

 <b>Cambridge Police Department</b>	<b>POLICY &amp; PROCEDURES</b>		<b>No. 426.1</b>
	<b>Subject/Title:</b> <b>Electronic Recording of Interrogations</b>		
	<b>Issuing Authority:</b>   <b>Robert C. Haas Police Commissioner</b>		<b>Review Date:</b> <b>Sept. 17, 2012</b>
			<b>Issue Date:</b> <b>October 22, 2012</b>
		<b>Effective Date:</b> <b>November 5, 2012</b>	
		<b>Rescinds:</b> <b>Policy #426 –dated, July 1, 2008</b>	
<b>References/ Attachments:</b> <b>Commonweath v. DiGiambattista, 442 Mass. 423 (2004); G.L. c. 272, § 99; Electronic Recording Refusal Form</b>		<b>Accreditation Standards:</b> <b>1.2.3</b>	

### I. PURPOSE:

The purpose of this guideline is to establish the procedures to be followed whenever an officer attempts to electronically record an interrogation. This policy and set of procedures is a companion policy to *Policy #425 – Interrogating Suspects and Arrestees*.

### II. POLICY:

It is the policy of this police department, whenever it is possible and practical to do so, to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention.

### III. 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 (1) in custody or (2) 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, because 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.” 442 Mass. at 448. Upon

the defendant's request, the trial judge must issue this instruction regardless of the reason that the police did not record the interrogation.

#### IV. DEFINITIONS:

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

- A. **Custody:** A custodial situation exists when an officer tells an individual that he/she is under arrest. A functionally equivalent situation exists when a "reasonable person" in the suspect's position would feel that his/her freedom of action has been restricted to the same degree as a formal arrest.<sup>1</sup>
- B. **Electronic Recording:** "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.
- C. **Interrogation:** Interrogation would include direct questioning of an individual about a crime or suspected crime, as well as any words or actions on the part of the police that the officers should know are reasonably likely to elicit an incriminating response.<sup>2</sup>
- D. **Place of Detention:** "Place of detention" includes a police station, state police barracks, prison, jail, house of correction, or a department of youth services secure facility where persons may be held in detention in relation to a criminal charge(s). A place of detention may also include other locations where the circumstances of an interrogation would make a reasonable person in the suspect's position believe they are not free to leave (e.g., hospital, fire station, etc.)

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). See also *Commonwealth v. Groome*, 435 Mass. 201, 211-212 (2001) (In assessing whether an individual is in custody, the courts consider "several factors: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest.").

<sup>2</sup> *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980) (finding no interrogation took place where two police officers had a conversation in their cruiser in the defendant's presence indicating that it would be "too bad" if a little child found the missing gun and "hurt themselves"); *Brewer v. Williams*, 430 U.S. 387, 392-393 (1977) (finding interrogation took place where after police officers were unable to locate the murder victim's body, an officer told the mentally ill, deeply-religious suspect that the victim deserved a Christian burial); *Commonwealth v. Morse*, 427 Mass. 117 (1998) (defining interrogation as "questioning or its functional equivalent, which includes any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

- E. Suspect:** “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.

**V. PROCEDURES:**

- A. Applicability:** These guidelines require officers to record, unless it is impractical to do so, two types of interrogations: (1) custodial interrogations of suspects, and (2) interrogations of suspects occurring at places of detention.

- 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:

1. Notify a suspect that his/her statements are being recorded, or
2. Conduct the interrogation in such a way that it is obvious to the suspect that his/her statements are being recorded.

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

- C. Creating a Clear and Complete Record:** Unless it is impractical to do so, the officer should electronically record the entire interrogation of a suspect. To assist in the creation of the record, officers should do the following:

1. Start the recording device.
2. Immediately inform the suspect that he/she is being recorded.
3. 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.
4. State the full name of the suspect.

5. Before any questioning begins, use a Miranda Rights and Recording Form to administer Miranda warnings where those warnings should be given either out of an abundance of caution or where Miranda warnings are required. After providing the Miranda warnings, ask the suspect whether he/she understands each of the rights provided, and if so, whether he/she wishes to speak to you. The suspect should also check the appropriate responses (yes or no) and initial and sign the corresponding lines on the Miranda Rights and Recording Form. If applicable, a *Rosario* waiver form should also be executed prior to questioning.
6. Using the Miranda Rights and Recording Form, inform the suspect that it is the policy of this department to electronically record all interviews so that there is a complete record of the discussion and then ask the suspect whether he/she will give permission to electronically record the interrogation. The officer shall also advise the suspect that he/she may change his/her decision about electronically recording the interrogation at any time.
7. If the suspect agrees to be electronically recorded, have him/her so indicate on the Miranda Rights and Recording Form and have him/her initial and sign the appropriate lines on the form. The officer should proceed with the recorded interrogation, keeping the six-hour *Rosario* rule in mind.
8. 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.
9. 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.
10. Conclude the recording by stating the date and the time the interrogation is completed.

