

# Truro Police Department

## ELECTRONIC RECORDING OF INTERROGATIONS / INTERVIEWS

*Policy Number: OPS-6.02.1*

*Effective Date: August 21, 2005*

**REFERENCE:**

*Revised Date: August 10, 2008*

*Accreditation Standards:*

*Mass. Gen. Law: Chap. 90, Sec.22B, MRCP 14(a)(1)(A)(viii)*

*Other: Comm. v. DiGiambattista, District Attorney's Guidelines on Identification Procedures*

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### I. GENERAL CONSIDERATIONS AND GUIDELINES

In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), the Supreme Judicial Court held that if the prosecution introduces a confession or statement that the police obtained during an interrogation of a defendant who was either in custody or at a "place of detention," and the police did not electronically record the statement, the defendant is entitled to a cautionary jury instruction. Upon the defendant's request, the judge must instruct the jury that "the State's highest court has expressed a *preference* that such interrogations be recorded whenever practicable and . . . that, in light of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care." This jury instruction is required regardless of the reason that the police did not record the interrogation.

Officers should be mindful of the 6 Hour Rule, which came about under *Comm v. Roasario*, 422 Mass 48 (1996). This states the police have 6 hours from the time of arrest to interview someone. This prevents unlawful detention and improper pressure. (*Added August 1, 2008*)

### II. POLICY

It is the policy of the department, whenever it is practical, to electronically record all interviews of witnesses and victims, and custodial interrogations of suspects or interrogations of suspects conducted in places of detention.

### III. DEFINITIONS

For the purpose of this policy, the following words and phrases are defined as follows:

- “custody” means circumstances in which a reasonable person would believe that his or her freedom of action has been curtailed such that he or she is not free to leave;
- “electronic recording” means preservation by analog (audio and/or VHS videotape) or digital (digital audio tape, CD and/or DVD non-rewritable discs) means through the use of audio or audio/video recording equipment;
- “interrogation” occurs when a law enforcement officer’s questions, actions or words (other than those normally attendant to arrest and custody), are reasonably likely to elicit an incriminating response from a suspect;
- “place of detention” means a police station and/or a secure facility where persons may be held in detention in relation to a criminal charge(s); and,
- “suspect” means a person who has either been charged with a crime or a person for whom there is a reasonable basis to believe that he or she may in the future be charged with a crime.
- Witnesses, victims and other persons who provide information to a law enforcement officer are not considered suspects unless and until there develops a reasonable basis to change their status.

### IV. PROCEDURES FOR THE INTERVIEW ROOM *(Revised 04-30-08)*

- A. The investigators office is to be used for both custodial and non-custodial interviews, and NOT to be used as a temporary detention area.
- B. Arrested subjects may be subject to wear restraints depending on their demeanor and officer’s discretion.
- C. All interviews will normally be conducted with no more than 2 officers in the room. One officer should conduct the interview and a second shall monitor the interview from the adjacent Sergeants office, where the monitor and recording equipment are located.
- D. To ensure the safety of everyone, all subjects will be searched prior to entering the interview room. ***Officers will secure their firearm prior to entering the room, and after searching the subject.***

- E. If assistance is needed in the interview room, the officer should indicate this by asking for assistance. The officer in the Sergeants office shall respond to aid the interviewing officer. Additional assistance shall be rendered as requested.
- F. As the Investigators office is also the interview room, common office products, apparatus and furniture is located therein.
- G. Access to restrooms, water or comfort breaks will be made available as needed. Such activities will require the officer to escort the interviewed individual to such amenities as needed.
- H. Communications shall constantly monitor the interview room as an added measure of safety, except if directed differently by the officer in charge of the incident.
- I. Subject(s) should not be left alone at any time while in the interview room.

#### V. PROCEDURES CONCERNING THE INTERVIEW

- A. **Applicability.** These guidelines require officers to record, whenever it is practical, two types of interrogations: (1) custodial interrogations of suspects, and (2) interrogations of suspects occurring at places of detention. It also covers interviews of witnesses and victims.
- B. **Wiretap Violations.** The Massachusetts wiretap statute, G.L. c. 272, §99, generally prohibits anyone from secretly recording another person's oral statements. Accordingly, unless one of the narrow exceptions in the wiretap statute applies, a law enforcement officer who electronically records a suspect's interrogation must do either of the following:
  - notify a suspect, witness and victim that his or her statements are being recorded, or
  - conduct the interview/interrogation in such a way that it is obvious to the suspect/witness/victim that his or her statements are being recorded.

Once the suspect/witness/victim knows or reasonably should know that he or she is being recorded, the law enforcement officer may record the interrogation or interview without asking for or receiving explicit consent to do so.

- C. **Creating a Clear and Complete Record.** To the extent it is practical, the officer should electronically record the entire interrogation of a suspect or interview of a witness/victim. To assist in the creation of the record, officers should do the following:

