

House Bill 3261

Sponsored by Representatives GORSEK, PILUSO; Representatives BYNUM, GREENLICK, POWER, SANCHEZ, Senators DEMBROW, GELSER, MONNES ANDERSON

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Modifies requirement to record peace officer's interview with person under 18 years of age to include interviews of investigations into misdemeanors, felonies and acts that, if committed by adult, would constitute crimes and require recorded interviews whenever person under 18 years of age would reasonably believe person is in custody.

A BILL FOR AN ACT

Relating to law enforcement interviews of persons under 18 years of age; creating new provisions; and amending ORS 133.400 and 165.540.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2019 Act is added to and made a part of ORS chapter 419C.

SECTION 2. (1) An interview conducted by a peace officer shall be electronically recorded if:

(a) The interview is with a person under 18 years of age;

(b) The interview is reasonably likely to elicit incriminating responses; and

(c) A reasonable person in the juvenile's position would believe the juvenile is in custody.

(2) Subsection (1) of this section does not apply to:

(a) A statement made before a grand jury;

(b) A statement made on the record in open court;

(c) An interview conducted in another state in compliance with the laws of that state;

(d) An interview conducted by a federal law enforcement officer in compliance with the laws of the United States;

(e) A statement that was spontaneously volunteered and did not result from an interview;

(f) A statement made during custody processing in response to a routine question;

(g) A law enforcement agency that employs five or fewer peace officers;

(h) An interview conducted in connection with an investigation carried out by a youth corrections officer or a staff member of the Oregon State Hospital in the performance of the officer's or staff member's official duties of treatment, custody, control or supervision of individuals committed to or confined in a place of incarceration or detention; or

(i) An interview for which the state demonstrates good cause for the failure to electronically record the interview.

(3) If the state offers an unrecorded statement made under the circumstances described in subsection (1) of this section in a juvenile delinquency proceeding or criminal proceeding alleging the commission of a misdemeanor, felony or an act that, if committed by an adult, would constitute a crime, and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, the court shall

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 consider the superior reliability of electronic recordings when compared with testimony
 2 about what was said and done when determining the evidentiary value of the statement.

3 (4) A law enforcement agency that creates an electronic recording of an interview shall
 4 preserve the recording until the youth’s adjudication for the offense is final and all direct,
 5 post-adjudication relief and habeas corpus appeals are exhausted, or until the adjudication
 6 of the offense is barred by law.

7 (5) The state shall provide an electronic copy of a youth’s interview to a youth in ac-
 8 cordance with ORS 135.805 to 135.873. Providing an electronic copy of the interview to the
 9 youth constitutes compliance with ORS 135.815 (1)(b), and the state is not required to provide
 10 the youth with a transcript of the contents of the interview. Unless the court orders other-
 11 wise, the youth’s attorney may not copy, disseminate or republish the electronic copy of the
 12 interview, except to provide a copy to an agent of the youth’s attorney for the limited pur-
 13 pose of case preparation.

14 (6) An electronic recording of an interview, and any transcription of the recording, that
 15 is certified as containing a complete recording, or a complete transcription, of the entirety
 16 of the interview, from the advisement of constitutional rights to the conclusion of the
 17 interview, is admissible in any preadjudication or post-adjudication hearing for the purpose
 18 of establishing the contents of a statement made in the recording and the identity of the
 19 person who made the statement, if the statement is otherwise admissible. A certification
 20 that complies with this subsection satisfies the requirements of ORS 40.505 and 132.320 for
 21 the recording or transcription. This subsection does not prohibit a party from calling a wit-
 22 ness to testify regarding the interview.

23 (7) As used in this section:

24 (a) “Crime” has the meaning given that term in ORS 161.515.

