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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
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Legislative Budget  
Office

H.B. 8  
134<sup>th</sup> General Assembly

## Final Analysis

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**Version:** As Passed by the General Assembly

**Primary Sponsors:** Reps. West and Plummer

**Effective date:** Emergency: sections related to **restraining or confining pregnant inmates** effective May 17, 2021; section related to electronic recording of custodial interrogations effective August 15, 2021

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## SUMMARY

### Electronic recording of custodial interrogations

- Replaces law that addressed, but did not require, electronic recording of statements made by a suspect of any of several specified criminal offenses during a custodial interrogation with law that, except in limited circumstances, requires recording all such statements made.
- Eliminates a ban against penalizing a law enforcement agency that employs a law enforcement officer who failed to electronically record statements, when required.
- Replaces a provision that specified that a failure to electronically record a statement, when required, did not provide the basis to exclude or suppress a statement in any legal proceeding with provisions specifying that if a law enforcement agency fails to record a custodial interrogation, when required by the act:
  - If the prosecution establishes by a preponderance of the evidence that one or more of the act's limited exceptions applies, the court must admit the evidence without a cautionary instruction;
  - If the prosecution does not meet that burden of proof, the court must provide a cautionary instruction to the jury that it may consider the failure in determining the reliability of the evidence.
- Replaces a provision specifying that a law enforcement officer's failure to electronically record a custodial interrogation did not create a private cause of action against the officer with a provision specifying that a failure to electronically record such an interrogation does not create a private cause of action against any person or agency.

## Restraining or confining of pregnant inmates

- In law that prohibits under specified circumstances the restraining or confining of charged or convicted criminal offenders and charged or adjudicated delinquent children who are, or were, pregnant:
  - Modifies the provisions with respect to the types of restraint covered, the onset of the restraint prohibition, an exception to the restraint prohibition, and possible sanctions for violations of the restraint prohibition;
  - Repeals the prohibition with respect to confinement.

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## DETAILED ANALYSIS

### Electronic recording of custodial interrogation

#### Required for certain suspects

The act replaces a provision of law that addressed, but did not require, the electronic recording of oral statements made during a custodial interrogation in a place of detention by a person suspected of committing any of a list of specified offenses with a provision that generally requires recording all such statements in those circumstances. Under the act, subject to the exceptions described below, every oral statement made during a custodial interrogation in a place of detention must be electronically recorded if the statement is made by a person who is suspected of committing any of the following offenses, which are the same offenses that were covered under the provision replaced by the act:

- Aggravated murder, murder, or voluntary manslaughter;
- A first or second degree felony violation of involuntary manslaughter or aggravated vehicular homicide;
- Rape, attempted rape, or sexual battery.

The recording provision replaced by the act did not require electronic recording of those statements by persons in those circumstances *per se*, but appeared to treat electronic recordings of statements by persons in those circumstances favorably by specifying that they were presumed to be voluntary and placing the burden on the person making the statements to prove that they were not voluntary. The act also eliminates a ban against penalizing a law enforcement agency that employed a law enforcement officer who failed to electronically record statements made in a custodial interrogation under the provision replaced by the act.<sup>1</sup>

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<sup>1</sup> R.C. 2933.81(B).

## Exceptions

The act provides the following exceptions in which recording under its provision is not required:<sup>2</sup>

1. The person subject to interrogation requests that the interrogation not be recorded, as long as this request is preserved by electronic recording or in writing.
2. The recording equipment malfunctions.
3. There are exigent circumstances related to public safety.
4. The interrogation occurs outside Ohio.
5. The statements are made during routine processing or booking.
6. The statements are made spontaneously and not in response to interrogation.
7. The interrogation occurs when no law enforcement officer conducting the interrogation has reason to believe that the individual attempted to commit, conspired to commit, was complicit in committing, or committed an offense specified above.

## Consequences of failure to record

The act repeals law that specified that a failure to electronically record a statement, when required under the former law replaced by the act, did not provide the basis to exclude or suppress a statement in a criminal, delinquent child, or other legal proceeding, and enacts provisions that address in a different manner the evidentiary effect of a failure to comply with its recording provision. Under the act, if a law enforcement agency fails to record a custodial interrogation as required by its recording provision:

1. If the prosecution establishes, by a preponderance of the evidence, that one or more of the exceptions described above applies, the court must admit the evidence without a cautionary instruction; but
2. If the prosecution *does not* meet that burden of proof, the court must provide a cautionary instruction to the jury that it may consider the failure to record the custodial interrogation in determining the reliability of the evidence.<sup>3</sup>

Expanding a provision of law that formerly specified that a law enforcement officer's failure to electronically record a custodial interrogation did not create a private cause of action against that officer, the act provides that a failure to electronically record a custodial interrogation does not create a private cause of action against any person or agency.<sup>4</sup>

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<sup>2</sup> R.C. 2933.81(C).

<sup>3</sup> R.C. 2933.81(C) repealed, and R.C. 2933.81(D).

<sup>4</sup> R.C. 2933.81(B).

## **Restraining or confining pregnant inmates**

### **General prohibition**

The act repeals provisions of law that prohibited the confinement by a law enforcement, court, or corrections official, under specified circumstances, of charged or convicted criminal offenders and charged or adjudicated delinquent children who are, or were, pregnant.

