

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Policy Number 10087.1: Electronic Recording of Custodial Statements in Federal Criminal Investigations

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Superseded: None
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- 1. Purpose/Background.** On May 12, 2014, the Department of Justice (DOJ) issued the “Policy Concerning Electronic Recording of Statements” (DOJ Recording Policy), which established a presumption that statements made by individuals in federal custody would be electronically recorded in an effort to ensure accountability and promote public confidence in the institutions and processes that guide federal law enforcement efforts. Subsequently, the U.S. Department of Homeland Security (DHS) issued Policy Statement, “Policy Concerning Electronic Recording of Statements in Federal Criminal Investigations” (DHS Recording Policy), which was derived from the DOJ Recording Policy.

This Directive implements the DHS and DOJ guidance to establish a presumption that U.S. Immigration and Customs Enforcement (ICE) criminal investigators will electronically record statements made by individuals in their custody in connection with a federal criminal investigation.

- 2. Policy.** This policy establishes a presumption that custodial statements of an individual taken by an ICE criminal investigator in a place of detention with suitable recording equipment, following arrest for a federal crime but prior to initial appearance, will be electronically recorded, subject to certain exceptions.

This policy only applies to interviews of persons in ICE custody for the commission of a federal criminal offense. Interviews in non-custodial settings or of individuals in civil or administrative custody are excluded from the recording presumption. This presumption does not apply outside of the United States.¹

This policy encourages ICE criminal investigators to consider, in consultation with federal prosecutors, electronic recording in investigative or other circumstances related to criminal investigations where the presumption does not apply.

All approvals, procedures, and legal guidance applicable to interviews in general, e.g., voluntariness, compliance with *Miranda*, and contact with represented persons, shall continue to apply to the electronic recording of custodial interviews. However, covert

¹ The decision whether to record an interview outside of the United States should be the subject of consultation between the criminal investigator and the prosecutor.

recording in fulfilling the requirements of this policy may be carried out without constraint by the procedures and approval requirements prescribed by ICE, DHS, or DOJ policies concerning consensual monitoring, including the Attorney General memorandum, "Procedures for Lawful, Warrantless Monitoring of Verbal Communications," dated May 30, 2002. Absent actual notice to the interviewee that the interview is in fact being recorded, recorded custodial interviews are considered covert.

A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the ICE criminal investigator in a Report of Investigation (ROI) providing a justification why the interview was not recorded as soon as is practicable. Such documentation shall be made available to the federal prosecutor, if requested.

This Directive is intended to be consistent with the DHS and DOJ Recording Policies, respectively.

- 3. Definitions.** The following definitions apply for purposes of this Directive only.
- 3.1 Criminal Investigator:** ICE employees in the GS-1811 job series and those so designated by those responsible for ensuring compliance with the provisions of this Directive.
- 3.2 Custodial Interviews:** Interviews that take place following arrest but prior to an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.
- 3.3 Place of detention:** Any structure where persons are held in connection with federal criminal charges where those persons may be interviewed. This includes not only federal facilities but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.
- 3.4 Suitable recording equipment** in a place of detention owned or controlled by DHS or any of its Components means:
- 1) An electronic device suitable for the recording of interviews;
 - 2) That is reasonably designed to capture electronically the entirety of the interview;
 - 3) Is not "dual-use" equipment, such as laptops or tablets, or any other devices that are not primarily electronic recording devices; and
 - 4) Is not an ICE-issued cell phone or personally owned equipment.

The use of any covert audio or video recording equipment currently utilized to support covert investigative activities is prohibited for custodial interviews without the prior approval of the Technical Operations Unit Chief for their respective program areas.

An ICE supervisor will determine on a case-by-case basis whether recording equipment in a place of detention not owned or controlled by DHS or one of its Components is suitable for recording interviews.

