

ELECTRONIC RECORDING OF INTERROGATIONS

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I. GENERAL CONSIDERATIONS AND GUIDELINES

In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), the Supreme Judicial Court held that if the prosecution introduces a confession or statement that the police obtained during an interrogation of a defendant who was either in custody or at a “place of detention,” and the police did not electronically record the statement, the defendant is entitled to a cautionary jury instruction. Upon the defendant’s request, the judge must instruct the jury that “the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable and . . . that, in light of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.” This jury instruction is required regardless of the reason that the police did not record the interrogation.

These procedures were adopted from the Massachusetts District Attorney’s Association’s recommended guidelines for recording interrogations.

II. POLICY

It is the policy of the department to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical.

III. DEFINITIONS

For the purpose of this policy, the following words and phrases are defined as follows:

- A. *Custody*:** Circumstances in which a reasonable person would believe that his or her freedom of action has been curtailed such that he or she is not free to leave.
- B. *Electronic recording*:** Preservation by analog (audio and/or VHS videotape) or digital (digital audio tape, CD and/or DVD non-rewritable discs) means through the use of audio or audio/video recording equipment.
- C. *Interrogation*:** An interrogation occurs when a law enforcement officer's questions, actions or words (other than those normally attendant to arrest and custody), are reasonably likely to elicit an incriminating response from a suspect.
- D. *Place of detention*:** A police station, state police barracks, prison, jail, house of correction, or a department of youth services secure facility where persons may be held in detention in relation to a criminal charge(s).
- E. *Suspect*:** A person who has either been charged with a crime or a person for whom there is a reasonable basis to believe that [s]he may in the future be charged with a crime. Witnesses, victims and other persons who provide information to a law enforcement officer are not considered suspects unless and until there develops a reasonable basis to change their status.

IV. PROCEDURES

- A. *Applicability*:** These guidelines require officers to record, whenever it is practical, two types of interrogations:

1. Custodial interrogations of suspects; and
2. Interrogations of suspects occurring at places of detention.

- B. *Wiretap Violations***

1. The Massachusetts wiretap statute, G.L. c. 272, §99, generally prohibits anyone from secretly recording another person's oral statements.
2. Unless one of the narrow exceptions in the wiretap statute applies, a law enforcement officer who electronically records a suspect's interrogation must do either of the following:

- a. Notify a suspect that his or her statements are being recorded; or
 - b. Conduct the interrogation in such a way that it is obvious to the suspect that his or her statements are being recorded.
3. Once the suspect knows or reasonably should know that [s]he is being recorded, the law enforcement officer may record the interrogation without asking for or receiving explicit consent to do so.

C. Creating a Clear and Complete Record

1. To the extent it is practical; the officer should electronically record the entire interrogation of a suspect.
2. To assist in the creation of the record, officers should do the following:
 - a. Start the recording device.
 - b. Inform the suspect that [s]he is being recorded.
 - c. State the date, time, location and names of persons present. If a video recording device is used which imprints the time on the tape or disk, verify that the correct time is displayed.
 - d. State the full name of the suspect.
 - e. Execute appropriate departmental forms including, but not limited to, Miranda warning and waiver, and waiver of prompt arraignment (if applicable).
 - f. If the officer must suspend the recording for any reason, [s]he should record the reasons for stopping (e.g., taking a break or a malfunction), the time the recording device is turned off, the time it is turned back on, and what transpired while the recording device was turned off.
 - g. If the officer uses or refers to documents or other items during the interrogation, the officer should describe those documents or items on the record and mark them with a unique number (similar to an exhibit number at trial) and the officer's initials. If the officer is unable to write on the actual document or item, the officer may write on a bag, envelope or case in which the document or item is placed or on a piece of tape attached to the document or item.
 - h. Conclude the recording by stating the date and the time the interrogation is completed.

D. Suspect Refuses to be Recorded.

1. GENERALLY: If a suspect refuses to make a recorded statement, the officer should record the refusal (if it is practical) and document it on a refusal form. (A refusal form is attached hereto.)

2. SUSPECT REFUSES BEFORE RECORDER IS TURNED ON

- a. If the suspect refuses to be recorded before the recording device is turned on, the officer should, if it is practical, turn on the recording device to record the refusal.
 - 1) The officer should identify himself or herself and the suspect; state the date, time and location; inform the suspect of any applicable rights (such as *Miranda*); and inform the suspect that there are potential benefits to recording the interrogation, including the fact that a recording will create a clear and complete record of what was said to the suspect, and what the suspect said during the interrogation.
 - 2) The officer should then ask the suspect on the record if [s]he is willing to make an electronically recorded statement.
 - 3) The officer should advise the suspect that if at any time [s]he changes his or her mind and decides that [s]he does want the interview to be recorded, [s]he should let the officer know, and the officer will turn on the recording device.
- b. If the suspect still refuses, the officer should turn off the device, execute a signed refusal form, and proceed with the interview.

3. SUSPECT REFUSES TO HAVE HIS OR HER REFUSAL RECORDED.

- a. If the suspect objects to having his or her refusal electronically recorded, the officer may proceed without recording the refusal or the interrogation.
- b. The officer should advise the suspect of the benefits of recording, execute a signed refusal form, and proceed with the interview.

