



BRAINTREE POLICE DEPARTMENT

Policy and Procedure

In-Custody Questioning

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General Considerations

Questioning of persons who are in police custody must conform to the standards set forth in the Miranda decision and to Due Process. Police questioning techniques include any words or actions that are designed to elicit incriminating statements. **[1.2.3]** If police questioning does not conform to legal standards, it can result in evidence being declared inadmissible in court.

It is important to understand that Miranda procedures only apply if both of the following situations are present:

- A person is in police custody or is otherwise deprived of his/her freedom of movement in a significant manner; and
- There is police questioning or its functional equivalent, including any words or actions that are reasonably likely to elicit an incriminating response. **[1.2.3]**

A suspect can stop police questioning at any time and for any reason by invoking his/her right to remain silent or by requesting the services of an attorney.

The ultimate goal of police in custody questioning should be to obtain the truth - not just to produce a confession or an admission of guilt.

"Spontaneous" statements are statements made to the police before, during or after the arrest by a person in custody. They are admissible in evidence even though the arrested person was not warned of his/her rights, provided that such statements are voluntary and are not made in response to police questioning or other actions that are

reasonably likely to elicit an incriminating response.

The objectives of in custody questioning should include the following:

1. Learning the truth;
2. Ascertaining the identity of criminal participants and accessories;
3. Obtaining an admission or a confession of guilt;
4. Acquiring all the facts, circumstances and method of operation of the crime under investigation;
5. Gathering information which may corroborate or disprove information obtained from other sources;
6. Eliminating suspects;
7. Uncovering information of any other crimes in which the suspect being questioned is, or has been involved;
8. Recovering evidence or property; and
9. Reporting all information obtained for subsequent court action.

Policy

It is the policy of this department that:

- Persons in custody shall be given their Miranda rights prior to any police questioning; and
- The Due Process rights of persons in custody will be respected.

Definitions

Custody: When a person is under arrest, or deprived of his/her freedom in a significant manner; or when they are not free to leave.

In Custody Questioning: Express questioning of a suspect about a crime or suspected crime. This includes any words or actions on the part of the police that the officers should know are reasonably likely to elicit an incriminating response.

Electronic Recording: The preservation by analog (audio and/or VHS videotape) or digital (digital audio tape, CD and or DVD non-rewritable discs) means through the use of audio or audio/video recording equipment.

Providing
Miranda
Warning

Officers shall give Miranda warnings whenever a person is placed in custody or deprived of his/her freedom in a significant manner and is subject to in custody questioning. **[1.2.3]**

Ideally, Miranda warnings should be read from a preprinted card or form prior to questioning.

Persons who do not speak English must be given Miranda warnings in a language that they understand. If there is a question of whether or not a person understands the English language, the suspect should read the rights himself or herself out loud.

Sample Miranda Warning Language:

- You have the right to remain silent;
- If you choose to speak, anything you say can be used against you in a court of law;
- You have the right to consult with a lawyer before answering any questions, and you may have him or her with you during questioning;
- If you cannot afford a lawyer and want one, a lawyer will be provided, at no cost to you, by the Commonwealth;
- You may answer questions now and waive (that means give up) your right to counsel and your right to remain silent;
- If you decide to talk to me, you still have the right to stop at any time and for any reason.

Officers should ensure the suspect's rights have been properly communicated to the suspect. A suspect must decide to speak with the police before being questioned while in custody. A suspect who invokes his/her right to silence or counsel will not be questioned while in police custody.

Any arrestee whom the police intend to question shall have the Miranda warnings read to them prior to questioning regardless of whether the warnings were previously given or not. Suspects should then be asked to sign a waiver form acknowledging that the warnings were given and also that they are willing to speak with the police. The officer giving the warnings should also sign the form as a witness, noting the date and time the suspect was advised of his/her rights. If there is any substantial delay between the Miranda warnings and the police questioning, the suspect shall be advised of these rights again before the questioning begins.

