

Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices, and Policies

One of the most useful innovations in criminal investigations is the ability to electronically record custodial interrogations. A complete record of an interrogation, from *Miranda* warnings through the conclusion, not only provides prosecutors, defense lawyers, and juries with complete and objective evidence of the interrogation, it also protects police officers from false claims of abuse. Recorded interrogations further serve as a first line of defense against false or coerced confessions. About 25% of the 242 exonerations revealed through post-conviction DNA testing have involved a false confession, indicating that the problem is not as uncommon as the average person (and potential juror) may believe it to be. Confessions are often the most powerful evidence against the defendant; juries will sometimes convict based on a confession alone. Because confessions hold so much weight with juries, we must take steps to ensure that jurors have complete and accurate records of the entire interrogation in order to weigh the evidence effectively.

Several states, for example Alaska, Minnesota, New Jersey, New Mexico, Maine, Wisconsin and Illinois, have mandated recording of custodial interrogations, but Texas has not. Texas statute does address statement evidence, however, and there is some confusion about legal requirements for documenting custodial interrogations versus statement evidence in Texas. To help clarify the statutes, practices, and policies in Texas, we analyze below the existing statute and compare anecdotal evidence of recording with the written recording policies of the largest municipalities and counties in the state.

Section 3 of Article 38.22 of the Texas Code of Criminal Procedures (CCP) states that “no oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless: (1) an electronic recording, which may include motion picture, video tape, or other visual recording is made of the statement.” It goes on to state that the accused must be read their rights and voluntarily waive those rights, that the recording must be accurate, that all voices on the recording must be identified, and that the defendant’s attorney must be provided with a complete copy of the recording. Statements that contain “assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused” are also admissible, whether or not they have been recorded.

Although upon first glance it may seem as though the existing Texas statute mandates recorded interrogations, the key to understanding the statute is the phrase “statement of an accused made *as a result of* custodial interrogation.” In other words, the only component of an interrogation

that must be recorded in order to be admissible is the final statement, or the confession itself. Even then, only “oral or sign language statements” must be recorded. Signed written statements, which are overwhelmingly relied upon, have no electronic recording requirement whatsoever. While recording of oral confessions is of some value because it presents the jury with the suspect’s final statement, it can also be misleading because it does not show jurors all of the conversation and questions that lead up to that statement; recording confessions without the interrogations that led to them provides statements that may be taken dangerously out of context.

A second statute, Section 51.095 of the Family Code, regulates the admissibility of a statement of a child. The Family Code offers slightly more protection for juveniles than the CCP and indicates that statements made by juveniles are admissible if they are made in writing after a magistrate is satisfied that the child understands his or her rights, if statements are made orally regarding circumstances that are found to be true, if the statement was *res gestae* of the delinquent conduct, if the statement is made in open court or before a grand jury, or if the statement is made orally and electronically recorded while the suspect is in custody. The Family Code, like the CCP, however, does not require that complete interrogations be recorded. The Code only states that confessions must be recorded and deemed voluntary by a magistrate. Juvenile suspects are even more vulnerable than their adult counterparts and require the protections that are afforded by “stem to stern” recording of custodial interrogations.

Despite the minimal recording requirements of the CCP and the Family Code, many people assume that law enforcement agencies in Texas generally do record interrogations (either video or audio) for a variety of crimes. To help better understand the prevalence of recording, The Justice Project recently surveyed Texas law enforcement agencies (numbering 1034 total departments) regarding their custodial interrogation recording practices. The results demonstrate that a majority of respondents do record interrogations at least some of the time. Of the 441 responses received by The Justice Project, 380 departments indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator.

