

Recording of Custodial Interrogations

Municipal Police Training Council Model Policy

*Standards established by rule of the
Division of Criminal Justice Services
Pursuant to Criminal Procedure Law 60.45(3)(e)*

June 2018



**Division of Criminal
Justice Services**

**Municipal Police
Training Council**

New York State Division of Criminal Justice Services
80 South Swan Street, Albany, New York 12210

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Justice Services

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Recording of Custodial Interrogations Model Policy

Standards Established by Rule of the Division Pursuant to CPL §60.45 (3) (e)

The Recording of Custodial Interrogations Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. Law Enforcement are encouraged to customize these protocols to meet their regional needs, while being mindful of the intent of the policy. As with all model policies adopted by the Municipal Police Training Council (MPTC), this policy is non-binding upon agencies within New York State and is meant to serve as a guide to be used in developing a department's individual policy.

The Municipal Police Training Council (MPTC) approved the model policy during their March 2013 meeting and amended the policy during their March 2018 meeting pursuant to Criminal Procedure Law section 60.45(3)(e) and Family Court Act section 344.2.

Acknowledgements

The District Attorney's Association of the State of New York "Guidelines for Recording Custodial Interrogations", the New York State Association of Chiefs of Police "Electronic recording of Custodial Interviews Model Policy", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations Regarding Electronic Recording of Custodial Interrogation" served as a basis for this model policy.

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by Special Assistant Michael-Sean Spence and the following associations and agencies:

District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

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I Purpose

New York State Criminal Procedure Law (CPL) § 60.45(3)(e) sets forth that any video recording of a custodial interrogation, required by law, be conducted in accordance with standards established by rule of the Division. This document was developed to meet that requirement. In 2017, Criminal Procedure Law was amended to require the video recording of custodial interrogations conducted by a public servant at a detention facility when the interrogation involves a qualifying offense.

This policy meets the statutory mandates set forth in CPL 60.45 and is grounded in evidence-based principles. Electronically recording custodial suspect interrogations will enhance the investigative process, ensure the admissibility of evidence, and will assist in defending against civil litigation and allegations of officer misconduct. The policy is intended to meet the needs of all police departments in New York State regardless of size or resource limitations.

The Municipal Police Training Council supports the standards set forth in this policy and recommends that all police agencies have written policies in order to comply with the statutory requirements of CPL 60.45.

II Definitions

- A. **Custodial interrogation:** *Custodial:* The objective standard for determining a suspect's custodial status is whether a reasonable person, innocent of any wrongdoing, would have believed that he or she was not free to leave. *Interrogation:* Interrogation refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally associated with arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.
- B. **Detention facility:** A police station, correctional facility, holding facility for prisoners, prosecutor's office, juvenile room designated by the Chief Administrator of the Courts as a suitable place for the questioning of juveniles in compliance with the requirements of 22 N.Y.C.R.R. 205.20 or any other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.
- C. **Electronic recording:** A digital, electronic video or other recording on electronic media.
- D. **Electronic media:** Video signals recorded on any of several storage media, including, but not limited to, analog tape (VHS, S-VHS, Hi 8),

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digital recording (DVD) or other portable digital storage media (CD, MP3 player, hard drive, etc.).

- E. **Interpreter:** A qualified person trained to convert oral and/or sign language messages from one language to another, in person or remotely
- F. **Auxiliary Aids:** Devices or services that enable effective communication for people with disabilities. Examples include but not limited to: notepad and pen or pencil; screen reader; assistive listening system or device; teletypewriter; and visual aid.
- G. **Recording room:** For the purpose of this policy, includes any designated room outfitted with audio-video recording equipment, and any police vehicle similarly equipped.

III Qualifying Offenses

- A. An electronic recording of a custodial interrogation should be made when the subject to be interviewed is reasonably suspected in the commission of the following, including but not limited to:
 - 1. All A-I non-drug felonies;
 - 2. All A-II felonies codified in Sections 130.95 and 130.96 of the New York State Penal Law;
 - 3. All B violent felonies codified in Section 125 of the New York State Penal Law;
 - 4. All B violent felonies codified in Section 130 of the New York State Penal Law.
 - 5. Any offense listed above, while subject is in custody at a facility specified in Section 305.2 (4) of the New York State Family Court Act.
- B. An electronic recording of a custodial interrogation should be made when the subject makes a confession, admission or other statement with respect to the subject's participation or lack of participation in an offense.
- C. Nothing in this policy prohibits the use of electronic recording equipment for any other interview or offense at the discretion of the police department.