25 (b) “Good cause” includes, but is not limited to, situations in which:

26 (A) The youth refused, or expressed an unwillingness, to have the interview electronically
 27 recorded;

28 (B) The failure to electronically record the interview was the result of equipment failure
 29 and a replacement device was not immediately available;

30 (C) The person operating the recording equipment believed, in good faith, that the
 31 equipment was recording the interview;

32 (D) Electronically recording the interview would jeopardize the safety of any person or
 33 the identity of a confidential informant; or

34 (E) Exigent circumstances prevented the recording of the interview.

35 (c) “Interview” means an interview in which the youth questioned reasonably believes the
 36 youth is in custody and is required to be advised of the youth’s constitutional rights.

37 (d) “Peace officer” has the meaning given that term in ORS 133.005.

38 **SECTION 3.** ORS 133.400 is amended to read:

39 133.400. (1) A custodial interview conducted by a peace officer in a law enforcement facility
 40 shall be electronically recorded if the interview is conducted[:]

41 [(a)] in connection with an investigation into aggravated murder as defined in ORS 163.095 or
 42 a crime listed in ORS 137.700 or 137.707[: or].

43 [(b) *With a person under 18 years of age in connection with an investigation into a felony, or an*
 44 *allegation that the person being interviewed committed an act that, if committed by an adult, would*
 45 *constitute a felony.*]

1 (2) Subsection (1) of this section does not apply to:

2 (a) A statement made before a grand jury;

3 (b) A statement made on the record in open court;

4 (c) A custodial interview conducted in another state in compliance with the laws of that state;

5 (d) A custodial interview conducted by a federal law enforcement officer in compliance with the
6 laws of the United States;

7 (e) A statement that was spontaneously volunteered and did not result from a custodial inter-
8 view;

9 (f) A statement made during arrest processing in response to a routine question;

10 (g) A law enforcement agency that employs five or fewer peace officers;

11 (h) A custodial interview conducted in connection with an investigation carried out by a cor-
12 rections officer, a youth corrections officer or a staff member of the Oregon State Hospital in the
13 performance of the officer's or staff member's official duties of treatment, custody, control or
14 supervision of individuals committed to or confined in a place of incarceration or detention; or

15 (i) A custodial interview for which the state demonstrates good cause for the failure to elec-
16 tronically record the interview.

17 (3)(a) If the state offers an unrecorded statement made under the circumstances described in
18 subsection [(1)(a)] (1) of this section in a criminal proceeding alleging the commission of aggravated
19 murder or a crime listed in ORS 137.700 or 137.707[*or under the circumstances described in sub-*
20 *section (1)(b) of this section in a criminal proceeding alleging the commission of a felony,*] and the state
21 is unable to demonstrate, by a preponderance of the evidence, that an exception described in sub-
22 section (2) of this section applies, upon the request of the defendant, the court shall instruct the jury
23 regarding the legal requirement described in subsection (1) of this section and the superior reli-
24 ability of electronic recordings when compared with testimony about what was said and done.

25 (b) The court may not exclude the defendant's statement or dismiss criminal charges as a result
26 of a violation of this section.

27 (c) If each of the statements made by the defendant that the state offers into evidence is re-
28 corded, the court may not give a cautionary jury instruction regarding the content of the
29 defendant's statements.

30 [(4) *If the state offers an unrecorded statement made under the circumstances described in sub-*
31 *section (1)(b) of this section in a juvenile delinquency proceeding alleging the commission of an act that,*
32 *if committed by an adult, would constitute a felony, and the state is unable to demonstrate, by a pre-*
33 *ponderance of the evidence, that an exception described in subsection (2) of this section applies, the*
34 *court shall consider the superior reliability of electronic recordings when compared with testimony*
35 *about what was said and done when determining the evidentiary value of the statement.*]

36 [(5)] (4) A law enforcement agency that creates an electronic recording of a custodial interview
37 shall preserve the recording until the defendant's conviction [*or youth's adjudication*] for the offense
38 is final and all direct, post-conviction relief and habeas corpus appeals are exhausted, or until the
39 prosecution of the offense is barred by law.

