

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2005 Session of  
2021

INTRODUCED BY HANBIDGE, KINSEY, SANCHEZ, SCHLOSSBERG, HILL-  
EVANS, A. DAVIS, CIRESI AND N. NELSON, OCTOBER 21, 2021

REFERRED TO COMMITTEE ON JUDICIARY, OCTOBER 21, 2021

AN ACT

1 Amending Titles 18 (Crimes and Offenses) and 44 (Law and  
2 Justice) of the Pennsylvania Consolidated Statutes, in  
3 wiretapping and electronic surveillance, further providing  
4 for exceptions to prohibition of interception and disclosure  
5 of communications; and providing for investigations.

6 The General Assembly of the Commonwealth of Pennsylvania  
7 hereby enacts as follows:

8 Section 1. Section 5704 of Title 18 of the Pennsylvania  
9 Consolidated Statutes is amended by adding a paragraph to read:

10 § 5704. Exceptions to prohibition of interception and  
11 disclosure of communications.

12 It shall not be unlawful and no prior court approval shall be  
13 required under this chapter for:

14 \* \* \*

15 (19) A law enforcement officer to engage in a custodial  
16 interrogation in accordance with 44 Pa.C.S. Ch. 83 Subch. A  
17 (relating to recording of interrogations).

18 Section 2. Title 44 is amended by adding a part to read:

19 PART V

PROCEDURES

Chapter

83. Investigations

CHAPTER 83

INVESTIGATIONS

Subchapter

A. Recording of Interrogations

B. (Reserved)

SUBCHAPTER A

RECORDING OF INTERROGATIONS

Sec.

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§ 8301. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commission." The Pennsylvania Commission on Crime and Delinquency.

"Custodial interrogation." An interview with an individual in which a question, statement or other conduct is reasonably likely to elicit an incriminating response and occurs while the individual interviewed is in custody.

1     "Custody." A state of affairs in which an individual who is  
2 interviewed by a law enforcement officer is:

3         (1) physically deprived of freedom in any significant  
4 way; or

5         (2) is placed in a situation in which the individual  
6 reasonably believes that the individual's freedom of action  
7 or movement is restricted.

8     "Electronic recording." An audiovisual recording of a  
9 statement that is authentic, accurate and unaltered.

10    "Interview." A conversation between a law enforcement  
11 officer and another individual that takes place in the course of  
12 a criminal investigation.

13    "Law enforcement agency." A government entity whose  
14 responsibilities include enforcement of criminal laws or the  
15 investigation of suspected criminal activity.

16    "Law enforcement officer." An officer or other employee of a  
17 law enforcement agency whose personal responsibilities include  
18 enforcement of criminal laws or the investigation of suspected  
19 criminal activity.

20    "Program." The Custodial Interrogation Recording Grant  
21 Program established under section 8306(a) (relating to grant  
22 program).

23    "Statement." An oral, written, sign language or nonverbal  
24 communication that takes place during a custodial interrogation.  
25 § 8302. Electronic recording.

26    (a) Requirement.--A law enforcement agency shall make a  
27 complete and contemporaneous electronic recording of each  
28 custodial interrogation relating to the investigation of all  
29 offenses, including any attempt, solicitation or conspiracy to  
30 commit an offense under 18 Pa.C.S. § 901 (relating to criminal

1 attempt), 902 (relating to criminal solicitation) or 903  
2 (relating to criminal conspiracy).

3 (b) Completeness.--An electronic recording under subsection  
4 (a) shall be complete only if the electronic recording is an  
5 authentic, accurate, uninterrupted and unaltered record of the  
6 custodial interrogation, beginning at or before the time that  
7 the individual enters the place of detention in which the law  
8 enforcement officer will conduct the custodial interrogation,  
9 and ending when the interview with the individual has completely  
10 finished.

11 (c) Visual recording.--Each camera that records visuals of a  
12 custodial interrogation shall be simultaneously focused on both  
13 the law enforcement officer conducting the interview and the  
14 suspect.

15 (d) Applicability.--

16 (1) This section does not apply if the court finds all  
17 of the following:

18 (i) The statement by the individual:

19 (A) is admissible as evidence; and

20 (B) is reliable and was made voluntarily, as  
21 proven by a preponderance of the evidence.

22 (ii) Either of the following, consistent with  
23 subparagraph (iii):

24 (A) The law enforcement officer who conducted  
25 the custodial interrogation made a contemporaneous  
26 record of the reason for not making an electronic  
27 recording of the statement.

28 (B) It was not feasible for the law enforcement  
29 officer who conducted the custodial interrogation to  
30 make a contemporaneous record of the reason for not

1           making an electronic recording of the statement, as  
2           proven by a preponderance of the evidence.

