

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 3/23/2006

To: All Field Offices
All HQ Divisions
All Legats

Attn: ADIC, SAC, and CDC
EAD, AD
FBIHQ, Manuals Desk
Legal Attache

From: Office of the General Counsel
Investigative Law Unit
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Case ID #: 66F-HQ-1283488-3
66F-HQ-C1384970

Title: ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS
INTERVIEWS

Synopsis: To clarify existing FBI policy on electronic recording of confessions and to provide guidance on some of the factors that the SAC should consider when deciding whether to authorize recording.

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Details: FBI policy on electronic recording of confessions and witness interviews is contained in SAC Memorandum 22-99, dated 10 August 1999, which revised SAC Memorandum 22-98, dated 24 July 1998. Under the current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the SAC or his or her designee. See MIOG, Part II, Section 10-10.10(2). Consultation with an AUSA, CDC, or OGC may be appropriate in certain circumstances, but it is not required.¹ In certain circumstances (set forth in the above)

¹ If the recording is going to be surreptitious, SACs are urged to obtain the concurrence of the CDC or the appropriate OGC attorney. In addition, in accordance with the Attorney General's "Procedure for Lawful, Warrantless Monitoring of Verbal Communication," dated May 30, 2002, advice that the proposed surreptitious recording is both legal and appropriate must be obtained from the USA, AUSA or DOJ attorney responsible for the investigation.

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To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

guidance),² FBIHQ concurrence is required.

In recent years, there has been on-going debate in the criminal justice community whether to make electronic recording of custodial interrogations mandatory. According to a study published in 2004 by a former U.S. Attorney,³ 238 law enforcement agencies in 37 states and the District of Columbia electronically record some or all custodial interviews of suspects. In four of those jurisdictions, electronic recording is mandated by law - by legislation in Illinois and the District of Columbia and by case law opinions issued by the state supreme courts of Alaska and Minnesota. In addition, it is the practice in some foreign countries--such as Great Britain and Australia--to record all interviews of suspects, and some U.S. Attorneys feel strongly that at least some interviews should be required to be recorded.⁴

There is no federal law that requires federal agents to electronically record custodial interviews and, to our knowledge, no federal law enforcement agency currently mandates this practice. There have been isolated incidents in which federal district court judges, as well as some United States Attorneys, have urged the FBI to revise its current policy to require recording all custodial interviews, or at least those involving selected serious offenses. In addition, agents testifying to statements made by criminal defendants have increasingly faced intense cross-examination concerning this policy in apparent efforts to cast doubt upon the voluntariness of statements in the absence of recordings or the accuracy of the testimony regarding the content of the statement. Furthermore, in some task force cases that result in state prosecution, FBI state or local partners have been precluded from using FBI agent testimony of the defendant's confession because of restrictive state law or policy.

² These circumstances include, among other things, extensive media scrutiny, difficult legal issues, complex operational concerns, or significant involvement by FBIHQ.

³ Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Northwestern University School of Law, Center on Wrongful Convictions, Number 1, Summer 2004.

⁴ There is a group within the Department of Justice, which includes the FBI, DEA, ATF and the Marshals Service, that has met periodically to discuss this issue. It is conceivable that an outgrowth of those discussions will be a pilot program in one or more judicial districts in which recording at least certain interviews will be required.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

Against this backdrop, FBI executive management has reviewed the current policy. After a careful deliberation of all the available options, the Director has opted for now to retain the current policy but has tasked the General Counsel to issue guidance on the factors that the SAC or his or her designee should consider before granting exceptions.

Before listing those factors, a brief review of the sound reasons behind the FBI policy on electronic recording of confessions and interviews is in order. First, the presence of recording equipment may interfere with and undermine the successful rapport-building interviewing technique which the FBI practices.⁵ Second, FBI agents have successfully testified to custodial defendants' statements for generations with only occasional, and rarely successful, challenges. Third, as all experienced investigators and prosecutors know, perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as proper means of obtaining information from defendants. Initial resistance may be interpreted as involuntariness and misleading a defendant as to the quality of the evidence against him may appear to be unfair deceit. Finally, there are 56 field offices and over 400 resident agencies in the FBI. A requirement to record all custodial interviews throughout the agency would not only involve massive logistic and transcription support but would also create unnecessary obstacles to the admissibility of lawfully obtained statements, which through inadvertence or circumstances beyond control of the interviewing agents, could not be recorded.

