

New York State Guidelines for Recording Custodial Interrogations of Suspects

Introduction

On a voluntary basis, where resources permit, law enforcement agencies around the State are embracing video recording of interrogations as an enhancement to the criminal justice system. Video recordings of interrogations are currently being conducted in over 30 counties in New York State, with more counties soon to join in. With additional funding and resources, the ability to conduct video recorded interrogations will grow throughout the State.

Purpose: The purpose of this policy is to establish broad guidelines for the electronic recording of suspects' statements in custodial interrogations and the associated use, management, storage and retrieval of such recordings. While these guidelines endorse the practice of recording custodial interrogations, they also recognize the dynamics of police work, field operations and suspect encounters. These guidelines provide latitude for officers in conducting interrogations at times that may not lend themselves to the availability of recording equipment.

Variations by County and Department: The guidelines are intended to allow for the individual needs of the 62 counties and over 550 police departments in New York State. Police and district attorneys are encouraged to modify these protocols to conform to their specific needs, while being mindful of the intent of the procedures. It is understood that significant resources are needed to video record custodial interrogations to cover, among other things, equipment, facilities, transcription, translation and storage.

Intent: It is expected that electronically recording custodial suspect interrogations will enhance the investigative process and assist in the investigation and prosecution of criminal cases. Critical evidence can be captured through the recording of interrogations. The recording will also preserve information needed regarding a person's right to counsel and the right against self-incrimination and it can be used to resolve a person's claim of innocence. Similarly, the electronic recording of custodial interrogations will assist in defending against civil litigation and allegations of officer misconduct.

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Definitions

1. **Custodial Interrogation:**
 - a. **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.
 - b. **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.
2. **Electronic Recording:** A digital, electronic video or other recording on electronic media.
3. **Electronic Media:** Video signals recorded on any of several storage media, including analog tape (VHS, S-VHS, Hi 8), digital recording (DVD) or other portable digital storage media (CD, MP3 player, hard drive, etc.).
4. **Subject:** The person being interrogated.
5. **Department:** The *(name)* Police Department.
6. **Members:** All sworn police officers of the *(name)* Department.
7. **Interview Room:** The room designated for the recording of interrogations. The equipment required in the room is specified in the "Equipment" section below.
8. **Qualifying Offense:** *(List crimes that the Department requires officers to record, at a minimum, if an interrogation is conducted).*

General

1. **When to Record:** All members of the *(name)* Department shall, whenever possible and practicable, utilize the electronic recording system located at *(location of interview room)* when conducting a custodial interrogation of someone suspected of committing a qualifying offense.
2. **When Recording may not be Practicable:** It is understood that recording may not always be possible. The following are some, but not all, of the practical reasons that may prevent a qualifying offense from being recorded:
 - a. Electronic recording equipment malfunctions.
 - b. Electronic recording equipment is not available, e.g., it is already in use.
 - c. Statements are made in response to questions that are routinely asked during the process of arresting a person.

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- d. Spontaneous statements are made that are not in response to police questioning.
 - e. Statements are made by the suspect at the time of arrest.
 - f. Statements are given in response to an interrogation at a time when the interviewer is unaware that a qualifying offense occurred.
 - g. Statements are made during an interrogation that is conducted at another location not equipped with recording devices, and the reasons for using that location are not to subvert the intent of this policy.
 - h. Statements are made at a location other than the interview room identified in these procedures because the defendant cannot be in the interview room, e.g., the defendant is out of the state, in a hospital or is in a correctional facility.
 - i. Statements are made after a suspect has made a documented refusal to participate in the interrogation if it is recorded and the officer has consequently turned off the recording equipment.
 - j. Inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel.
3. **Equipment in View vs. Hidden Equipment:** At the discretion of the Department, recorded interrogations can be done with the equipment in view or with the equipment hidden. The Department can decide whether or not to inform the suspect that the interrogation is being recorded. If the Department chooses to inform the suspect of the recording, it can be done in a number of ways, for example, by orally informing the suspect, by providing the suspect with written notice, or by posting signage in the interview room or in the police station. If the equipment is hidden and the subject asks if the interrogation is being recorded, the interrogating officer should answer truthfully and continue the interrogation.
4. **Field Interviews:** These guidelines are 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.
5. **Interrogation Methods:** Depending on the circumstances of the case, an interrogation can be conducted in a variety of ways to enhance the investigation and to protect the rights of the suspect. The use of pointed interrogations, accusatory questions, deception and other similar tactics are recognized as appropriate law enforcement techniques in interrogation, provided the tactics are not

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“fundamentally unfair” as defined by New York courts (*People v Tarsia*, 50 N.Y.2d 1, 11-12 [1980]). Note: Members should receive training to ensure that officers know how to conduct an interrogation. The entire interrogation, including the use of pointed questions, accusatory questions, deception and other similar tactics, must be recorded according to the Department’s video recording protocols.

6. **Juvenile Room:** So that juveniles (over seven and less than sixteen years old) and adults can be questioned in the interview room, the room may also be designated a juvenile room, where practical. To meet these criteria, the room must have been designated by the Chief Administrator of the Courts as a suitable place for the questioning of juveniles and it must comply with the requirements of the Uniform Rules for the Family Court, Part 205. Note: A juvenile room is not required for a person between thirteen and fifteen years of age who will be prosecuted as an adult in criminal court as a *juvenile offender*. CPL 1.20 (42) [defining “juvenile offender”].
7. **Search of the Suspect:** 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.
8. **Illegal Eavesdropping:** Members must avoid any circumstance where conversations are recorded in which a party is either unaware of or has not consented to the recording.
9. **Use of Translator:** If the subject requests a translator or if the officer deems that a translator is necessary, the officer will seek a translator, in conformance with the existing Department policy. Translators used during the interrogation will be identified on the recording by name and affiliation.

