



**Homeland
Security**

Policy Statement 047-03

MEMORANDUM FOR: Sarah Saldaña
Assistant Secretary
U.S. Immigration and Customs Enforcement

Joseph Clancy
Director
U.S. Secret Service

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Admiral Paul F. Zukunft
Commandant
U.S. Coast Guard

Peter Neffenger
Administrator
Transportation Security Administration

L. Eric Patterson
Director
Federal Protective Service

FROM: Alejandro N. Mayorkas
Deputy Secretary

A handwritten signature in blue ink, appearing to read "AN Mayorkas", written over the printed name and title of the Deputy Secretary.

SUBJECT: **Policy Concerning Electronic Recording of Statements in
Federal Criminal Investigations**

This policy establishes a presumption that criminal investigators (GS-1811 job series) within the Department of Homeland Security (DHS) and its Components (hereinafter "Criminal Investigators") will electronically record statements made by

individuals in their custody in connection with a federal criminal investigation in the circumstances set forth below.

This policy also encourages Criminal Investigators to consider electronic recording in investigative or other circumstances related to criminal investigations where the presumption does not apply, and encourages Criminal Investigators to consult with prosecutors in such circumstances.

This policy is solely intended for internal DHS guidance. It is not intended to, does not, and may not be relied upon to create any rights or benefits (substantive or procedural) enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or Criminal Investigators, or any other person, nor does it place any limitation on otherwise lawful investigative and statutorily-derived prerogatives of the Department of Homeland Security.

PRESUMPTION OF RECORDING

Consistent with the *Policy Concerning Electronic Recording of Statements* issued by the U.S. Department of Justice on May 12, 2014 (“DOJ Recording Policy”), this policy establishes a presumption that the custodial statement of an individual taken by a Criminal Investigator in a place of detention with suitable recording equipment, following arrest for a federal crime but prior to initial appearance, will be electronically recorded, subject to the exceptions below.

- a. **Electronic Recording.** This policy strongly encourages the use of video recording to satisfy the presumption. Audio recording may be used when video recording equipment considered suitable under Component policy is not available.
- b. **Custodial Interviews.** This presumption applies only to interviews of persons in DHS custody for the commission of a federal criminal offense. Interviews in non-custodial settings are excluded from the presumption, as are interviews of individuals in DHS civil or administrative custody.
- c. **Place of Detention.** A place of detention is any structure where persons are held in connection with federal criminal charges where those persons may be interviewed. This includes not only federal facilities but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff’s station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

- d. **Suitable Recording Equipment.** This presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by the Department or any of its Components, suitable recording equipment means (1) an electronic device suitable for the recording of interviews that (2) is reasonably designed to capture electronically the entirety of the interview. Each Component will draft its own policy governing placement, maintenance, and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content. Components will coordinate their separate policies with other DHS Components and with the DHS Office of the General Counsel, the Office of Policy, the Privacy Office, and the Office for Civil Rights and Civil Liberties. When dealing with interviews that may take place in a place of detention not owned or controlled by the Department or any of its Components, appropriate Component supervisors determine on a case-by-case basis whether any available recording equipment meets or is equivalent to component requirements or is otherwise suitable for recording interviews for purposes of this policy. The Undersecretary for Management shall convene relevant Components and coordinate a process for the procurement of appropriate recording devices to ensure compliance with this policy.
- e. **Timing.** This presumption applies to persons in custody for a federal crime in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.
- f. **Scope of Offenses.** The presumption applies to interviews in connection with all federal crimes.
- g. **Scope of Recording.** Electronic recording begins as soon as the subject enters the interview area or room and continues until the interview is completed.
- h. **Recording may be Overt or Covert.** Recording under this policy may be overt or covert. Covert recording constitutes consensual monitoring, which is allowed by federal law in accordance with Title 18 U.S.C. § 2511(2)(c). Covert recording in fulfilling the requirements of this policy may be carried out under the procedures and approval requirements in Component or Department policies for consensual monitoring.

EXCEPTIONS TO THE PRESUMPTION

A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the Criminal Investigator as soon as practicable. Such documentation shall be made available to the federal prosecutor, if requested.

- a. Refusal by Interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to provide a statement but only if it is not electronically recorded, then a recording need not take place.
- b. Public Safety and National Security Exception. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*, 467 U.S. 649 (1984). The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning the intelligence, sources, or methods, the public disclosure of which would cause damage to national security. Recording is not prohibited under any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the Criminal Investigator and the prosecutor.
- c. Recording is Not Reasonably Practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or the need for multiple interviews in a limited timeframe exceeding the available number of recording devices.
- d. Residual Exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

EXTRATERRITORIALITY

This presumption does not apply outside of the United States. Recording may, however, be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview – whether the subject is in foreign custody, U.S. custody, or not in custody – outside the United States should be the subject of consultation between the Criminal Investigator and the federal prosecutor, in addition to other applicable requirements and authorities.

ADMINISTRATIVE ISSUES

- a. Training. Component Field Offices shall, in connection with the implementation of this policy, collaborate with Component counsel and the local U.S. Attorney's Office to provide district-wide training for Criminal Investigators on best practices associated with electronic recording of interviews.
- b. Assignment of Responsibilities. Components comply with guidance from the Under Secretary of Management and bear the cost of acquiring and maintaining recording equipment in sufficient numbers to meet the expected needs for the recording of such interviews. Components should pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorney's offices should pay for transcripts of recordings, as necessary and consistent with the DOJ Recording Policy.

EFFECTIVE DATE

This policy takes effect on March 31, 2016.