3           (iii) As proven by a preponderance of the evidence,  
4           one or more of the following circumstances existed at the  
5           time of the custodial interrogation:

6           (A) The statement was made spontaneously and was  
7           not made in response to a question.

8           (B) The statement was made spontaneously in the  
9           course of the routine intake processing of the  
10          individual.

11          (C) The law enforcement officer in good faith  
12          failed to make an electronic recording of the  
13          custodial interrogation because the law enforcement  
14          officer inadvertently failed to operate the recording  
15          equipment properly or, without the law enforcement  
16          officer's knowledge, the recording equipment  
17          malfunctioned or stopped operating.

18          (D) The custodial interrogation took place in  
19          another jurisdiction and was conducted by an official  
20          of that jurisdiction in compliance with the law of  
21          that jurisdiction.

22          (E) The law enforcement officer conducting or  
23          contemporaneously observing the custodial  
24          interrogation reasonably believed that the making of  
25          an electronic recording would jeopardize the safety  
26          of a confidential informant.

27          (F) Exigent circumstances existed which  
28          prevented or made infeasible the making of an  
29          electronic recording of the custodial interrogation.

30          (G) Before the custodial interrogation:

1                   (I) the individual to be interrogated  
2                   indicated that the individual would participate  
3                   only if the custodial interrogation would not be  
4                   electronically recorded; and

5                   (II) if feasible, the agreement to  
6                   participate without electronic recording was  
7                   electronically recorded.

8           (2) This section does not apply to a statement if any of  
9           the following apply:

10                   (i) The statement is offered as evidence solely to  
11                   impeach or rebut the testimony of the individual  
12                   interrogated and not as substantive evidence.

13                   (ii) The law enforcement agency has demonstrated to  
14                   the commission that:

15                           (A) the equipment and training required to  
16                           fulfill the requirements of this section would create  
17                           a financial hardship for the law enforcement agency;  
18                           and

19                           (B) the law enforcement agency is currently  
20                           awaiting the distribution of program grant money  
21                           under section 8306 (relating to grant program).

22 § 8303. Wiretap exception to electronic recording.

23           (a) Authorization.--Notwithstanding 18 Pa.C.S. Ch. 57  
24           (relating to wiretapping and electronic surveillance), a law  
25           enforcement officer engaged in custodial interrogation under  
26           section 8302 (relating to electronic recording) may  
27           electronically record the custodial interrogation without  
28           consent or knowledge of the individual being held or  
29           interrogated.

30           (b) Permissible actions.--Notwithstanding subsection (a), a

1 law enforcement officer may obtain an individual's consent to  
2 recording or inform the individual that the custodial  
3 interrogation will be electronically recorded.

4 § 8304. Jury instructions.

5 (a) Cautionary instructions.--If the prosecution offers an  
6 unrecorded statement into evidence that was required to be  
7 electronically recorded under this subchapter and the  
8 prosecution has not established by a preponderance of the  
9 evidence that an exception under section 8302(d) (relating to  
10 electronic recording) applies, the court shall provide the jury  
11 with the following cautionary instructions with any changes  
12 necessary to be consistent with the evidence:

13 "The law of this Commonwealth required that the interview  
14 of the defendant by law enforcement officers, which took  
15 place on {insert date} at {insert place}, was to be  
16 electronically recorded from beginning to end. The purpose of  
17 this requirement is to ensure that you jurors will have  
18 before you a complete, unaltered and precise record of the  
19 circumstances under which the interview was conducted and  
20 what was said and done by each of the individuals present.

21 In this case, the interviewing law enforcement officers  
22 failed to comply with that law by not making an electronic  
23 recording of the interview of the defendant. Instead, you  
24 have been presented with the testimony as to what took place,  
25 based upon the recollections of law enforcement officers and  
26 the defendant.

27 No justification for their failure to make an electronic  
28 recording has been presented to the court.

29 Because the interview was not electronically recorded as  
30 required by our law, you have not been provided the most

1 reliable evidence as to what was said and done by the  
2 participants. You cannot hear the exact words used by the  
3 participants, nor the tone or the inflection of their voices.

4 As you go about determining what occurred during the  
5 interview, you should take the testimony about the statement  
6 with caution and special attention to whether you are  
7 satisfied that what was said and done has been accurately  
8 reported by the participants, including testimony by law  
9 enforcement witnesses as to the statements attributed to the  
10 defendant.

11 Accordingly, because law enforcement officers failed to  
12 make an electronic recording, you may take this into account  
13 when determining what weight to attribute to the statements  
14 attributed to the defendant and the accuracy and credibility  
15 of the testimony of the witnesses."