4. SUSPECT REFUSES AFTER THE RECORDING DEVICE HAS BEEN TURNED ON.

- a. If, during the course of a recorded interrogation, a suspect decides that [s]he will no longer answer questions unless the recording device is turned off, the officer should again advise the suspect of the benefits of recording the interrogation.
- b. If the suspect still refuses, the officer should turn off the recording device, execute a refusal form, and proceed with the interview.

E. Discretionary Decision Not to Record

1. An officer may decide not to record an interrogation, even where it is practical to do so, if that officer reasonably believes that recording the interrogation will jeopardize the safety of an officer, the suspect, or any other person.

2. If an officer decides, without conferring with the suspect, that it is unsafe under the circumstances to record the interrogation, the officer should document in his or her interview or case report the reason(s) why the interrogation was not recorded.
3. If, after conferring with the suspect, an officer decides that it is unsafe under the circumstances to record the interrogation, the officer should, nonetheless, advise the suspect of the benefits of recording the interrogation.
4. If the suspect still does not want the interrogation to be recorded, the officer should:
 - a. Document in his or her interview or case report the reason(s) why [s]he did not record the interrogation;
 - b. Execute a signed refusal form; and
 - c. Proceed with the interview.

F. Recording Devices

1. Officers should choose a recording device that has a removable storage tape or disk that can be easily duplicated.
2. RECORDING DEVICE MALFUNCTIONS
 - a. If the recording device malfunctions, the officer conducting the interrogation must make a decision whether and how to continue the interrogation and [s]he must document what occurred.
 - b. If the recording device can be restarted, the officer should state on the record that the device malfunctioned, how long the device was not working, and whether or not the suspect made any statements that were not recorded.
 - c. If the recording device cannot be restarted, the officer should include in his or her interview or case report the fact that the device malfunctioned and whether or not the suspect made any statements that were not recorded.
 - d. If the recording device cannot be restarted, the officer should ask the suspect whether [s]he wishes to continue the interrogation without a recording device, or whether [s]he wishes to suspend the interrogation until an operable recording device is available.
 - e. If the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed statement by the suspect or in the officer's interview or case report.

3. INOPERABLE OR UNAVAILABLE RECORDING DEVICE

- a. If there is no recording device available or the recording device is inoperable, the officer should defer the interrogation until an operable recording device can be obtained.
- b. If it is impractical to defer the interrogation, and the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed statement by the suspect or in the officer's interview or case report.

G. Preservation and Copying of Original Recordings

1. COPYING

- a. The officer who conducted the interrogation must take steps to preserve the original recording.
- b. The storage medium should be removed from the recording device, clearly labeled, and appropriately stored.
- c. If the interrogation is recorded digitally, the officer should preserve at least one whole copy which must be clearly labeled and appropriately stored.
 - 1) To the extent it is practical; statements from multiple suspects should not be recorded on the same tape or disk.
 - 2) As soon as it is practical, an officer who records the statements of a suspect should create at least one exact copy of the original recording. The copy should be clearly labeled as a copy and appropriately stored.
 - 3) Once the copy has been made, the copy, and not the original, should be used to make additional copies. Additionally, copies, and not the original, should be used to prepare a written transcript, to comply with discovery obligations, and for all other purposes.

2. STORAGE

- a. The officer who conducted the interrogation shall preserve in the original case file all written forms and notes or records of all statements by a suspect that were not electronically recorded.
- b. All electronically recorded interrogations shall be preserved, according to the state records retention law and department policy, as criminal evidence.
- c. The original storage device shall be labeled as such and any copies labeled as such.

- d. Each original and copy shall be authenticated by the interrogator with the following information:
 - 1) Date and time of recording;
 - 2) Location of the interrogation;
 - 3) Name of person interrogated;
 - 4) Name of person(s) conducting the interrogation; and
 - 5) Department assigned case number or incident report number.

**TOWN OF ERVING***Department of Police*

71 French King Highway

Erving, Massachusetts 01344

Phone (413) 423-3310 · Fax (413) 423-3340

ELECTRONIC RECORDING – REFUSAL FORM

Name: _____

Date of Birth: ____ / ____ / ____ Type of Recording Device: _____

Person(s) Present: _____

Date: _____ Time: _____ Location: _____

_____ I have requested that this interview **not** be recorded._____ I have requested that this interview **no longer** be recorded.

To be read to suspect: There are potential benefits to the electronic recording of interviews. For example, the electronic recording of this interview will create a complete record of what was said to you today and what you said in return.

As you know, we have a recording device available for the purpose of electronically recording this interview and are ready and willing to electronically record this interview.

At your request, we will conduct this interview without electronically recording (or any further recording of) your statements. If, at any time, you change your mind and decide that you do want to electronically record this interview, please let me know and we will turn on the recording device.

I am going to ask you to initial and sign this form:

Do you understand the information that I have read to you?

YES_____
NO

Do you still request that this interview **not** be recorded?

YES_____
NO

Signature: _____

Date: _____

Witness: _____