- Start the recording device.
  - Inform the suspect/victim or witness that he or she is being recorded.
  - State the date, time, location and names of persons present. If a video recording device is used which imprints the time on the tape or disk, verify that the correct time is displayed.
  - State the full name of the suspect/victim/witness.
  - Execute appropriate departmental forms including but not limited to *Miranda* warning and waiver, and waiver of prompt arraignment (if applicable).
  - If the officer must suspend the recording for any reason, he or she should record the reasons for stopping (*e.g.*, taking a break or a malfunction), the time the recording device is turned off, the time it is turned back on, and what transpired while the recording device was turned off.
  - If the officer uses or refers to documents or other items during the interrogation, the officer should describe those documents or items on the record and mark them with a unique number (similar to an exhibit number at trial) and the officer's initials. If the officer is unable to write on the actual document or item, the officer may write on a bag, envelope or case in which the document or item is placed or on a piece of tape attached to the document or item.
  - Conclude the recording by stating the date and the time the interrogation or interview is completed.
- D. Subject refuses to be Recorded.** If a suspect/victim/witness refuses to make a recorded statement, the officer should record the refusal (if it is practical) and document it on a refusal form. (A refusal form is attached hereto).
1. Subject refuses before the recording device is turned on. If the subject refuses to be recorded before the recording device is turned on, the officer should, if it is practical, turn on the recording device to record the refusal.
- The officer should identify himself or herself and the subject, state the date, time and location, inform the suspect of any applicable rights if any (such as *Miranda*), and inform the suspect that there are potential benefits to recording the interrogation/interview, including the fact that a recording will create a clear and complete record of what was said to the suspect, and what the suspect said during the interrogation/interview.

- The officer should then ask the subject on the record if he or she is willing to make an electronically recorded statement.
  - The officer should advise the subject that if at any time he or she changes his or her mind and decides that he or she does want the interview to be recorded, he or she should let the officer know and the officer will turn on the recording device.
  - If the subject still refuses, the officer should turn off the device, execute a signed refusal form, and proceed with the interview.
2.     Subject refuses to have his or her refusal recorded.
- The officer should advise the subjects of the benefits of recording, execute a signed refusal form, and proceed with the interview.
3.     Subject refuses after the recording device has been turned on.
- If, during the course of a recorded interview or interrogation, a subject decides that he or she will no longer answer questions unless the recording device is turned off, the officer should again advise the subject of the benefits of recording the interrogation or interview.
  - If the subject still refuses, the officer should conclude the recording by stating the date/time and the reason.

**E. Discretionary Decision not to Record.** An officer may decide not to record an interrogation/interview even where it is practical to do so if that officer reasonably believes that recording the interrogation/interview will jeopardize the safety of an officer, the subject, or any other person.

- If an officer decides, without conferring with the subject, that it is unsafe under the circumstances to record the interview/interrogation, the officer should document in his or her interview or case report the reason(s) why the interrogation/interview was not recorded.
- If, after conferring with the subject, an officer decides that it is unsafe under the circumstances to record the interview/interrogation, the officer should nonetheless advise the subject of the benefits of recording the interrogation. If the subject still does not want the interrogation/interview to be recorded, the officer should document in his or her interview or case report the reason(s) why he or she did not record the

interrogation/interview, execute a signed refusal form, and proceed with the interview.

- F. Recording Devices.** Officers will only use the device located in the Investigators office.
- G. Recording Device Malfunctions.** If the recording device malfunctions, the officer conducting the interrogation/interview must make a decision whether and how to continue the interrogation/interview, and he or she must document what occurred.
- If the recording device can be restarted, the officer should state on the record that the device malfunctioned, how long the device was not working, and whether or not the subject made any statements that were not recorded.
  - If the recording device cannot be restarted, the officer should include in his or her interview or case report the fact that the device malfunctioned and whether or not the subject made any statements that were not recorded.
  - If the recording device cannot be restarted, the officer should advise the subject, and should continue the interrogation without a recording device. Arrangement can be made to suspend the interrogation/interview until an operable recording device is available.
  - If the subject consents to continuing the interrogation without a recording device, that consent and the interrogation/interview should be documented in some manner, such as in a signed statement by the subject or in the officer's interview or case report.
- H. Inoperable or Unavailable Recording Device.** If there is no recording device available or the recording device is inoperable, the officer may defer the interrogation/interview until an operable recording device can be obtained.
- If it is impractical to defer the interrogation or interview, and the subject consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed statement by the subject or in the officer's interview or case report.
- I. Preservation and Copying of Original Recordings.** The officer who conducted the interrogation must take steps to preserve the original recording. The storage medium should be removed from the recording device, clearly labeled, and appropriately stored. If the interrogation is recorded digitally, the officer should preserve a whole copy which must be clearly labeled and appropriately stored.

- To the extent it is practical; statements from multiple subjects should not be recorded on the same disk.

**J. Storage.** The officer that conducted the interrogation shall preserve all written forms and notes or records of all statements by a subject that were not electronically recorded in the original case file. The recording will be entered into the computer as evidence.

All electronically recorded interrogations and interviews shall be preserved according to the records retention law and department policy as evidence. The original storage device shall be labeled as such and any copies labeled as such. Each original and copy shall be authenticated by the interrogator with the following information:

- Date and time of recording;
- Location of the interview/interrogation;
- Name of person interviewed/interrogated;
- Name of person(s) conducting the interview/interrogation; and
- Departmental incident number.

**ELECTRONIC RECORDING INTERVIEW FORM**

It is the preference of the Massachusetts courts that interviews be electronically recorded. The police will electronically record your interview unless you refuse to be recorded. If you refuse to be recorded, you may at any time request that your interview be recorded.

\_\_\_\_\_ I agree to have my interview electronically recorded.

\_\_\_\_\_ I decline to have my interview electronically recorded. I understand that my interview will be recorded if, at any time, I request that it be recorded.

\_\_\_\_\_  
Signature Date & Time

\_\_\_\_\_  
Witness Date & Time

\_\_\_\_\_  
Witness Date & Time

\_\_\_\_\_ Having initially declined to have my interview recorded, I now choose to have the remainder of my interview electronically recorded.

\_\_\_\_\_ Having initially agreed to have my interview recorded, I now decline to have the remainder of my interview recorded.

\_\_\_\_\_  
Signature Date & Time

11/6/04

*Initial in space below when each item is accomplished. (Use N/A when not applicable).  
Include in folder when complete.*