The act retains provisions that prohibit the restraint by a law enforcement, court, or corrections official, under similar circumstances, of charged or convicted criminal offenders and charged or adjudicated delinquent children who are, or were, pregnant, but it modifies the prohibition (and related provisions) by specifying that the prohibition:<sup>5</sup>

- Does not apply with respect to an offender or child unless the person is in custody of a law enforcement, court, or corrections official “following arrest, transportation, and routine processing and booking” (formerly, the provision did not include the arrest, transportation, or processing and booking criterion);
- Applies with respect to the use of shackles, handcuffs, or “other similar appliances or devices” (formerly, it applied with respect to the use of shackles, handcuffs, or “other physical restraints”); and
- Applies “beginning on the date on which pregnancy is confirmed to law enforcement by a health care professional” and the official has knowledge that the person is pregnant or was pregnant (formerly, it applied based on law enforcement’s knowledge of the pregnancy whether or not the pregnancy was confirmed by a professional).

### **Exception to general prohibition**

The act modifies law that authorizes a law enforcement, court, or corrections official, in specified circumstances, to restrain a charged or convicted criminal offender or charged or adjudicated delinquent child during a period of time covered by the general prohibition described above. It retains law authorizing an official to restrain a charged or convicted criminal offender or charged or adjudicated delinquent child during a period of time covered by the general prohibition if the official determines that the person presents a serious threat of physical harm to herself, to the official, to other law enforcement or court personnel, or to any other person, presents a serious threat of physical harm to property, presents a substantial security risk, or presents a substantial flight risk. The act repeals the requirement that, except in an emergency, (1) the official, prior to restraining the person, contact a health care professional treating the person and identify the type and expected duration of restraint, and (2) the professional did not object to the specified type of restraint and its expected duration. Under preexisting law retained by the act, an official may not use any leg, ankle, or waist restraint to restrain the person.<sup>6</sup>

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<sup>5</sup> R.C. 2152.75(A) and (B) and 2901.10(A) and (B).

<sup>6</sup> R.C. 2152.75(C) and 2901.10(C).

## Possible criminal sanctions and civil actions

The act repeals provisions that pertained to possible criminal sanctions and civil actions regarding a violation of the general prohibition described above. The repealed provisions specified that:<sup>7</sup>

1. A person who violated the general prohibition was guilty of the offense of “interfering with civil rights,” in violation of R.C. 2921.45 – a first degree misdemeanor.
2. A child or woman who was restrained or confined in violation of the general prohibition as it existed prior to the act could commence a civil action under R.C. 2307.60 against the law enforcement, court, or corrections official who committed the violation, against the official’s employing agency or court, or against both, and, in the action, could recover the full damages specified in the section, punitive damages, the costs of maintaining the action and reasonable attorney’s fees, or both punitive damages and the costs of maintaining the action and reasonable attorney’s fees. (R.C. 2307.60, not in the act, specifies that anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the action and attorney’s fees if authorized by the Rules of Civil Procedure or another R.C. section or under the state’s common law, and may recover punitive or exemplary damages if authorized by any R.C. section.)
3. The provisions described above in (1) and (2) did not limit any right of a person to obtain injunctive relief or to recover damages in a civil action under any other statutory or common law of Ohio or the United States.

## Definitions

### Custodial interrogation provisions

The following preexisting terms, unchanged by the act except as expressly indicated, are used in the parts of the act pertaining to the electronic recording of custodial interrogations:<sup>8</sup>

A **custodial interrogation** is any interrogation 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 self to be in custody, beginning when a person should have been advised of the person’s right to counsel and right to remain silent and of the fact that anything the person says could be used against the person, as specified in the landmark *Miranda v. Arizona*<sup>9</sup> Supreme Court case and subsequent decisions, and ending when the questioning has completely finished.

A **detention facility** is a public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the

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<sup>7</sup> R.C. 2151.75(F)(1) to (3), 2901.10(F)(1) to (3), and 2921.45.

<sup>8</sup> R.C. 2933.81(A).

<sup>9</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

United States or alleged or found to be a delinquent child or unruly child in Ohio or another state or under federal law.<sup>10</sup>

**Electronic recording** or **electronically recorded**, as modified by the act, means an “audio or audiovisual” recording that is an authentic, accurate, unaltered record of a custodial interrogation. (Formerly, the definition applied only with respect to “audio and visual” recordings.)

A **law enforcement agency** is a police department, the office of a sheriff, the state highway patrol, a county prosecuting attorney, or a federal, state, or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest.<sup>11</sup>

A **place of detention** is a jail, police or sheriff’s station, holding cell, state correctional institution, local correctional facility, detention facility, or Department of Youth Services facility, but a law enforcement vehicle is not a place of detention.

A **statement** is an oral, written, sign language, or nonverbal communication.

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## HISTORY

Action	Date
Introduced	02-03-21
Reported, H. Criminal Justice	04-15-21
Passed House (90-0)	04-15-21
Reported, S. Judiciary	05-12-21
Passed Senate (32-0)	05-12-21
House concurred in Senate amendments (94-0)	05-12-21

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<sup>10</sup> By reference to R.C. 2921.01, not in the act.

<sup>11</sup> By reference to R.C. 109.573, not in the act.