



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 152 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator Tonya Schuitmaker  
Committee: Judiciary

Date Completed: 4-21-11

### **RATIONALE**

Many police departments around the country, including some in Michigan, make electronic recordings of custodial interrogations. It is widely accepted that this practice can protect against false confessions, deter police misconduct, prevent false claims of abuse or coercion, and help law enforcement officers, judges, and juries assess the truthfulness of a confession. In 2005, the Representative Assembly of the State Bar of Michigan adopted a resolution stating its support in principle for the use of video and audio recording "as the best method of securing a precise and accurate record of custodial interrogations". The resolution also called for the appointment of a State Bar Custodial Interrogation Recording Task Force. The 16-member task force was appointed in May 2006 and includes representatives of the criminal defense, prosecution, judicial, and law enforcement communities. In order to examine the effects of recording interrogations, the task force began a pilot project in Eaton, Jackson, and Washtenaw Counties several years ago, and developed protocol for the audiovisual recording of custodial interrogations in those counties. The pilot project is considered a success, according to a representative of the task force, and has been well received by the police departments involved. In order to promote transparency in the criminal justice process, many people believe that Michigan law should mandate the recording of custodial interrogations for certain offenses.

### **CONTENT**

**The bill would amend the Code of Criminal Procedure to do the following:**

- **Require a law enforcement official to make an audiovisual recording of an entire interrogation of an individual in custodial detention for questioning of his or her involvement in a major felony.**
- **Require the recording to include the individual's notification of Miranda rights.**
- **Allow an individual to object to having his or her interrogation recorded, and require the objection to be documented.**
- **Allow a major felony recording to be made without the consent or knowledge of, or despite the objection of the person being interrogated.**
- **Require a copy of a recorded statement to be provided to the defense upon request.**
- **Exempt a recorded statement from public disclosure before conviction or acquittal.**
- **Specify that failure to record a statement would not prevent a law enforcement officer from testifying in court about the statement.**
- **Require a jury to be instructed about the recording requirement and allow a jury to consider the absence of a recording.**
- **Specify that failure to comply with the bill would not create a civil cause of action.**
- **Require the Michigan Commission on Law Enforcement Standards (MCOLES) to establish quality standards and conduct cost assessments.**

- **Require the Legislature to appropriate funds to MCOLES for distribution to law enforcement agencies for the purchase of audiovisual recording equipment.**

#### Definitions

The bill would define "interrogation" as questioning in a criminal investigation that may elicit a self-incriminating response from an individual. The term would include a law enforcement official's words or actions that the official should know are reasonably likely to elicit a self-incriminating response.

"Custodial detention" would mean an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under a law enforcement official's control, and is 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 may be held in connection with a criminal charge that has been or may be filed against the individual.

"Major felony" would mean a felony punishable by imprisonment for life, for life or any term of years, or for a statutory maximum of 20 years or more, or third-degree criminal sexual conduct (which is punishable by up to 15 years' imprisonment).

"Law enforcement official" would mean any of the following:

- A police officer of this State or a political subdivision of the State as defined in the Commission on Law Enforcement Standards Act.
- A county sheriff or his or her deputy.
- A prosecuting attorney.
- A public safety officer of a college or university.
- A conservation officer of the Department of Natural Resources.
- An individual acting under the direction of one of those law enforcement officials.

#### Recording Requirement

Under the bill, a law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony would have to make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording would have to include the law enforcement official's notification to the individual of his or her Miranda rights.

An individual who believed his or her interrogation was being recorded could object to having it recorded. The objection would have to be documented either by the individual's objection stated on the recording or by his or her signature on a document stating the objection. If the individual refused to document his or her objection by either recording or signature, a law enforcement official would have to document the objection by a recording or signed document. A major felony recording could be made without the consent or knowledge of, or despite the objection of, the individual being interrogated.

A major felony recording would have to be produced using equipment and procedures that were designed to prevent alteration of the recording's audio or visual record.

#### Availability of Recording

Pursuant to any request of discovery, the prosecutor would have to provide a copy of a recorded statement to the defense counsel of record or to the defendant, if he or she were not represented by counsel. The court could not require the police or the prosecutor to prepare or pay for a transcript of a recorded statement. A court or the defense could have a transcript prepared at its own expense.

Before conviction or acquittal, a statement recorded under the bill would be exempt from disclosure under the Freedom of Information Act.

#### Failure to Record

Any failure to record a statement or to preserve a recorded statement as required under the bill would not prevent any law enforcement officer present when the statement was taken from testifying in court

as to the circumstances and content of the individual's statement if the court determined that the statement otherwise was admissible.