40 [(6)] (5) The state shall provide an electronic copy of a defendant's [*or youth's*] custodial inter-
41 view to a defendant [*or youth*] in accordance with ORS 135.805 to 135.873. Providing an electronic
42 copy of the custodial interview to the defendant [*or youth*] constitutes compliance with ORS 135.815
43 (1)(b), and the state is not required to provide the defendant [*or youth*] with a transcript of the
44 contents of the interview. Unless the court orders otherwise, the defendant's [*or youth's*] attorney
45 may not copy, disseminate or republish the electronic copy of the custodial interview, except to

1 provide a copy to an agent of the defendant's [or youth's] attorney for the limited purpose of case
2 preparation.

3 [(7)] (6) An electronic recording of a custodial interview, and any transcription of the recording,
4 that is certified as containing a complete recording, or a complete transcription, of the entirety of
5 the custodial interview, from the advisement of constitutional rights to the conclusion of the custo-
6 dial interview, is admissible in any pretrial or post-trial hearing for the purpose of establishing the
7 contents of a statement made in the recording and the identity of the person who made the state-
8 ment, if the statement is otherwise admissible. A certification that complies with this subsection
9 satisfies the requirements of ORS 40.505 and 132.320 for the recording or transcription. This sub-
10 section does not prohibit a party from calling a witness to testify regarding the custodial interview.

11 [(8)] (7) As used in this section:

12 (a) "Custodial interview" means an interview in which the person questioned is in custody and
13 is required to be advised of the person's constitutional rights.

14 (b) "Good cause" includes, but is not limited to, situations in which:

15 (A) The defendant [or youth] refused, or expressed an unwillingness, to have the custodial
16 interview electronically recorded;

17 (B) The failure to electronically record the custodial interview was the result of equipment
18 failure and a replacement device was not immediately available;

19 (C) The person operating the recording equipment believed, in good faith, that the equipment
20 was recording the custodial interview;

21 (D) Electronically recording the custodial interview would jeopardize the safety of any person
22 or the identity of a confidential informant;

23 (E) Exigent circumstances prevented the recording of the custodial interview; or

24 (F) The peace officer conducting the custodial interview reasonably believed, at the time the
25 custodial interview began, that the custodial interview[:]

26 [(i)] was conducted in connection with a crime other than aggravated murder as defined in ORS
27 163.095 or a crime listed in ORS 137.700 or 137.707[; or].

28 [(ii)] *Was conducted in connection with a crime other than a felony, or an allegation that the person
29 being interviewed committed an act that, if committed by an adult, would constitute a felony, if the
30 person is under 18 years of age.*

31 (c) "Law enforcement facility" means a courthouse, building or premises that is a place of op-
32 eration for a municipal police department, county sheriff's office or other law enforcement agency
33 at which persons may be detained in connection with a juvenile delinquency petition or criminal
34 charge.

35 [(d)] *"Youth" means a person under 18 years of age who is suspected or alleged to have committed
36 an act that, if committed by an adult, would constitute a felony.*

37 **SECTION 4.** ORS 165.540 is amended to read:

38 165.540. (1) Except as otherwise provided in ORS 133.724 or 133.726 or subsections (2) to (7) of
39 this section, a person may not:

40 (a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio com-
41 munication to which the person is not a participant, by means of any device, contrivance, machine
42 or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at
43 least one participant.

44 (b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or
45 facilities of a telecommunication or radio communication company over which messages are trans-

mitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which the person is not a participant.

(c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.

(d) Obtain the whole or any part of a conversation, telecommunication or radio communication from any person, while knowing or having good reason to believe that the conversation, telecommunication or radio communication was initially obtained in a manner prohibited by this section.

(e) Use or attempt to use, or divulge to others, any conversation, telecommunication or radio communication obtained by any means prohibited by this section.