Whenever an officer has any doubt as to the applicability of the Miranda warnings in any particular case, the warnings should be given to the suspect to avoid any subsequent legal barrier to the admissibility of any statements obtained.

If, at any time, a suspect requests to read his/her rights or to be informed of his/her rights again, these requests shall be granted.

Before a juvenile between the ages of 12 and 18 is questioned, the Miranda warnings shall be given in the presence of the juvenile and his parent, guardian or other interested adult. The adult must acknowledge that he/she understands the rights given and the juvenile, depending upon their age, must be afforded the opportunity to have a meaningful or actual consultation with the interested adult, before a valid waiver can be made. See department policy on **Juveniles. [1.2.3]**

Non-Miranda Situations

Spontaneous Statements

Officers should note any spontaneous or volunteered statements. When a suspect or detainee voluntarily makes a statement, officers do not have to prevent him/her from continuing to talk and the Miranda warnings are not a prerequisite for admissibility. **[1.2.3]**

- Spontaneous and volunteered statements are statements made by a suspect of his/her own free will and not made in response to police questioning.
- A person who voluntarily enters a police station and makes incriminating statements need not be given the Miranda warnings.
- Spontaneous and volunteered statements may be taken after the suspect is in custody and before, during, or after actual in custody questioning so long as the statements are clearly voluntary.

Investigatory Stop and Frisks

Non-custodial preliminary or investigative questioning need not be preceded by Miranda warnings. See department policy on ***Threshold Inquiries*** **[1.2.3]**

Non-Law Enforcement Questioning

Miranda does not apply to statements made in response to questioning by private citizens, unless the private citizen is acting on behalf of the police. For a citizen to constitute an agent of the police, the police must solicit the citizen's help. For example, where a fellow detainee initiates questioning about a crime in hopes of trading information for a lighter sentence, any statements made are admissible if the police neither encouraged nor sought the detainee's assistance.

Traffic Violations or Traffic Accidents

- A person need not be given Miranda warnings if [s]he has been stopped for violating motor vehicle laws.
- An officer's request that a motorist perform field sobriety tests does not require that Miranda warnings be given.

Waiver of Rights

Valid Waiver

1. Statements made by a detainee more than six hours after the arrest (safe harbor period) are inadmissible unless the detainee has been arraigned or has made a valid written waiver (Rosario Prompt Waiver) of his/her right to be arraigned without unreasonable delay.

2. Sample Rosario Waiver Language:
 - You have the right to be brought to court within a reasonable period of time when the court is open to be arraigned on the charges for which you have been arrested.
 - The Quincy District Court is open Monday through Friday, 8:30 a.m. to 4:30 p.m. except on legal holidays.
 - The police may not question you if more than six hours have passed since the time of your arrest, unless you give them permission to do so. If you are disabled due to drug and/or alcohol intoxication at the time of your arrest, the six hour time period for questioning does not begin until your disability ends.
 - a. If the detainee is incapacitated due to a self-induced disability (such as the use of drugs or alcohol) the six hour safe harbor period does not begin until the disability terminates.
 - b. The six hour period is also tolled when in custody questioning is not possible or must be suspended for reasons not attributable to the police, such as a natural disaster or emergency. **[1.2.3]**
3. Questioning officers should make sure that the suspect understands the rights which have been read to him/her as the burden will be on the prosecution to prove that the waiver was valid.
4. The waiver must be made voluntarily, knowingly, and intelligently to meet the conditions of the Miranda decision.
5. In determining whether a valid waiver was made, the court examines whether in light of the totality of the circumstances surrounding the making of the waiver, the will of the suspect was overborne such that the statement was not a free and voluntary act. The court considers the circumstances of the questioning and the individual characteristics and conduct of the suspect, such as the length of time which transpired between the giving of the Miranda warnings and the waiver, the suspect's age, mental capacity and experience.
6. When the suspect waives his/her rights, questioning officers should obtain a written waiver when possible. A waiver may be made orally or in writing, but a written and properly witnessed waiver is more likely to be upheld in court.