- 3.5 Covert recording:** Occurs when the interviewee (1) is not advised that the interview is, or will be, recorded; (2) does not inquire as to whether the interview will be recorded; and (3) the recording device used to capture the conversation is hidden or concealed. Covert recording constitutes consensual monitoring, which is allowed by federal law in accordance with Title 18, United States Code (U.S.C.), Section 2511(2)(c).
- 3.6 Overt recording:** Occurs when the interviewee (1) is advised that the interview is or will be recorded, or (2) is otherwise clearly aware that the interview is in fact being recorded, e.g., visible recording device is placed in front of individual.
- 4. Responsibilities.**
- 4.1 The Executive Associate Director of Homeland Security Investigations (HSI) is responsible for:**
- 1) Ensuring compliance with the provisions of this Directive within HSI; and
 - 2) Developing, in coordination with OTD, mandatory training for HSI Special Agents.
- 4.2 The Assistant Director of the Office of Professional Responsibility (OPR) is responsible for:**
- 1) Ensuring compliance with the provisions of this Directive within OPR; and
 - 2) Developing, in coordination with OTD, mandatory training for OPR Special Agents.
- 4.3 The Assistant Director of the Office of Training and Development (OTD) is responsible for assisting HSI and OPR in the development and delivery of training on the provisions of this policy.**
- 5. Procedures/Requirements.**
- 5.1 Scope of Recording.** The recording must begin as soon as the subject enters the interview area or room and continue until the interview is completed. Video recording is encouraged, but audio recording may be used when suitable video recording equipment is not available. Recording may be overt or covert.

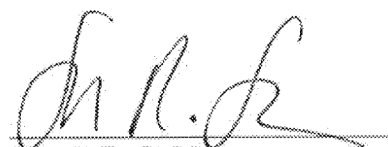
- 5.2 Retention and Storage of Electronic Recording.** Retention and storage of the electronic recording of custodial interviews for open cases will be handled in accordance with HSI's and OPR's policies on evidence handling. The General and DHS Records Schedule retention and storage guidelines will be followed for closed cases.
- 5.3 Training.** HSI and OPR will work with OTD to develop and implement training on the provisions of this policy. All criminal investigators will be required to complete a one-time training on the recording policy.
- 5.4 Exceptions to Recording.** Exceptions to mandatory recording of post-arrest custodial interviews are permitted when:
- 1) *Refused by the interviewee.* If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to provide a statement but only if it is not electronically recorded, then a recording need not take place.
 - 2) *Public safety and national security exception.* There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*, 467 U.S. 649 (1984). The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security. Recording is not prohibited under any of the circumstances covered by this exception, and the decision whether or not to record should wherever possible be the subject of consultation between the ICE criminal investigator and the federal prosecutor.
 - 3) *Recording is not reasonably practicable.* Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or the need for multiple interviews in a limited timeframe exceeding the available number of recording devices.
 - 4) *Residual exception.* The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.
- 6. Recordkeeping.** Recordings of custodial interviews should be controlled, stored, handled, transmitted, distributed, and disposed of in accordance with the DHS and ICE Records Schedules; DHS Management Directive 11042.1, "Safeguarding Sensitive but Unclassified (For Official Use Only) Information," dated January 6, 2005 or as updated; and ICE Directive 4003.2, "Safeguarding Law Enforcement Sensitive Information," dated May 20, 2014, or as updated.

7. Authorities/References.

- 7.1 DHS Policy Statement 047-03, Policy Concerning Electronic Recording of Statements in Federal Criminal Investigations, Effective March 29, 2016.
- 7.2 DOJ, Policy Concerning Electronic Recording of Statements, May 12, 2014.
- 7.3 Attorney General memorandum, "Procedures for Lawful, Warrantless Monitoring of Verbal Communications," dated May 30, 2002.
- 7.4 18 U.S.C. § 2511(2)(c).
- 7.5 Interviewing Techniques Handbook (OI HB 10-03), dated April 28, 2010, or as updated.
- 7.6 Technical Operations Handbook (HSI HB 14-04), dated July 21, 2014, or as updated.
- 7.7 Evidence Handbook (HSI HB 15-05), dated November 9, 2015, or as updated.
- 7.8 OPR Guidebook.
- 7.9 *New York v. Quarles*, 467 U.S. 649 (1984).

8. Attachments.

- 8.1 DHS Policy Statement 047-03, Policy Concerning Electronic Recording of Statements in Federal Criminal Investigations, Effective March 29, 2016.
- 8.2 DOJ, Policy Concerning Electronic Recording of Statements, May 12, 2014.
- 9. **No Private Right.** These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.



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