

West's Montana Code Annotated Currentness

Title 46. Criminal Procedure

▢ Chapter 4. Investigative Procedures (Refs & Annos)

➔ Part 4. Custodial Interrogations----Recording

46-4-401. Definitions

As used in this part, the following definitions apply:

(1) "Pen register" means a device that records or decodes electronic or other impulses that identify a number dialed or otherwise transmitted on a telephone line to which the pen register is attached. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services, such as but not limited to caller identification services, or used for cost accounting or similar purposes in the ordinary course of business.

(2) "Trap and trace device" means a device that records or decodes incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services, such as but not limited to caller identification services, or used for cost accounting or similar purposes in the ordinary course of business.

46-4-402. Limitations on use of pen register or trap and trace device

(1) A person may not install or use a pen register or trap and trace device without a court order obtained under [46-4-403](#), except as provided in subsection (2). Subsection (2) may not be construed to permit a law enforcement agent to operate a pen register or trap and trace device without a court order obtained under [46-4-403](#). The use of a pen register or trap and trace device that has the ability to record conversations is prohibited.

(2) Subsection (1) does not apply to the installation or use of a pen register or trap and trace device by a provider of a wire or electronic communication service:

(a) for the:

- (i) operation, maintenance, or testing of the service;
- (ii) protection of the rights and property of the provider; or
- (iii) protection of a user of the service from abuse of or unlawful use of the service;

(b) to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the communication, or a user of the service from fraudulent, unlawful, or abusive use of the service; or

(c) if the consent of each person whose originating or transmitted number is recorded or decoded is obtained.

(3) A person who knowingly violates subsection (1) commits a criminal offense punishable upon conviction by incarceration for a period of up to 6 months and a fine of up to \$500.

46-4-403. Order for pen register or trap and trace device--installation-- disclosures

(1) A prosecutor may apply to the district court for an order, or for the extension of an existing order, for the installation and use of a pen register or a trap and trace device. The application must be in writing and under oath. The application must name the prosecutor and must also name the law enforcement agency that will use the pen register or trap and trace device. The applicant shall show probable cause for the order.

(2) If the court is satisfied that the applicant has shown probable cause for the order, the court shall issue the order. The order must state:

(a) the name, if known, of each person to whom the telephone line is leased or in whose name the telephone line to which a pen register or trap and trace device is to be attached is listed;

(b) the name, if known, of each person who is the subject of the criminal investigation;

(c) the number and, if known, the physical location of each telephone line to which a pen register or trap and trace device is to be attached and, for a trap and trace device, the geographic limits of the court order; and

(d) the offense or offenses to which the information that might be obtained relates.

(3) The order must direct the provider of the telephone service and a landlord, custodian, or other person to furnish the prosecutor and law enforcement agency with the information, facilities, and technical assistance necessary to install and operate the pen register or trap and trace device. The installation and operation must create the most minimal interference with the telephone service of each person whose originating or transmitted telephone number is recorded or decoded. Information received by the service provider from the operation of the pen register or trap and trace device must be given to the law enforcement agency at reasonable intervals during regular business hours.

(4) The order may cover a period not to exceed 60 days and may be extended for periods not to exceed 60 days for each extension. An extension may be granted only if the court is satisfied that probable cause for the extension has been shown.

(5) A person leasing or owning a telephone line that is subject to the order, the provider of the service, and any other person with knowledge of the order, pen register, or trap and trace device may not disclose the existence of the order, pen register, or trap and trace device to any person without the court's permission.

(6) A service provider, landlord, custodian, or other person must be reasonably compensated by the law enforcement agency for expenses incurred in furnishing facilities or assistance relating to the order.

(7) Proceedings conducted under this section are subject to the secrecy and disclosure provisions relating to grand jury proceedings. Any information obtained pursuant to an order issued under this section is confidential criminal justice information subject to the provisions of Title 44, chapter 5.

