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## FISCAL IMPACT REPORT

SPONSOR Rubio ORIGINAL DATE 02/22/17  
LAST UPDATED \_\_\_\_\_ HB 379  
SHORT TITLE Recording of Custodial Interrogations SB \_\_\_\_\_  
ANALYST Sánchez

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Office of the Attorney General (OAG)

### SUMMARY

#### Synopsis of Bill

House Bill 379 proposes to amend the law to making custodial interrogations inadmissible in a judicial proceeding unless electronically recorded. Law enforcement officers are required to comply unless there is good cause for not electronically recording the interrogation in its entirety. The bill removes equipment failure or the individual refusing to be recorded from the list of good causes. The officer must make a written or electronic recording of the reason for not recording at the time of the custodial interrogation.

### FISCAL IMPLICATIONS

Agencies responding report minimal fiscal impact.

### SIGNIFICANT ISSUES

The Office of the Attorney General (OAG) states that it is unclear how Subsection B would work with the new Subsection A, which deletes the “reasonably able” language and makes custodial interrogations inadmissible unless electronically recorded. The two subsections appear to be in conflict. OAG asks, if an unrecorded custodial interrogation is inadmissible regardless of whether the officer was “reasonably able” to record it, could *any* “good cause” exceptions apply? Although Subsection B deletes the “good cause” exceptions, it does not otherwise limit the

possible exceptions in its use of the phrase “good cause includes.”

OAG also point out that Subsection I provides that “[t]his section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.” This subsection has not been changed and there is no case law to illuminate its meaning. It is unclear how this subsection would work with subsections A and B. It is not clear what “otherwise admissible evidence” means in this context. Generally, a suspect’s statement is admissible if it complies with *Miranda* and is otherwise voluntary. These two claims are distinct – whether a statement is voluntary is a due process issue whereas *Miranda* involves the Fifth Amendment. See e.g. *State v. Fekete*, 1995-NMSC-049, ¶ 33, 120 N.M. 290 (“A claim that the police coerced a statement requires a different analysis than a claim that an accused voluntarily waived his or her Fifth Amendment protections under *Miranda v. Arizona*, 384 U.S. 436 . . . (1966)”). It is not clear if Subsection I is intended to apply to statements which have been held admissible under these separate constitutional protections. If so, it is also unclear how Subsection A’s proposed proscription on *any* unrecorded custodial interrogation in a judicial proceeding applies.

The Administrative Office of the Courts (AOC) states that there may be fewer challenges to admissibility because of the stringent requirements in the bill for recording custodial interrogations.

## **PERFORMANCE IMPLICATIONS**

This bill may have an impact on the following performance measures in the district courts:

- Cases disposed of as a percent of cases filed
- Percentage change in case filings by case type

## **OTHER SUBSTANTIVE ISSUES**

According to the Harvard Law Review in a report of March, 2015, since 2003 the number of states requiring law enforcement officers to electronically record some or all interviews conducted with suspects in their custody has grown from two to at least 22. Additionally, as of May 2014, the Dept. of Justice created a presumption that FBI, DEA, ATF and U.S. Marshals will electronically record custodial interviews. See, *Dep’t of Justice, New Department Policy Concerning Electronic Recording of Statements*, 128 Harv. L. Rev. 1552 (March 10, 2015), <http://harvardlawreview.org/2015/03/dept-of-justice-new-department-policy-concerning-electronic-recording-of-statements/>. For a policy review of the electronic recording of custodial interrogations by The Justice Project, including a model policy, see [http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf)

The Innocence Project recommends enacting legislation requiring interrogations to be recorded to prevent false confessions from leading to wrongful convictions. It further states that mandated electronic recording of the entire interrogations process protects the innocent, ensures the admissibility of legitimate confessions, and helps law enforcement defend against allegations of coercion.

## **ALTERNATIVES**

OAG suggests including a provision in Subsection A making it subject to the provisions in Subsection B.