The jury would have to be instructed, however, that it was the law of this State to record statements of an individual in custodial detention who was under interrogation for a major felony and that the jury could consider the absence of a recording in evaluating the evidence relating to the individual's statement.

Failure to comply with the bill's recording requirements would not create a civil cause of action against a department or individual. The requirement to produce a major felony recording would be a directive to departments and law enforcement officials, and would not be a right conferred on an individual who was interrogated.

#### Standards; Funding; Implementation

The Commission on Law Enforcement Standards would have to set quality standards for the audiovisual recording of statements under the bill and would have to conduct an assessment of the initial cost necessary for law enforcement agencies to purchase audiovisual recording equipment. The first assessment would have to be conducted within 120 days after the bill's effective date. The Commission would have to conduct subsequent assessments regarding the necessary costs of purchasing, upgrading, or replacing the equipment every two years.

The Legislature annually would have to appropriate funds to MCOLES in the amount determined by the Commission's assessment for distribution to law enforcement agencies throughout the State to allow them to purchase audiovisual recording equipment for the purposes of the bill. Any funds appropriated for this purpose would have to be in addition to the appropriation provided to MCOLES in the prior fiscal year, and could not be appropriated from the Law Enforcement Officers Training Fund.

Law enforcement agencies would have to implement the bill's requirements within 120 days after receiving these funds from MCOLES.

A law enforcement agency would have to comply with the bill within 60 days after the date MCOLES adopted the quality standards, however, if the agency had audiovisual recording equipment that complied with the standards on that date, or within 60 days after the date the agency subsequently obtained the equipment.

Proposed MCL 763.7-763.11

#### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

The practice of electronically recording custodial interrogations is a powerful fact-finding tool that helps the criminal justice system reach the truth and protects against wrongful convictions. There are a number of reasons that a custodial interrogation can produce a false confession and otherwise lead to a wrongful conviction. Custodial interrogations by nature take place in isolation, and contradictory accounts of what transpired can result. Participants' perceptions can differ, recollections can fade before trial, and statements can have uncertain meanings. If interrogators are taking notes, they are less able to engage in active listening or observe a suspect's demeanor. An audiovisual recording can eliminate or alleviate these factors, providing a reliable, impartial account of the session and facilitating more effective questioning.

Recording interrogations also can deter police misconduct, as well as reduce the number and length of motions to suppress confessions. The reduced time spent on suppression proceedings allows law enforcement officers to focus on other activities and lessens overtime costs associated with hearings. Fewer claims of police misconduct also can avoid time-consuming investigations and litigation, saving resources of both law enforcement agencies and courts.

The recording of a custodial interrogation also can preserve strong evidence to convict the guilty, and help prosecutors assess a case, prepare for trial, or engage in plea bargaining.

In addition, recording interrogations helps ensure that suspects receive the benefit of their Miranda rights, and provides independent evidence if police conduct was coercive or a statement was not voluntary. A recording also can be used to develop a defense or establish support for a false confession claim.

In a number of other states, recording custodial interrogations is mandated by statute, rule, or court ruling. In Michigan, the Court of Appeals has held that recording custodial interrogations is not constitutionally required (*People v Geno*, 261 Mich App 624, and *People v Fike*, 228 Mich App 178). One appellate judge wrote separately, however, "to urge the Legislature to promulgate a statute mandating the electronic recording of prestatement conversation and actual interrogation" (*Fike*).

The three-county pilot project being conducted by the State Bar task force has shown that recording custodial interrogations can provide transparency in the criminal justice system without interfering with the way cases are processed. Senate Bill 152 (S-1) reflects the experience gathered from the pilot project, and represents the best efforts of judges, prosecutors, the defense bar, and law enforcement professionals to implement the recording of custodial interrogations.

**Response:** The cost of purchasing, installing, and maintaining the necessary audiovisual equipment is presently unknown. Although the bill would require the Legislature to make annual appropriations to MCOLES for distribution to law enforcement agencies, and would prohibit the appropriation of money from the Law Enforcement Officers Training Fund, the bill would not actually make an appropriation and does not identify a funding source.

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

The bill would have an indeterminate, but potentially substantial, fiscal impact on the State. The Michigan Commission on Law Enforcement Standards would be required to do a cost assessment of implementing the bill's provisions. To date, MCOLES has not offered an estimate of the costs, which the

bill would require the Legislature to appropriate. Among the major felonies that would require a recorded interrogation with an arrested individual, the Michigan uniform crime report reflects that in 2009 there were 223 arrests for homicide, 234 for rape, and 206 for kidnapping. Currently, several law enforcement agencies already possess the technical means to fulfill the requirements of the bill; many others do not.

Fiscal Analyst: Bruce Baker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.