

EXHIBIT C

City of Buffalo

Department of Police

DETECTIVE DIVISION

Policy Regarding Recording Custodial Interrogations



Byron C. Lockwood

Commissioner of Police

Joseph A. Gramaglia

Deputy Police Commissioner of Patrol

Barbara A. Lark

Deputy Police Commissioner of Operations

Dennis J. Richards

Chief of Detectives

City of Buffalo

Department of Police

Policy Regarding Recording Custodial Interrogations

Acknowledgements

The New York State Division of Criminal Justice Services (DCJS) "Recording of Custodial Interrogations Model Policy," the District Attorneys' Association of the State of New York "Guidelines for Recording Custodial Interrogations," the New York State Association of Chief 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 policy.

The City of Buffalo and Buffalo Police Department acknowledged the extensive work done by the following associations and agencies:

New York State Division of Criminal Justice Services

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 Erie County District Attorney's Office

City of Buffalo Corporation Counsel's Office

I 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. The policy is intended to allow for the individual needs of 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. While this policy endorses the practice of recording custodial interrogations, it also recognizes the dynamics of police work, filed operations and suspect encounters. This policy is mindful of the benefits of recordings balanced with the overwhelming public policy demands upon the police in solving crimes. This policy provides latitude for officers in conducting interrogations at times that may not lend themselves to the availability of recording equipment.

II Policy

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.

III 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 these normally associated with arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.
- B. **Electronic recording:** A digital, electronic video or other recording on electronic media.
- C. **Electronic media:** Video signals recorded on any of several storage media, including, but not limited to, analog tape (VHS, S-VHS, Hi 8), digital recording (DVD) or other portable digital storage media (CD, MP3 player, hard drive, etc.).
- D. **Recording room:** For the purpose of this policy includes any designated room outfitted with audio-video recording equipment, and any police vehicle similarly equipped.

IV Qualifying Offenses

- A. Whenever possible and practicable, 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 B violent felonies codified in Section 125 of the New York State Penal Law;
 - 3. All B violent felonies codified in Section 130 of the New York State Penal Law.

- B. Nothing in this policy prohibits the use of electronic recording equipment for any other interview or offense at the discretion of the police department.

V Exceptions

It is understood that recording may not always be possible. The following are some, but not all, of the practical reasons that may prevent an interrogation 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.
- 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 a custodial interrogation at a time when the interviewer is unaware that a qualifying offense occurred.
- G. Statements are made during a custodial 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 during a custodial interrogation at a location other than the recording room identified in these procedures because the defendant cannot be in the recording 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.
- J. Inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel.

VI 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.

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 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 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:** So that juveniles (over seven and less than sixteen years old) and adults can be questioned in the recording *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 22 N.Y.C.R.R. 205.20. 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"].

When questioning a 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 and the requirement that the parent or guardian of the child 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 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 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.
- 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 recommences 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.
- D. Acknowledgement of Provisions to Subject:** Where possible, it should be made clear on the recording when a subject is or had 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 noted according to Department protocols.
- 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:** A "master" copy of the interview shall be made and labeled "master" with the case file number and name and will be preserved at the Buffalo Police Department Crime Scene Unit Officer. The designee(s) who made or makes said copy shall ensure that a proper copy was made and that there are no deletions, audio or video malfunctions on the master copy. A second copy will be kept in the Detectives office case file folder. Copies shall be made available to the Erie County District Attorney's office upon their request. Any defense request for a copy of the interrogations 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 be documented Department rules and procedures.
- 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 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.
- G. **Documenting All Interrogations/Interviews:** All interrogations/interviews whether recorded or not are to be documented on a master log in the Detective's office for recording purposes.
- H. **Maintaining the Recordings:** The recorded material will be maintained for a period of at least 30 days or longer so long as there is sufficient room on the hard drive for additional copies are made with no deletions or audio/video interruptions or malfunctions. This must be verified at the time of the copy process which is to be done after the completion of the interview.