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IV Exceptions

It is understood that recording may not always be possible. Upon a showing of good cause by a prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to:

- A. Electronic recording equipment malfunctions.
- B. Electronic recording equipment is not available because it was otherwise being used.
- C. Statements that are made in response to questions that are routinely asked during arrest processing.
- D. Statements that are made spontaneously and are not in response to police questioning.
- E. Statements that are made during a custodial interrogation at a time when the interviewer is unaware that a qualifying offense occurred.
- F. Statements that are made during a custodial interrogation at a location other than the "interview room" because the defendant cannot be brought to such room, e.g., the suspect is in a hospital or is out of state and that state is not governed by a law requiring the recordation of an interrogation.
- G. Statements that are made after a suspect has refused to participate in the interrogation if it is recorded and appropriate effort to document such refusal is made.
- H. Statements that are not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct of law enforcement personnel.
- I. If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.
- J. Statements that are made at a location not equipped with a recording device, and the reason for using that location is not to subvert the intent of this policy or relevant law.

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V Field Interviews

This policy is not meant to discourage field interviews. Gathering “real time” information in the field can be critical for an investigation. For example, information is often immediately needed to locate a weapon, to find victims or accomplices, or to secure a crime scene. If information is gathered from the suspect in the field regarding a qualifying event, efforts should be made to memorialize the statements at the earliest practicable time.

VI Use of Interpreters and Auxiliary Aids

If the suspect requests an interpreter or a use of an auxiliary aid or if the interviewing officer deems that either are necessary, the interviewing officer should seek to provide such to protect the rights of the suspect and mutual understanding of all parties.

VII Miranda Warnings

Any custodial interrogation must be preceded by the reading of Miranda Warnings. This does not preclude pre-interrogation discussions with the subject before Miranda Warnings are read and the actual interrogation commences. In cases involving qualifying offenses where the interrogation is to be recorded, all conversations that occur inside the recording room must be recorded, including pre-interrogation discussions and the administration of the Miranda Warnings.

VIII Prior to Recording

- A. **Record entire interview:** The recording equipment should be turned on prior to the subject being placed within the recording room and should only be turned off after the subject has left the room after the interrogation is completed. All discussions in the recording room, including any pre-interrogation discussions, even if they occur before the reading of Miranda Warnings, must be included in the recording. Should the need arise for either the subject or the interrogating officer to leave the recording room; recording devices should continue to operate without interruption. If the recording is temporarily stopped, the reason for stopping the recording and the duration should be documented.
- B. **Suspect search:** Prior to the interview, the interviewing officer should be certain that the suspect, who is in custody, was searched for weapons, contraband, evidence, electronic devices or telephones and that all relevant items were removed.
- C. **Covert Recording:** If an agency chooses to make the electronic recording equipment covert, the officer shall not inform the subject that the

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interrogation is being recorded, nor discuss the topic of recording. If the subject asks about the recording, the department shall determine protocols for responding within the confines of the law.

- D. **Eavesdropping:** Article 250 of the Penal Law must be followed to avoid any circumstance in which conversations are recorded in which no party thereto is aware of the recording. To legally record a conversation, at least one party must be aware of, and have consented to, the recording.
- E. **Juveniles:** Questioning of youth must take place in age-appropriate settings. So that juveniles (over seven and less than seventeen years old as of October 1, 2018, over seven and less than eighteen years old as of October 1, 2019) and adults can be questioned in the recording room, the room may also be designated a juvenile room, where practical.

When questioning a juvenile, who will be prosecuted as a juvenile delinquent under the Family Court Act, the interview should take place in a designated juvenile room.