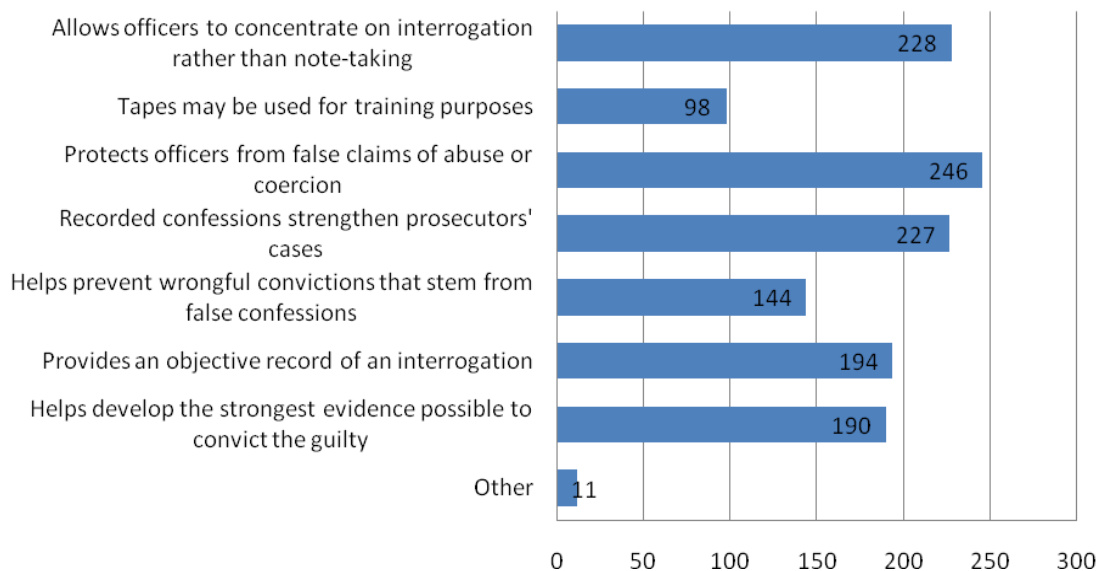
The fact that so many departments already record interrogations does much to dispute the standard arguments against recording. For example, although cost of implementation is of concern, there are at least 380 departments in the state that already have appropriate recording equipment installed and make use of it without significant financial hardship. Departments that have not recorded in the past are also generally concerned about storage issues, but we can draw upon the experiences of departments that do record to share solutions to any storage issues that cannot be solved through digital, computer-based archives. Finally, police and prosecutors that have not entered recorded interrogations into evidence sometimes believe that jurors will react negatively to the interrogation techniques they view or hear on tape, or that suspects will refuse to talk if they are being recorded. The large number of law enforcement agencies that record, however, indicates that those departments find recording to be helpful rather than harmful to investigations.

When specifically asked their reasons for recording custodial interrogations, 246 departments (over 64%) indicated that recording interrogations protects officers from false claims of abuse or coercion and strengthens prosecutors’ cases. Recording also serves a practical purpose as 228

(60%) of respondents who record interrogations indicated that it allows officers to focus on the interrogation itself, rather than note-taking (see the full results in the table below).

Clearly, many Texas police departments have demonstrated that electronic recording is a practical and valuable law enforcement tool that helps to build the best evidence possible.

Why Many Texas Departments Record



The many benefits to law enforcement identified in our survey align with other research that shows that police officers with experience recording interrogations overwhelmingly endorse it as an effective law enforcement tool. In light of these encouraging findings, the State of Texas should ensure that all departments record custodial interrogations and provide resources to departments to help them start or expand their recording practices.

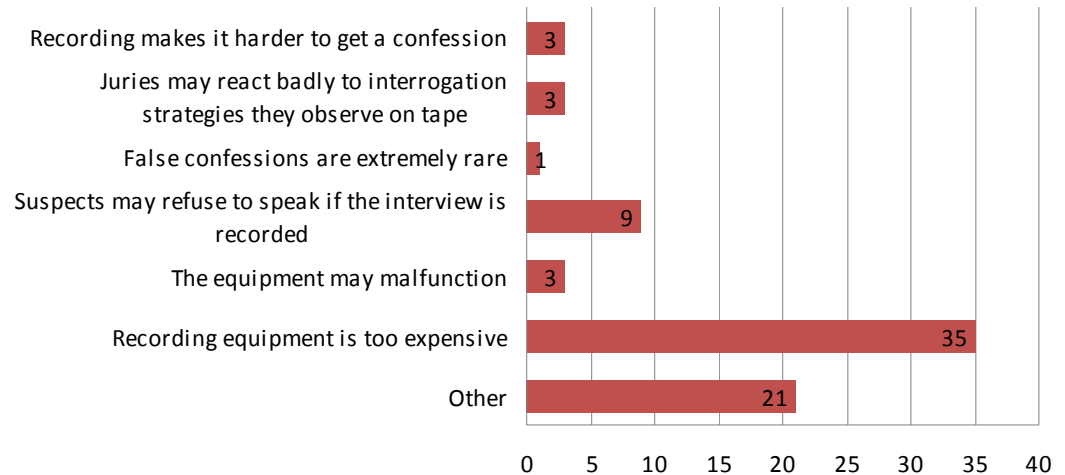
Of the 61 departments in the survey who indicated that they do not record custodial interrogations, 35 (57%) of them indicated that they do not record because recording equipment is too expensive. When asked if financial assistance to obtain recording equipment and training would lead them to start or expand recording practices, about 79% of respondents indicated that it would.

