment as of the date MCOLES adopted the standards would have to comply with the recording requirements within 60 days *if* its equipment complied with those standards or within 60 days after the date the agency subsequently obtained audiovisual recording equipment complying with the adopted standards.

Once an agency had the equipment, failure to comply with the recording and preservation requirements would not create a civil cause of action against a department or individual. The bill would specify that a requirement to produce a major felony recording was a directive to departments and law enforcement officials and not a right conferred on an individual who was interrogated.

Any failure to record a statement or to preserve a recorded statement as required by the bill would not prevent any law enforcement officer present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented as provided for Section 8, the jury would have to be instructed that

it is the law of the state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury was permitted to consider the absence of a recording in evaluating the evidence relating to the individual's statement. (Note: Section 9 of the bill refers to preservation of the recordings as required by Section 8, but Section 8 does not address the issue.)

Objections to being recorded. The bill would allow an individual who believed the interrogation was being recorded to object to the recording of the interrogation. An objection would have to be documented either by the individual stating the objection on the recording or by the individual putting the objection on a signed document. If the individual refused to document the objection by either of these means, a law enforcement officer would have to do so either by a recording or a signed document.

A major felony recording could be made without the consent or knowledge of, or despite the objection of, the individual being interrogated.

Discovery. If a defendant's attorney requested a copy of the interrogation recording as part of the discovery process, a prosecutor would have to make a copy of the recorded statement available. If the defendant was not represented by counsel, the copy would go to the defendant. A court could not require the police or the prosecutor to either prepare or pay for a transcript of a recorded statement. However, a court or the defense could have transcript prepared at its own expense.

FOIA exemption. Prior to conviction or acquittal, a statement recorded under the bill's provisions would be exempt from disclosure under the Freedom of Information Act.

FISCAL IMPACT:

The fiscal impact to the state is indeterminate at this time. Under the bill, the Legislature would be required to annually appropriate funding to the Michigan Commission on Law Enforcement Standards (MCOLES) for distribution to law enforcement agencies throughout the state to allow for the purchase of audio visual recording equipment. The appropriation amount would be recommended by MCOLES based on an assessment they conduct of the costs to law enforcement agencies for purchasing the equipment. A cost estimate is not available at this time. Some law enforcement agencies possess similar equipment, which would enable them to meet the requirements of the bill, but many others do not.

BRIEF DISCUSSION OF THE ISSUE:

Recording the interrogation of suspects by police has been proven to be an effective way to protect the rights of suspects as well as protect officers from accusations of wrongdoing. The bill represents best practices that have been implemented in many law enforcement agencies across the nation and in at least 50 Michigan jurisdictions. A recording provides an accurate record of the interrogation. It can protect against a false confession leading to incarceration of an innocent person, thus protecting local units and state government from lawsuits for wrongful conviction. A pilot project conducted in several Michigan cities has been highly successful and is yielding important information

useful in developing statewide protocols. Many feel it is time that all law enforcement agencies in the state be required to record interrogations—at least for crimes that could lead to a prison sentence.

However, the bill acknowledges that revenue remains an issue. Therefore, a law enforcement agency would only have to comply with the bill's requirements after obtaining equipment complying with standards to be developed by MCOLES. The Legislature would be required to appropriate funds for this purpose, but is not required to appropriate a specific amount. Therefore, the bill's requirements could be phased in as revenue is available. An agency could also secure funding for the recording equipment by other means (for instance, grants or gifts). A jury would not have to be instructed that state law mandated recordings of interrogations unless the police agency that conducted the interrogation had the required equipment at the time of the interrogation.

Still, the bill appears to have a few shortcomings. For instance, Section 9 of the bill contains a reference to "preserve a recorded statement as required by Section 8," but Section 8 does not address how or for long a taped recording would be preserved. In addition, the bill does not establish a timeframe for when MCOLES would have to develop and adopt standards for equipment and recording protocols.

Most importantly, some would say that the bill should follow national recommendations made by the Innocence Project and others that mandatory audiovisual recordings be made of all interrogations involving juveniles and individuals with mental impairments or mental illnesses, as they are particularly vulnerable to making false confessions. In addition, recordings should be made in all felony cases, not just ones with longer sentences. Even a "minor" felony can significantly affect a person's ability to secure a job, housing, enter the military, or get a student loan to go to college.

POSITIONS:

Representatives of the State Bar of Michigan testified in support of the bill. (10-17-12)

The Prosecuting Attorneys Association of Michigan indicated support for the bill. (11-8-12)

The Michigan Judges Association indicated support for the bill. (11-8-12)

The Michigan County Social Services Association indicated support for the bill. (11-8-12)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.