

## State of California

### PENAL CODE

#### Section 859.5

---

859.5. (a) Except as otherwise provided in this section, a custodial interrogation of any person, including an adult or a minor, who is in a fixed place of detention, and suspected of committing murder, as listed in Section 187 or 189 of this code, or paragraph (1) of subdivision (b) of Section 707 of the Welfare and Institutions Code, shall be electronically recorded in its entirety. A statement that is electronically recorded as required pursuant to this section creates a rebuttable presumption that the electronically recorded statement was, in fact, given and was accurately recorded by the prosecution's witnesses, provided that the electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible.

(b) The requirement for the electronic recordation of a custodial interrogation pursuant to this section shall not apply under any of the following circumstances:

(1) Electronic recording is not feasible because of exigent circumstances. An explanation of the exigent circumstances shall be documented in the police report.

(2) The person to be interrogated states that he or she will speak to a law enforcement officer only if the interrogation is not electronically recorded. If feasible, that statement shall be electronically recorded. The requirement also does not apply if the person being interrogated indicates during interrogation that he or she will not participate in further interrogation unless electronic recording ceases. If the person being interrogated refuses to record any statement, the officer shall document that refusal in writing.

(3) The custodial interrogation occurred in another jurisdiction and was conducted by law enforcement officers of that jurisdiction in compliance with the law of that jurisdiction, unless the interrogation was conducted with intent to avoid the requirements of this section.

(4) The interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed murder for which this section requires that a custodial interrogation be recorded. If during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that murder has been committed, continued custodial interrogation concerning that offense shall be electronically recorded pursuant to this section.

(5) A law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being

interrogated, or another individual. An explanation of the circumstances shall be documented in the police report.

(6) The failure to create an electronic recording of the entire custodial interrogation was the result of a malfunction of the recording device, despite reasonable maintenance of the equipment, and timely repair or replacement was not feasible.

(7) The questions presented to a person by law enforcement personnel and the person's responsive statements were part of a routine processing or booking of that person. Electronic recording is not required for spontaneous statements made in response to questions asked during the routine processing of the arrest of the person.

(8) The interrogation of a person who is in custody on a charge of a violation of Section 187 or 189 of this code or paragraph (1) of subdivision (b) of Section 707 of the Welfare and Institutions Code if the interrogation is not related to any of these offenses. If, during the interrogation, any information concerning one of these offenses is raised or mentioned, continued custodial interrogation concerning that offense shall be electronically recorded pursuant to this section.

(c) If the prosecution relies on an exception in subdivision (b) to justify a failure to make an electronic recording of a custodial interrogation, the prosecution shall show by clear and convincing evidence that the exception applies.

(d) A person's statements that were not electronically recorded pursuant to this section may be admitted into evidence in a criminal proceeding or in a juvenile court proceeding, as applicable, if the court finds that all of the following apply:

(1) The statements are admissible under applicable rules of evidence.

(2) The prosecution has proven by clear and convincing evidence that the statements were made voluntarily.

(3) Law enforcement personnel made a contemporaneous audio or audio and visual recording of the reason for not making an electronic recording of the statements. This provision does not apply if it was not feasible for law enforcement personnel to make that recording.

(4) The prosecution has proven by clear and convincing evidence that one or more of the circumstances described in subdivision (b) existed at the time of the custodial interrogation.

(e) Unless the court finds that an exception in subdivision (b) applies, all of the following remedies shall be granted as relief for noncompliance:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of a defendant made during or after a custodial interrogation.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that a defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.

(3) If the court finds that a defendant was subject to a custodial interrogation in violation of subdivision (a), the court shall provide the jury with an instruction, to be developed by the Judicial Council, that advises the jury to view with caution the statements made in that custodial interrogation.

(f) The interrogating entity shall maintain the original or an exact copy of an electronic recording made of a custodial interrogation until a conviction for any offense relating to the interrogation is final and all direct and habeas corpus appeals are exhausted or the prosecution for that offense is barred by law or, in a juvenile court proceeding, as otherwise provided in subdivision (b) of Section 626.8 of the Welfare and Institutions Code. The interrogating entity may make one or more true, accurate, and complete copies of the electronic recording in a different format.

(g) For the purposes of this section, the following terms have the following meanings:

(1) “Custodial interrogation” means any interrogation in a fixed place of detention involving a law enforcement officer’s questioning that is reasonably likely to elicit incriminating responses, and in which a reasonable person in the subject’s position would consider himself or herself to be in custody, beginning when a person should have been advised of his or her constitutional rights, including the right to remain silent, the right to have counsel present during any interrogation, and the right to have counsel appointed if the person is unable to afford counsel, and ending when the questioning has completely finished.

(2) (A) For the purposes of the custodial interrogation of a minor, pursuant to subdivision (a) or (b), “electronically recorded,” “electronic recordation,” and “electronic recording” refer to a video recording that accurately records a custodial interrogation.

(B) For the purposes of the custodial interrogation of an adult, pursuant to subdivision (a) or (b), “electronically recorded,” “electronic recordation,” and “electronic recording” refer to a video or audio recording that accurately records a custodial interrogation. The Legislature encourages law enforcement agencies to use video recording when available.

(3) “Fixed place of detention” means a fixed location under the control of a law enforcement agency where an individual is held in detention in connection with a criminal offense that has been, or may be, filed against that person, including a jail, police or sheriff’s station, holding cell, correctional or detention facility, juvenile hall, or a facility of the Division of Juvenile Facilities.

(4) “Law enforcement officer” means a person employed by a law enforcement agency whose duties include enforcing criminal laws or investigating criminal activity, or any other person who is acting at the request or direction of that person.

(Amended by Stats. 2016, Ch. 791, Sec. 2. (SB 1389) Effective January 1, 2017.)