The officer should be aware of other considerations, including the parental notification requirements and the requirement that the parent or guardian of the child, if present, be given Miranda Warnings of Family Court Act Section 305.2 (applicable to the questioning of juvenile delinquents), and Criminal Procedure Law Section 140.20(6) (requiring the arresting officer to notify the parent or guardian of a juvenile offender arrested without a warrant of the arrest and the location where the juvenile is detained). The officer may also consider using simplified Miranda Warnings when questioning a juvenile.

- F. **Recording Device Responsibility:** At least one officer conducting the interrogation shall be responsible for operating the recording device used during the interrogation and should know the Department's electronic recording protocols.
- G. **Recording Time and Date:** Date and time stamping of the electronic recording is encouraged. If the equipment cannot digitally time stamp the video, the video camera should be positioned to also capture in frame an analog clock, preferably with a sweeping second hand to show the linear and uninterrupted passage of time. The clock should be positioned out of the suspect's line of sight so as not to serve as a distraction.
- H. **Camera Position and Field of View:** To the extent practicable, the camera positioning and field of view should be set to capture as much of the room and occupants as possible while still maintaining a frontal high angle view of the interrogated subject.

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- I. **Recording Capacity:** Before the interrogation begins, the officer should make sure there is enough capacity to record the entirety of the interrogation.
- J. **Document Equipment Challenges:** The time and nature of any irregularities that occur with the equipment should be documented by the officer in writing. Even if there is a problem with the electronic media, the electronic media must be preserved.

IX During Recording

- A. **Attorney Visit:** If the subject of a recorded interrogation has an attorney visit, the subject and attorney shall be offered a separate, private area in which to confer if one is available. The recording of the empty room can continue during their absence to memorialize the event until such time that the interrogation is either resumed or terminated. Alternatively, a record can be made of when the recording was discontinued for the attorney visit. If the interrogation re-commences after the attorney visit, then there should be documentation of the attorney's agreement to allow the questioning to continue and the time that the recording began again. In no event shall the visit between the attorney and the suspect be recorded.
- B. **Written Statements:** After the subject of the recorded custodial interrogation has provided all of the pertinent information, a written statement may be obtained from the subject. If the officer opts to obtain a written statement, that procedure should also be recorded.
- C. **Identification of Parties:** All persons within the recording room should be identified on the recording, whether by the interviewing member or by the subjects themselves. Use of any interpreter during the interrogation should be identified on the recording by name and affiliation.
- D. **Acknowledgement of Auxiliary Aids or Provisions to Subject:** The use of any auxiliary aids during the interrogation should be identified on the recording. In addition, where possible, it should be made clear on the recording when a subject is or has previously been provided with food, drink, cigarettes, access to toilet facilities, etc.

X After Interview

- A. **Label Recording Media:** After the custodial interrogation, the officer(s) conducting the interrogation, or an employee designated by the Department, shall label all applicable documents, recorded media and notes according to Department protocols.

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- B. **Avoid Altering Media:** No person shall alter the operation of the electronic recording equipment. No person shall, in any manner or for any purpose, alter the original “master” electronic recording of a custodial interrogation.
- C. **Copies:** Reproductions of the recorded interrogation should be made according to Department protocols. Any defense request for a copy of the interrogation should be referred to the District Attorney’s Office.
- D. **Originals:** The original of the electronic media should be appropriately vouchered in accordance with Departmental evidence procedures. The original should be retained according to the Department’s retention policy. Accordingly, electronic media may be utilized to create an authoritative original of the recording for systems that write and maintain the video file on a hard drive or server.
- E. **Dissemination of Recordings:** Any dissemination of any recording shall be carried out according to documented Department rules and procedures. Policies for the viewing of recordings should be developed to allow for training, related investigations, quality control, supervision, and the like.
- F. **710.30 Notice:** Complete either a 710.30 CPL Notice of Statement or a Felony Interview Reporting Form, and indicate that an electronic recording was made, or conversely, was not made, of a custodial interrogation. The substance of all oral admissions must also be documented on the 710.30 CPL form from all involved members regardless of whether there was a subsequent recorded and/or written statement. Note: Failure to notify the prosecutor of the recorded interview could prevent its use in court.