**D. If a Suspect Refuses to be Recorded After the Device is Recording:** If, after being provided with the Miranda rights and recording advisements as described above (See § C., ¶¶ 5-6), the suspect refuses to make an electronically recorded statement, the officer should have the suspect document the refusal while being electronically recorded. The following guidelines should be adhered to:

1. The officer should inform the suspect that there are potential benefits to recording the interrogation, 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.
2. The officer should also advise the suspect that notwithstanding any initial decision, the recording device can be turned on or off at any time if the suspect changes his/her mind about electronically recording the interrogation.
3. The officer should then ask the suspect if he/she understands each of the advisements provided to him/her and if he/she is willing to make an electronically recorded statement.
4. If the suspect still refuses to be electronically recorded, the officer should document the refusal by executing both the Miranda Rights and Recording Form and the Electronic Recording Refusal Form. (A refusal form is attached hereto).
5. Once the appropriate forms have been executed, the officer should turn off the device and proceed with the interrogation, keeping the six-hour *Rosario* rule in mind.

**E. If a Suspect Refuses to be Recorded Before the Device is Recording:** If the suspect refuses to be electronically recorded before the recording device is turned on and recording, the officer should (if the suspect agrees) turn on the recording device to record the refusal. The following guidelines should then be adhered to:

1. The officer should identify himself/herself and the suspect, state the date, time and location, and provide the suspect with the Miranda warnings in the manner described above (See § C., ¶ 5).
2. Once the Miranda warnings have been read and an appropriate waiver is obtained and documented (See § C., ¶ 5), the officer should inform the suspect that it is the policy of this department to electronically record all interviews so that there is a complete record of the discussion (See § C., ¶ 6). The officer should then inform the suspect that there are potential benefits to recording the interrogation, 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.
3. The officer should also advise the suspect that notwithstanding any initial decision, the recording device can be turned on or off at any time if the suspect changes his/her mind about electronically recording the interrogation.

4. The officer should then ask the suspect if he/she understands the advisements provided to him/her and if he/she is willing to make an electronically recorded statement.
5. If the suspect still refuses to have the interrogation recorded, the officer should have the suspect document the refusal by executing both the Miranda Rights and Recording Form and the Electronic Recording Refusal Form.
6. Once the appropriate forms have been executed, the officer should turn off the device and proceed with the interrogation, keeping the six-hour *Rosario* rule in mind.

**F. Suspect Refuses to Have His or Her Miranda Waiver and/or Refusal**

**Recorded:** If the suspect objects to having his/her Miranda waiver and/or refusal electronically recorded, the officer may proceed without recording the Miranda waiver, refusal and/or the ensuing interrogation. The officer should have the suspect execute the Miranda Rights and Recording Form (adhering to § C., ¶¶ 5-6) and the Electronic Recording Refusal Form, making sure to advise the suspect of the benefits of recording the Miranda waiver, refusal and interrogation. The officer should then proceed with the interrogation, keeping the six-hour *Rosario* rule in mind.

**G. Suspect Changes His or Her Decision During Interrogation:** If the suspect changes his/her decision about being electronically recorded during the interrogation, the officer should use the Miranda Rights and Recording Form (and where applicable, the Electronic Recording Refusal Form) to have him/her so indicate his/her new choice regarding electronic recording and have him/her initial and sign the form(s) on the appropriate lines. The officer should then resume the interview, either with or without electronically recording the remainder of the interrogation as the suspect chose.

1. If a suspect initially agreed to be electronically recorded during the interrogation and later changes his/her mind, the officer should inform the suspect that there are potential benefits to recording the entire interrogation, 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 entire interrogation. The officer should electronically record this advisement and the suspect's documentation of the refusal of further recording on the Miranda Rights and Recording Form and the Electronic Recording Refusal Form.
2. If the suspect initially declined to be electronically recorded during the interrogation and later changes his/her mind, once electronic recording has started, the officer should indicate what transpired while the recording

device was turned off and attempt to elicit and document any and all non-recorded statements previously made by the suspect.