The Interrogation

Use of the Equipment

1. **Familiarity with the Equipment:** 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.
2. **Interview Room Setup:** Consideration should be given to pre-designating the locations within the room where the various parties should sit. In covert recordings, the suspect should, if possible, remain in a location that can be viewed by the camera. If the suspect moves around the room, the suspect could move out of camera range.

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3. **Disc Capacity:** Before the interrogation begins, the officer should make sure that there is enough capacity to record the entirety of the interrogation, e.g., enough DVD or disc space.
4. **Date and Time Stamping:** Date and time stamping of the electronic recording is encouraged. A clock can also be on the wall of the interview room and in view of the recording device.
5. **Problem with the Equipment:** 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.

Recording the Interrogation

1. **Location of Recording:** The interrogation should take place in the designated interview room, which is equipped for recording.
2. **Identify Participants:** The names of all of the parties present in the interview room during the interrogation should be documented.
3. **When to Start and End the Recording:** The recording equipment should be turned on prior to the subject being placed within the interview room and should only be turned off after the subject has left the room after the interrogation is completed. All discussions in the interview 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 interview room, recording devices can continue to operate without interruption. If the recording is temporarily stopped, the reason for stopping the recording and the duration should be documented.
4. **Hidden Equipment:** If the Department chooses to make the electronic recording equipment covert, the officer shall not inform the subject that the interrogation is being recorded, nor discuss the topic of recording unless the subject asks whether the interrogation is being recorded. If the subject does ask about recording, the interrogating officer should answer truthfully and continue the interrogation.
 - a. If the subject refuses to participate in the interview if it is being recorded, then the subject's refusal should be documented on the recording. If the subject insists that the recording be ended immediately, the subject's refusal should be documented in writing. The interview can then continue without the recording.
5. **Accommodations for Suspect:** Where possible, it should be made clear on the

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recording when a subject is or has previously been provided with food, drink, cigarettes, access to toilet facilities, etc.

6. **Written Statement:** After the subject of the 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.

Reading Miranda Warnings and Right to Counsel (*in Brief*)

1. **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 qualifying cases where the interrogation is to be recorded, all conversations that occur inside the interview room must be recorded, including pre-interrogation discussions and the administration of the Miranda Warnings.
2. **Invocation of the Right to Remain Silent:** A suspect has a Fifth Amendment right not to speak with the police; this right must be carefully honored. This right presents a choice which is the suspect's to make. However, for the invocation of this right to be effective, it must be unequivocally stated by the suspect, e.g., "I don't want to say anything." This means that if the subject definitely and unambiguously states that he or she does not want to speak with the police, the interrogation must end immediately.
3. **Invocation of the Right to Counsel:** A subject has a right to counsel and this right must be carefully honored. Whether or not to request the presence of counsel is the suspect's choice to make. However, for the invocation of this right to be effective, it must be unequivocally stated by the subject, e.g., "I want an attorney." This means that if the subject definitely and unambiguously states that he or she wishes to speak with an attorney, the interrogation must end immediately.
4. **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.
5. **Questioning a Juvenile and Simplified Miranda Warnings:** When questioning a

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juvenile, who will be prosecuted as a juvenile delinquent under the Family Court Act (over seven and less than sixteen years old), the interview should take place in a designated juvenile room. The officer should be aware of other considerations, including the parental notification requirements of Family Court Act Section 305.2 (applicable to the questioning of juvenile delinquents), and Criminal Procedure Law Section 140.20(6) (applicable to the questioning of juvenile offenders, who will be prosecuted as adults in criminal court). The officer may also consider using simplified Miranda Warnings when questioning a juvenile.

Preservation of Evidence and Discovery

1. **Labeling the Electronic Media:** After the 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.
2. **Copies:** Copies of the recorded interrogation should be made according to Department protocols.
3. **Storage of Electronic Media:** The original of the electronic media should be appropriately vouchered in accordance with Departmental evidence procedures.
4. **Retention of Original:** The original should be retained according to the Department's retention policy.
5. **Defense Request for a Copy of the Interrogation:** Any defense request for a copy of the interrogation should be referred to the District Attorney's office.
6. **No Alteration of the Original:** No person shall, in any manner or for any purpose, alter the original "master" electronic recording of a custodial interrogation.
7. **Dissemination:** Any dissemination of any recording shall be carried out according to documented Department rules and procedures.
8. **Viewing of the Electronic Media:** Policies for the viewing of recordings should be developed to allow for training, related investigations, quality control, supervision, and the like.
9. **Felony Interview Reporting Form** (*only for jurisdictions that use this form*): A Felony Interview Reporting Form must be completed indicating that a recording was made of a suspect's interrogation, even if the suspect only refused to speak on the recording. The form provides notice to the prosecutor about the existence of an audio/video recorded statement to ensure that the prosecution can provide adequate notice under Criminal Procedure Law Sections 710.30 and 240.20(1)(g).

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Failure to so notify the prosecution of the recorded interrogation could result in a court ruling prohibiting the use of the defendant's statements.

Equipment and Maintenance

Equipment and Maintenance:

(Provide information about the equipment to be used and how the equipment will be maintained)

Training:

Officers should be trained in how to use the equipment, as well as the procedures for conducting a recorded interrogation. Officers should be familiar with how to conduct an interrogation, as well as the suspect's right to counsel and the suspect's right to remain silent.