46-4-404. Immunity from suit

Except for gross negligence or willful or wanton misconduct, there is no cause of action against a service provider, landlord, or custodian or their officers, employees, or agents or other nongovernmental person for injury or damage caused in furnishing facilities or assistance under the order or against a service provider or its officers, employees, or agents for providing the law enforcement agency with information received from the operation of the pen register or trap and trace device. The immunity provided by this section does not extend to any governmental agency, law enforcement agent, or prosecutor.

46-4-405. Procedural irregularity--rule of evidence

An irregularity in a proceeding under this part may not be used to exclude evidence obtained under an order unless the irregularity affects substantial rights of the accused.

46-4-406. Purpose

The legislature intends to require the electronic recording of custodial interrogations in felony cases based on the finding that properly recorded interrogations:

- (1) provide the best evidence of the communications that occurred during an interrogation;
- (2) prevent disputes about a peace officer's conduct or treatment of a suspect during the course of an interrogation;
- (3) prevent a defendant from lying about the account of events originally provided to law enforcement by the defendant;
- (4) spare judges and jurors the time necessary and the need to assess which account of an interrogation to believe;
- (5) enhance public confidence in the criminal process; and
- (6) have been encouraged by the Montana supreme court in a written opinion of that court.

46-4-407. Definitions

As used in 46-4-406 through 46-4-411, the following definitions apply:

- (1) "Custodial interrogation" means an interview conducted by a peace officer in a place of detention for the purpose of investigating a felony or, in the case of a youth, an offense that would be a felony if committed by an adult if the interview is reasonably likely to elicit a response from the person being interviewed that may incriminate the person being interviewed with regard to the commission of an offense.
- (2) "Electronic recording" or "electronically recorded" means an audio recording, visual recording, or audiovisual recording, if available, that is an authentic, unaltered record of a custodial interrogation.
- (3) "Place of detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, office, or other structure in this state where persons are held in connection with criminal charges or juvenile delinquency proceedings.
- (4) "Statement" means an oral, written, sign language, or nonverbal communication.

46-4-408. Recordings required

Except as provided in 46-4-409, all custodial interrogations must be electronically recorded. The recording must contain a peace officer advising the person being interviewed of the person's Miranda rights, a recording of the interview, and a conclusion of the interview.

46-4-409. Exceptions to custodial recording requirements

A judge shall admit statements or evidence of statements that do not conform to 46-4-408 if, at hearing, the state proves by a preponderance of the evidence that:

- (1) the statements have been made voluntarily and are reliable; or
- (2) one or more of the following circumstances existed at the time of the custodial interrogation:
 - (a) the questions put forth by law enforcement personnel and the person's responsive statements were part of the routine processing or booking of the person;
 - (b) before or during a custodial interrogation, the person unambiguously declared that the person would respond to the law enforcement officer's questions only if the person's statements were not electronically recorded;
 - (c) the failure to electronically record an interrogation in its entirety was the result of unforeseeable equipment failure and obtaining replacement equipment was not practicable;
 - (d) exigent circumstances prevented the making of an electronic recording of the custodial interrogation;
 - (e) the person's statements were surreptitiously recorded by or under the direction of law enforcement personnel;
 - (f) the person's statement was made during a custodial interrogation that was conducted in another state by peace officers of that state in compliance with the laws of that state; or
 - (g) the person's statement was made spontaneously and not in response to a question.

46-4-410. Cautionary jury instruction

If the defendant objects to the introduction of evidence under 46-4-408 and the court finds by a preponderance of the evidence that the statements are admissible, the judge shall, upon motion of the defendant, provide the jury with a cautionary instruction.

46-4-411. Handling and preservation of electronic recordings

- (1) An electronic recording of a custodial interrogation must be clearly identified and catalogued by law enforcement personnel.
- (2) If a criminal or youth court proceeding is brought against a person who was the subject of an electronically recorded custodial interrogation, the electronic recording must be preserved by law enforcement personnel until all appeals and all postconviction and habeas corpus proceedings are final and concluded or until the time

within which the proceedings must be brought has expired.

(3) Upon motion by the defendant, the court may order that a copy of the electronic recording be preserved for any period beyond the expiration of all appeals.

(4) If a criminal or youth court proceeding is not brought against a person who has been the subject of an electronically recorded custodial interrogation, the related electronic recording must be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person.

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