While cost is a legitimate concern, the benefits of recording far outweigh the minimal costs because the technology available today is very inexpensive, and many departments already have the necessary technology in place. Providing the option of audio recording in particular ensures that no department will have to bear major costs to implement a recording policy. Digital audio recorders can be purchased for well under \$100 and only require a computer for storage. Audio files can be backed up with other law enforcement data through existing procedures.

The Texas criminal justice system could reap huge rewards from this small investment. For example, by creating a comprehensive, reviewable record of interrogations, defense motions to suppress confessions are reduced and are more efficiently adjudicated. Appropriate plea deals

are also more likely to be reached when interrogations are recorded, further enhancing judicial efficiency.

Why Some Texas Departments Do Not Record



Some responses to the survey (see the full list of responses in the table above) identify reasons for not recording that are at odds with the positive experiences of many departments across the country that do. This is cause for concern as several of the wrongful convictions reversed through DNA testing in Texas have resulted from false confessions. The false confession of Christopher Ochoa, for example, was not only used to wrongly imprison him, but it was also the key piece of evidence used to convict his friend, Richard Danziger, in a 1990 murder and sexual assault case. They each spent over a decade in prison before DNA testing revealed the true perpetrator. During the trial, the jury was not presented with the 20-hour interrogation that led to Ochoa’s false confession, and this played a major role in their deliberations. As one juror stated to The Justice Project, “I think we should hear how that testimony came about because we had no choice with what we heard. . . . And I was uneasy about the verdict, but if you believed what you were hearing, and it was hard not to, you had to find him guilty.” A documented account of the interrogation and confession would have given the jurors an opportunity to evaluate the evidence in the case rather than accept it at face value.

Because confessions hold so much weight with the jury, we must take steps to ensure that the confessions used to convict individuals are not false confessions. By requiring all felony custodial interrogations to be recorded, the State of Texas protects officers and innocent suspects and strengthens the quality of evidence presented at trial. An objective record of the interrogation strengthens a prosecutor’s case, and it provides the jury with a clear and complete picture of the evidence that they rely upon to determine guilt or innocence.

Although there is evidence that many law enforcement agencies across Texas do electronically record custodial interrogations at least some of the time, it is often an optional practice rather than a formally stated policy. The policies themselves frequently instruct officers only to comply with the Code of Criminal Procedure—a practice that limits recording to a confession

statement rather than an interrogation in its entirety, and which is only required if there is no written statement signed by the defendant. Because most confessions are obtained in the form of a signed written statement, even this modest protection seldom applies.

In 2009 The Justice Project submitted a request under the Texas Public Information Act to the most populous municipalities and counties in Texas to provide any policies regarding electronic recording of interrogations. Below is a summary of existing policies provided by the departments.