16 (b) Unrecorded statement presented to impeach or rebut  
17 testimony.--If the prosecution offers an unrecorded statement  
18 into evidence solely to impeach or rebut the testimony of the  
19 individual interrogated and not as substantive evidence subject  
20 to section 8302(d)(2)(i), the court shall:

21 (1) provide the jury with instructions as appropriate to  
22 explain that the statement is exempt from the electronic  
23 recording requirements under section 8302; and

24 (2) clarify that the statement is offered into evidence  
25 to impeach or rebut the testimony of the individual  
26 interrogated and not as substantive evidence.

27 (c) Additional instructions.--In addition to the  
28 instructions outlined under subsection (a), the court may  
29 provide the jury with any other instructions as appropriate if  
30 requested by the prosecution or defense.



1 § 8305. Handling and preservation of electronic recordings.

2 (a) Identification and catalog.--A law enforcement agency  
3 shall clearly identify and catalog all electronic recordings of  
4 the law enforcement agency.

5 (b) Preservation.--

6 (1) If a juvenile or criminal proceeding is brought  
7 against an individual interrogated in an electronically  
8 recorded custodial interrogation, law enforcement personnel  
9 shall preserve the electronic recording until all appeals,  
10 postconviction and habeas corpus proceedings by the  
11 individual are concluded or the period within which those  
12 proceedings must be brought has expired.

13 (2) If a juvenile or criminal proceeding is not brought  
14 against an individual interrogated in an electronically  
15 recorded custodial interrogation, law enforcement personnel  
16 shall preserve the electronic recording until all applicable  
17 Federal and State statutes of limitations bar prosecution of  
18 the individual.

19 § 8306. Grant program.

20 (a) Establishment.--The Custodial Interrogation Recording  
21 Grant Program is established within the commission.

22 (b) Purpose.--The purpose of the program is to award annual  
23 grants to each law enforcement agency for which the acquisition  
24 of equipment or the training necessary to utilize the equipment  
25 to fulfill the requirements of section 8302 (relating to  
26 electronic recording) or 8305 (relating to handling and  
27 preservation of electronic recordings) would create a financial  
28 hardship for the law enforcement agency.

29 (c) Administration.--The commission shall administer the  
30 program and may promulgate rules and regulations as necessary to

1 administer the program.

2 (d) Public notice.--The commission shall provide information  
3 regarding the availability and award of program grant money,  
4 including the application form under subsection (e), on the  
5 publicly accessible Internet website of the commission.

6 (e) Application forms.--The commission shall develop an  
7 annual program grant application form for any law enforcement  
8 agency that seeks program grant money. At a minimum, the form  
9 shall contain the following information:

10 (1) The name, address and contact information of the law  
11 enforcement agency.

12 (2) The amount of program grant money requested.

13 (3) The proposed use for the program grant money  
14 requested, including a clearly defined breakdown of the costs  
15 that the program grant money would cover.

16 (4) Evidence that the acquisition of equipment or the  
17 training necessary to utilize the equipment to fulfill the  
18 requirements of section 8302 or 8305 would create a financial  
19 hardship for the law enforcement agency.

20 (5) Any other information that the commission deems  
21 necessary and appropriate.

22 (f) Award of program grant money.--

23 (1) After review of the information provided under each  
24 applicant's submitted application form, the commission shall  
25 determine whether to award program grant money to the  
26 applicant and, if so, the amount of the program grant money  
27 awarded.

28 (2) In awarding program grant money, the commission  
29 shall:

30 (i) Give preference to applicants whose grant

1       proposals demonstrate the greatest financial need.

2           (ii) Consider the average number of custodial  
3       interrogations that the law enforcement agency handles on  
4       a yearly basis.

5   \$ 8307. Appropriations.

6       In addition to any amounts otherwise authorized to be  
7       appropriated or made available to the commission, the sum of  
8       \$1,000,000 is hereby appropriated for each of the three fiscal  
9       years following the effective date of this section to provide  
10      program grants.

11   \$ 8308. Administrative costs.

12      The commission may use up to 8% of the money appropriated for  
13      program grants each year for the costs of administering the  
14      program, which may include the costs relating to the employment  
15      of personnel, providing technical assistance to grantees, the  
16      reimbursement of travel expenses and evaluating the financial  
17      needs of program applicants.

18   \$ 8309. Reports.

19      At the end of each fiscal year following the appropriation of  
20      program grant money, the commission shall prepare and submit a  
21      report to the General Assembly regarding the distribution of  
22      program grant money to law enforcement agencies, including:

23           (1) The total amount of program grant money awarded.

24           (2) The amount of program grant money awarded to each  
25      law enforcement agency.

26           (3) The proposed uses for the program grant money  
27      awarded.

28                   SUBCHAPTER B

29                   (Reserved)

30      Section 3. This act shall take effect in one year.