



DELAWARE DEPARTMENT OF JUSTICE RECOMMENDED POLICY ON ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Scope and Effect

This policy establishes the position of the Delaware Department of Justice (“DDOJ”) with respect to the electronic recordation of statements by individuals in the custody of Delaware law enforcement agencies. DDOJ does not have the authority to mandate the manner in which statements are recorded by law enforcement agencies, or whether they are recorded; however, DDOJ does make discretionary decisions regarding the charging and prosecution of criminal cases, and those decisions are guided in large part by the strength and reliability of the evidence gathered by law enforcement agencies. Adherence to the practices outlined in this policy, which are designed to ensure strong and reliable evidence, will in some instances affect the strength of a case from DOJ’s perspective.¹

Recording: Recommended Default

The custodial interview² of an individual in a place of detention with suitable recording equipment should be electronically recorded, subject to the

¹ This policy is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural, enforceable at law or in equity in any manner, civil or criminal, by any party against the State of Delaware, its departments, agencies, or entities, its officers, employees, or agents, or any other person, government, or local agency, nor does it place any limitation on any otherwise lawful investigative and litigative prerogatives of any law enforcement agency.

² A “custodial interview” is an interview involving a law enforcement officer’s questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject’s position would consider himself to be under arrest or its functional equivalent. It does not include, among other things, conversations that occur during routine processing or “booking” of persons.

exceptions defined below. No supervisory approval should be required for recording such custodial interviews. This section of the Policy Recommendation applies only to interviews of persons in the custody of a law enforcement agency in a place of detention;³ interviews in non-custodial settings are expressly excluded.⁴

- a. Electronic recording. When necessary equipment is available, electronic recording should be done through video recording, and when necessary equipment is available, that video recording should allow a viewer to see both the individual being questioned and the individual(s) asking the questions. When video recording equipment is not available or impractical, audio recording may be utilized.
- b. Scope of offenses. If otherwise required by this policy, recording should be done for custodial interrogations relating to all alleged criminal offenses, misdemeanor and felony.
- c. Scope of recording. Electronic recording should begin as soon as a subject enters the interview room or area and continue until the interview is completed.⁵
- d. Recording may be overt or covert. Recording may be covert or overt, as covert recording constitutes one-party consent monitoring which is permitted by Delaware state law. Covert recording in fulfilling this policy may be carried out without constraint by the procedures and approval requirements prescribed for any other monitoring.

³ A “place of detention” is defined as any structure where persons are held in connection with criminal charges where those persons can be interviewed. It includes law enforcement facilities, offices, correctional or detention facilities, police and sheriff’s offices, holding cells, or other structures used for such purpose.

⁴ As one example, DOJ does not expect that recording will occur while a person is at the scene of the arrest or waiting for transportation to, or is en route to, a place of detention.

⁵ Although it is not the subject of this policy statement, DOJ also recommends that law enforcement agencies have interviewees sign a formal Miranda Waiver Form before conducting interviews where Miranda warnings are required, in order to eliminate any question as to whether Miranda warnings were properly administered.

Exceptions

Recording of interrogations need not be conducted under the following specific circumstances. A decision not to record an interview that would otherwise be recorded under one of the following exceptions should be documented by the responsible law enforcement agency as soon as practicable.

- a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place. Such a refusal should be electronically recorded.
- b. Public safety exception. If law enforcement officials are required, for immediate public safety reasons such as ascertaining the nearby existence of guns or drug paraphernalia, or the status of hostages or kidnapped persons, to conduct custodial interrogations without the use of otherwise required constitutional safeguards, then a recording need not take place.
- c. Recording is not reasonably practicable. This exception should be used only in very limited circumstances. Examples of situations where recording is not reasonably practicable could include an equipment malfunction, an unexpected need to move an interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.
- d. With permission of DOJ attorney. A DOJ attorney may authorize a non-recorded interrogation for reasons that do not fall within the prior three exceptions when a significant and articulable law enforcement purpose justifies such an interrogation. Such authorization shall be in writing and shall explain the rationale for granting such permission.