- **Amarillo Police Department:** The Amarillo Police have several rooms that are equipped with recording technology. While its policy states that the equipment is “ready to record when needed,” it does not provide any direction on when to begin and end the recording or which investigations require recorded interrogations. There is a clear protocol for electronically recording DWI arrest and booking procedures.
- **Arlington Police Department:** Arlington PD does not require or provide for electronic recording of custodial interrogations. The policy merely states that written statements must be produced using the appropriate department format and procedure.
- **Austin Police Department:** Austin Police policy states that whenever possible, personnel will record interrogations and interviews by audio and/or video recording.
- **Bexar County Sheriff’s Office:** The department does not require or provide for electronic recording of custodial interrogations. Statements by suspects or witnesses may be video or audio recorded at the discretion of a supervisor.
- **Corpus Christi Police Department:** Department policy states that recorded interviews are the preferred format for documenting interrogations; however, officers may also use audio and written statements unless specifically prohibited from doing so.
- **Dallas Police Department:** Dallas does not have any departmental policies, procedures, or general orders in place that require electronic recording of custodial interrogations. The department does have monitored interview/interrogation rooms that detectives are encouraged to utilize for prisoner interrogations whenever available. Thus there is routine recording, but no policy that requires it.
- **Dallas County Sheriff’s Department:** The Dallas County Sheriff’s Department does not have any departmental policies, procedures, or general orders regarding recording of custodial interrogations (audio or video). Money has been budgeted for video and audio equipment to be installed in their interrogation rooms, and policies and procedures will be in place for 2010.
- **El Paso County Sheriff’s Office:** The policy merely states that all oral statements must be documented in accordance with the Code of Criminal Procedures.

- **El Paso Police Department:** The department’s policy states that confessions should be recorded in accordance with the Code of Criminal Procedures. A subsection of the policy, however, provides for a more robust recording to be made. EPPD officers must record *Miranda* warnings prior to the initiation of the interview, and the policy instructs officers to identify any new person who enters the room, explain any reasons why the recording is stopped, and clearly state that the interview has ended prior to shutting off the equipment. Although the department cites the requirements of the CCP, its policy takes steps beyond the minimum legal requirements.
- **Fort Worth Police Department:** FWPD has no written departmental policies or procedures regarding the recording of custodial interrogations. There is a clear protocol for electronically recording DWI arrest and booking procedures.
- **Garland Police Department:** GPD merely states that recording of confessions/statements of any defendant must comply with the Code of Criminal Procedure.
- **Harris County Sheriff’s Department:** The department’s policy simply states that “a written statement taken from a suspect shall be recorded on an approved statement form,” indicating that the Harris County Sheriff’s Department relies upon written, rather than electronically recorded, statements.
- **Houston Police Department:** HPD policy states that interviews may be recorded at the discretion of the investigator. Videotaped confession statements are the preferred format.
- **Irving Police Department:** Irving requires all personnel to be trained on the operations of recording equipment used in the interview rooms. The policy states: “The recording equipment will be activated prior to the start of the interrogation/interview and will record continuously until the end of the interview.”
- **Laredo Police Department:** Laredo Police policy merely instructs officers to comply with provisions in the Code of Criminal Procedures for oral and written statements.
- **Lubbock Police Department:** Lubbock Police have no written departmental policies or procedures regarding the recording of custodial interrogations.
- **Pasadena Police Department:** Pasadena policy states that the interview/interrogation should be videotaped. Officers are advised that proper forms must be utilized when the interview leads to a written confession.
- **Plano Police Department:** Plano has no written departmental policies or procedures regarding the recording of custodial interrogations.
- **San Antonio Police Department:** Although SAPD only requires basic compliance with the CCP in adult criminal cases, the policy states that the “electronic recording of

juvenile suspects will commence at the beginning of the interrogation process and end after a statement is complete.”

- **Tarrant County Sheriff’s Office:** Tarrant County Sheriff’s Office has no written departmental policies or procedures regarding the recording of custodial interrogations.
- **Travis County Sheriff’s Office:** Travis County Sheriff’s Office has no written departmental policies or procedures regarding the recording of custodial interrogations.

The policies above demonstrate that there is great inconsistency in how electronic recording is conducted across Texas jurisdictions. While protection is afforded to police officers and suspects in some municipalities and counties, it is absent in others. This is problematic because it places innocent suspects and police officers at undue risk, and it overlooks the positive feedback that recording has received from law enforcement agencies around the nation. For example, police departments that do record interrogations reported to the National Institutes of Justice that the policy is useful and that recording increases the quality and quantity of incriminating evidence available at trial. Combined with the ability to prevent wrongful convictions and the added benefits to public safety when the correct perpetrators of crime are tried and convicted, electronic recording of custodial interrogations is the only responsible and just course of action to follow in Texas. For minimal financial costs, we regain the integrity of the criminal justice system that is lost through false confessions and wrongful convictions. With mandated recording of custodial interrogations, the State of Texas will establish itself as a leader in the effort to modernize and legitimize the criminal justice system.