Notwithstanding these reasons for not mandating recording, it is recognized that there are many situations in which recording a subject's interview would be prudent. For this reason, it has been FBI policy for nearly eight years to grant an SAC the authority and flexibility to permit recording if he or she deems it advisable.

Often, during the time this policy has been in effect, SAC discretion has been viewed negatively, i.e., as an "exception" to the "no recording" policy, instead of positively, i.e., as a case-by-case opportunity to use this technique where and when it will further the investigation and the subsequent prosecution. Supervisors are encouraged to seek permission to record, and SACs are encouraged to grant it, whenever it is determined that these objectives will be met.

⁵ In theory, surreptitious recording would not affect this approach. However, if recording became routine practice, it would not take long before that practice became well known--especially among members of organized crime.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

When deciding whether to exercise this discretion, SACs are encouraged to consider the following factors:

- 1) Whether the purpose of the interview is to gather evidence for prosecution, or intelligence for analysis, or both;
- 2) If prosecution is anticipated, the type and seriousness of the crime, including, in particular, whether the crime has a mental element (such as knowledge or intent to defraud), proof of which would be considerably aided by the defendant's admissions in his own words;
- 3) Whether the defendant's own words and appearance (in video recordings) would help rebut any doubt about the voluntariness of his confession raised by his age, mental state, educational level, or understanding of the English language; or is otherwise expected to be an issue at trial, such as to rebut an insanity defense; or may be of value to behavioral analysts;
- 4) The sufficiency of other available evidence to prove the charge beyond a reasonable doubt;
- 5) The preference of the United States Attorney's Office and the Federal District Court regarding recorded confessions;
- 6) Local laws and practice--particularly in task force investigations where state prosecution is possible;
- 7) Whether interviews with other subjects in the same or related cases have been electronically recorded;
- 8) The potential to use the subject as a cooperating witness and the value of using his own words to elicit his cooperation;
- 9) Practical considerations--such as the expected length of the interview; the availability of recording equipment and transcription (and, if necessary, translation) services; and the time and available resources required to obtain them. If cost factors prove prohibitive, consider whether the requesting U.S. Attorney's Office will agree to pay for the services.

These factors should not be viewed as a checklist and are not intended to limit the SAC's discretion. It is recognized, however, that establishing reasonable standards on the type of cases, crimes, circumstances, and subjects for which recording is a desirable objective so as to maintain internal field office consistency and to inform field agents and supervisors when and why to request recording.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

Field office standards are to be encouraged for another very important reason. The absence of any standard by which field office discretion in this matter is exercised will render testifying agents vulnerable to attack on cross-examination. If, on the other hand, an agent can point to identifiable standards that provide a reasonable explanation for why some interviews are recorded and others are not, the implication that the agent chose not to record an interview to mask the involuntary nature of the defendant's admissions will be much harder to argue.⁶ This office is prepared to assist in the preparation of such standards if desired.

Finally, in order to assist agents who testify to unrecorded admissions, an explanation of this policy and the reasons behind it should be added to field office quarterly legal training. Questions may be directed to Assistant General Counsel Jung-Won Choi, at the Office of the General Counsel, Investigative Law Unit, at 202-324-9625.

⁶ Carrying this point further, it would be even easier to withstand cross-examination if a fixed policy as to when to record and when not to record were established at FBI Headquarters that permits no field office or agent discretion. Yet, such an advantage would be far off set by the loss of flexibility that field office SACs and supervisors need to make sound investigative decisions such as the choice of interviewing techniques.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

LEAD(s):

Set Lead 1: (Action)

ALL RECEIVING OFFICES

Disseminate to all personnel. The CDC of each field office should be the principal point of contact for this EC and should provide a briefing to the agents in his or her office consistent with this EC.

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1 - Ms. Caproni
1 - Mr. Kelley
1 - Ms. Gulyassy
1 - Ms. Thomas
1 - Ms. Lammert
1 - Mr. Larson
1 - Mr. Choi
2 - ILU