- H. Discretionary Decision not to Record:** An officer may decide not to record an interrogation, even where it is practical to do so, if that officer reasonably believes that recording the interrogation will jeopardize the safety of an officer, the suspect, or any other person.<sup>3</sup>
1. If an officer decides, without conferring with the suspect, that it is unsafe under the circumstances to record the interrogation, the officer should document in his/her interview or case report the reason(s) why the interrogation was not recorded.
  2. If, after conferring with the suspect, an officer decides that it is unsafe under the circumstances to record the interrogation, the officer should nonetheless advise the suspect of the benefits of recording the interrogation. If the suspect does not want the interrogation to be recorded, the officer should have the suspect document the refusal on a Miranda Rights and Recording Form and an Electronic Recording Refusal Form. If the suspect does want the interrogation to be recorded, the officer should document in his/her interview or case report the reason(s) why he/she did not record the interrogation, and proceed with the interview.
- I. Recording Devices:** Officers should choose a recording device that has a removable storage tape or disk that can be easily duplicated.
- J. Recording Device Malfunctions:** If the recording device malfunctions, the officer conducting the interrogation must decide whether and how to continue the interrogation, and he/she must document what occurred.
1. 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 suspect made any statements that were not recorded.
  2. If the recording device cannot be restarted, the officer should include in his/her interview or case report the fact that the device malfunctioned and whether or not the suspect made any statements that were not recorded.
  3. If the recording device cannot be restarted, the officer should ask the suspect whether he/she wishes to continue the interrogation without a recording

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<sup>3</sup> This may include situations where there is a reasonable concern of retaliation, violence or witness intimidation against the suspect, another person or an officer (i.e., undercover or investigating officer) if an electronically recorded interrogation were later disclosed or disseminated.

device, or whether he/she wishes to suspend the interrogation until an operable recording device is available.

4. If the suspect 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 suspect or in the officer's interview or case report.

**K. Inoperable or Unavailable Recording Device:** If there is no recording device available or the recording device is inoperable, the officer should defer the interrogation until an operable recording device can be obtained, keeping the six-hour *Rosario* rule in mind.

**NOTE:** If it is impractical to defer the interrogation, and the suspect 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 suspect or in the officer's interview or case report.

**L. 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 at least one whole copy that must be clearly labeled and appropriately stored.

1. To the extent it is practical; statements from multiple suspects should not be recorded on the same tape or disk.
2. As soon as it is practical, an officer who records the statements of a suspect should create at least one exact copy of the original recording. The copy should be clearly labeled as a copy and appropriately stored.
3. Once the copy has been made, the copy, and not the original, should be used to make additional copies. Additionally, copies, and not the original, should be used to prepare a written transcript, to comply with discovery obligations, and for all other purposes.<sup>4</sup>

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<sup>4</sup> *Commonwealth v. Portillo*, 462 Mass. 324 (2012) (holding that where a language other than English is spoken in a recorded statement, the prosecutor may not offer the recorded statement in evidence without an English-language transcript, and may not rely on the jury's understanding of the foreign language to ascertain the meaning of the recorded words).

- M. Storage:** The officer that conducted the interrogation shall preserve all written forms and notes or records of all statements by a suspect that were not electronically recorded in the original case file.

All electronically recorded interrogations shall be preserved according to the state records retention law and department policy as criminal evidence. The original storage device and any copies shall be 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 interrogation;
- Name of person interrogated;
- Name of person(s) conducting the interrogation; and
- Departmental assigned case number or incident report number.

CAMBRIDGE POLICE DEPARTMENT
ELECTRONIC RECORDING – REFUSAL FORM

Name: \_\_\_\_\_

Date of Birth: \_\_\_ / \_\_\_ / \_\_\_ Type of Recording Device: \_\_\_\_\_

Person(s) Present: \_\_\_\_\_
\_\_\_\_\_

Date: \_\_\_\_\_ Time: \_\_\_\_\_ Location: \_\_\_\_\_

\_\_\_\_\_ I have requested that this interview not be recorded.

\_\_\_\_\_ I have requested that this interview no longer be recorded.

To be read to suspect: There are potential benefits to the electronic recording of interviews. For example, the electronic recording of this interview will create a complete record of what was said to you today and what you said in return.

As you know, we have a recording device available for the purpose of electronically recording this interview and are ready and willing to electronically record this interview.

At your request, we will conduct this interview without electronically recording (or any further recording) of your statements. If, at any time, you change your mind and decide that you do want to electronically record this interview, please let me know and we will turn on the recording device. I am going to ask you to initial and sign this form:

Do you understand the information that I have read to you?

\_\_\_\_\_ YES \_\_\_\_\_ NO

Do you still request that this interview not be recorded?

\_\_\_\_\_ YES \_\_\_\_\_ NO

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Witness: \_\_\_\_\_