7. Silence on the part of the suspect does not constitute a valid waiver.
8. Courts consider the physical and emotional condition of the person being questioned in determining the validity of a waiver. The police should refrain from questioning a suspect if he/she is clearly not capable of understanding his/her rights.

Competency

A suspect must be competent to waive his/her rights prior to police questioning. The question of competency is a question of fact to be determined by the circumstances in each case.

The competency issue is more likely to be raised under the following circumstances:

- a. If the suspect is distraught or very disturbed because of any mental or emotional condition; or
- b. If the suspect has been wounded or is the victim of shock or other physical impairment; or
- c. If the suspect is so intoxicated or influenced by alcohol or drugs that [s]he cannot think rationally or act sensibly; or
- d. If the suspect's intelligence level is so low, or his/her learning and education are so minimal, that [s]he does not comprehend his/her rights.

In all of the circumstances enumerated above, any waiver obtained will be carefully scrutinized by the court.

Assessing Competency

After the Miranda rights have been read and after the suspect has shown an initial willingness to waive those rights, the police should ask the suspect about the following in order to assess the suspect's ability to intelligently understand and waive his/her rights:

- a. His/her age;
- b. Whether [s]he is under the influence of any drugs or alcohol;
- c. Whether [s]he is suffering from any mental or emotional problem;
- d. His/her education and learning;
- e. His/her employment;
- f. Whether [s]he has ever been given Miranda warnings previously;
- g. Whether [s]he understands the words used by the officer in reciting the Miranda warnings or what they mean.

Presence of an Attorney

If a suspect states that [s]he wishes to consult an attorney, [s]he must not be questioned further by police until [s]he has had an opportunity to consult an attorney. However, if the suspect initiates statements or conversation, the police may respond to those statements or conversation. **[1.2.3]**

Although a suspect has voluntarily waived his/her right to remain silent, [s]he may still invoke this right by refusing to answer any further questions or by requesting the services of an attorney, and at this point the police questioning must cease.

If the police are aware that the suspect is represented by an attorney, even on other matters, and that the attorney desires to be present with his/her client during any questioning, the police must inform the suspect that his/her attorney wishes to be present during questioning. However, once so informed, the suspect may waive his/her right to have his/her attorney present. *Commonwealth v. McNulty*, 458 Mass. 305 (2010) states that “investigators are obligated to inform a suspect immediately of an attorney’s attempt to reach him and to immediately relay the attorney’s message to him, including a message advising him not to talk to investigators.” **[1.2.3]**

A suspect may answer some questions and refuse to answer others. The officer is not required to discontinue questioning unless the suspect indicates that [s]he wishes to remain totally silent, to stop the questioning or to consult with a lawyer. **[1.2.3]**

Once a suspect has been arraigned, [s]he has the right to counsel, whether or not [s]he is in custody, and [s]he shall not be questioned in the absence of counsel unless [s]he specifically waives his/her right.

Documenting Statements and Confessions

Officers should, when practical, electronically and visually record in its entirety all custodial questioning of suspects or questioning of suspects conducted in places of detention. This can be accomplished by activating the in-house recording system located in the BCI interview room or by utilizing a portable recording device (audio only). Before recording an in custody questioning, the suspect shall be notified that the conversation will be audio and/or visually recorded. Once the suspect has been notified of this, the officer should while recording:

1. Inform the suspect they are being recorded;
2. State the location, date, time of day of the questioning as well as the identities of officers, suspect or others present;
3. Execute appropriate and applicable departmental forms, including but not limited to, Miranda and waiver of prompt arraignment (see Rosario Waiver attached below);
4. Record the time and reason for any suspension of the recording (such as a break for water, food or the restroom) as well as record the time when the recording

- proceeds;
5. If the officer uses or refers to documents or other items during the in custody questioning, the officer should describe those documents or items on the recording;
 6. Conclude the recording by stating the date and the time the questioning is completed;

Refusal: If a suspect refuses to make a recorded statement, the officer should record the refusal (if possible) and document the refusal within their written report.