(2)(a) The prohibitions in subsection (1)(a), (b) and (c) of this section do not apply to:

(A) Officers, employees or agents of a telecommunication or radio communication company who perform the acts prohibited by subsection (1)(a), (b) and (c) of this section for the purpose of construction, maintenance or conducting of their telecommunication or radio communication service, facilities or equipment.

(B) Public officials in charge of and at jails, police premises, sheriffs' offices, Department of Corrections institutions and other penal or correctional institutions, except as to communications or conversations between an attorney and the client of the attorney.

(b) Officers, employees or agents of a telecommunication or radio communication company who obtain information under paragraph (a) of this subsection may not use or attempt to use, or divulge to others, the information except for the purpose of construction, maintenance, or conducting of their telecommunication or radio communication service, facilities or equipment.

(3) The prohibitions in subsection (1)(a), (b) or (c) of this section do not apply to subscribers or members of their family who perform the acts prohibited in subsection (1) of this section in their homes.

(4) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

(5) The prohibitions in subsection (1)(c) of this section do not apply to:

(a) A person who records a conversation during a felony that endangers human life;

(b) A person who records a conversation in which a law enforcement officer is a participant, if:

(A) The recording is made while the officer is performing official duties;

(B) The recording is made openly and in plain view of the participants in the conversation;

(C) The conversation being recorded is audible to the person by normal unaided hearing; and

(D) The person is in a place where the person lawfully may be;

(c)(A) A person who, pursuant to ORS 133.400, records an interview conducted by a peace officer in a law enforcement facility; **or**

(B) A person who, pursuant to section 1 of this 2019 Act, records an interview conducted by a peace officer;

(d) A law enforcement officer who is in uniform and displaying a badge and who is operating:

(A) A vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained; or

(B) A video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty, unless:

(i) The officer has an opportunity to announce at the beginning of the interaction that the con-

1 versation is being obtained; and

2 (ii) The announcement can be accomplished without causing jeopardy to the officer or any other
3 person and without unreasonably impairing a criminal investigation; or

4 (e) A law enforcement officer who, acting in the officer's official capacity, deploys an Electro-
5 Muscular Disruption Technology device that contains a built-in monitoring system capable of re-
6 cording audio or video, for the duration of that deployment.

7 (6) The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept
8 or attempt to intercept with an unconcealed recording device the oral communications that are part
9 of any of the following proceedings:

10 (a) Public or semipublic meetings such as hearings before governmental or quasi-governmental
11 bodies, trials, press conferences, public speeches, rallies and sporting or other events;

12 (b) Regularly scheduled classes or similar educational activities in public or private institutions;
13 or

14 (c) Private meetings or conferences if all others involved knew or reasonably should have known
15 that the recording was being made.

16 (7) The prohibitions in subsection (1)(a), (c), (d) and (e) of this section do not apply to any:

17 (a) Radio communication that is transmitted by a station operating on an authorized frequency
18 within the amateur or citizens bands; or

19 (b) Person who intercepts a radio communication that is transmitted by any governmental, law
20 enforcement, civil defense or public safety communications system, including police and fire, readily
21 accessible to the general public provided that the interception is not for purposes of illegal activity.

22 (8) Violation of subsection (1) or (2)(b) of this section is a Class A misdemeanor.

23 (9) The exception described in subsection (5)(b) of this section does not authorize the person
24 recording the law enforcement officer to engage in criminal trespass as described in ORS 164.243,
25 164.245, 164.255, 164.265 or 164.278 or to interfere with a peace officer as described in ORS 162.247.

26 (10) As used in this section:

27 (a) "Electro-Muscular Disruption Technology device" means a device that uses a high-voltage,
28 low power charge of electricity to induce involuntary muscle contractions intended to cause tem-
29 porary incapacitation. "Electro-Muscular Disruption Technology device" includes devices commonly
30 known as tasers.

31 (b) "Law enforcement officer" has the meaning given that term in ORS 133.726.

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