Discretionary Decision not to Record: An officer may decide not to record an in custody questioning session even where it is practical to do so if that officer believes that recording the in custody questioning session will jeopardize the safety of an officer, the suspect, or any other person. The officer should fully document in their written report the reason(s) why the in custody questioning session was not recorded.

Inoperable or Unavailable Recording Device: If there is no recording device available or it is inoperable, the officer should defer questioning until an operable recording device is available. If it is impractical to defer questioning, and the suspect consents to continuing the questioning without a recording device, that consent and the questioning should be documented in some manner, such as in a signed written statement by the suspect or in the officers' written report.

Preservation and Copying of Original Recordings: The officer who conducts the in custody questioning session must take steps to preserve the original recording. All recordings should be properly labeled and placed into evidence per departmental procedure. Copies should only be made by an officer authorized by the Chief of Police.

Written Statements: When a written statement is provided, the suspect shall be asked to read, sign and date all written statements and confessions. Questioning officer(s) shall sign and date all written statements and confessions. The questioning officer shall prepare and submit a report in accordance with departmental procedures which shall include the above information and any written or recorded statements. **[1.2.3]**

Interview Rooms

An interview room located in the main lobby is not audio nor video recorded. Generally, this interview room should be used to interview victims, complainants and to take walk-in reports. Officers utilizing the main lobby's interview room are not required to secure their firearm. **[42.2.10]**

A second interview room is located in the entryway to the Department's Bureau of Criminal Investigations. This interview room is both audio and video recorded and generally should be used to interview suspects and detainees during the course of criminal

investigations. Both uniformed and non-uniformed officers are authorized to use this room.

In custody questioning sessions should be controlled by the uniformed or non-uniformed officer in a setting that provides reasonable privacy and safety.

- Weapons should not be allowed inside the interview room and should be secured in a designated area outside of the room during the in custody questioning of a detainee. **[42.2.10 a]**
- The interview room shall be inspected prior to bringing a suspect into the room. **[42.2.10 b]**
- No more than three officers should be allowed in the room during an in custody questioning session. **[42.2.10 c]**
- The Shift Commander and Station Officer shall be notified if a detainee is being taken from the cell block to the interview room. A back-up officer shall be located in the immediate vicinity of the interview room. The Station Officer should perform extra checks in the BCI area during an in custody questioning session of a detainee and can serve as the backup officer. The Station Officer and/or Shift Commander can monitor the interview room in real time through the camera system, and should do so from time to time to ensure the safety of personnel in the interview room. Officers shall have a portable radio or telephone available to summons assistance. A duress device may be installed in the room. **[42.2.10 d]**
- The interview room may be sparsely furnished. The room may contain a desk or table, seating for the subject and officers, writing materials, overhead lighting, a digital audio recording device and camera that can be turned on/off from the room. The audio/video shall be turned on when questioning takes place inside the interview room. **[42.2.10 e]**
- Upon request, subjects must be allowed reasonable access to restrooms, drinking water and comfort breaks. Arrangements shall be made for the safety and security of all parties, whether involved in the questioning or not. **[42.2.10 f]**



Rosario Waiver

I, _____, have been informed that I have the right to be brought to court within a reasonable period of time when the court is open, to be arraigned on the charges for which I have been arrested.

I have been informed that the Quincy District Court is open Monday through Friday, 8:30 a.m. to 4:30 p.m., except on legal holidays.

I have also been informed that the police may not question me if more than six (6) hours have passed since the time of my arrest, unless I give them my permission to do so. I understand that if I am disabled for drug and/or alcohol intoxication at the time of my arrest, the six hour time period for questioning does not begin until my disability ends.

Having these rights in mind, I wish to continue speaking with the police.

Signature _____

Witnessed by _____

Date & Time _____ Location _____