



Town of Lexington

Police Department

Subject: Interrogating Detainees and Arrestees

Reference: 1.2.3(b); 42.2.1(b); 42.2.3(b); 42.2.10

Effective Date:

November 1, 2010

Review Date:

Annually

By Order of: Mark J. Corr, Chief of Police

**Policy &
Procedure**

41K

The Municipal Police Institute, Inc. (MPI) is a private, nonprofit charitable affiliate of the Massachusetts Chief's of Police Association. MPI provides training and model policies and procedures for police agencies. This policy is an edited version of MPI Policy 1.13, "Interrogating Suspects and Arrestees."

GENERAL CONSIDERATIONS AND GUIDELINES

Interrogations of persons in police custody must conform to the standards set forth in the *Miranda* decision as well as due process. A suspect must **knowingly, intelligently and voluntarily** waive his/her rights to this constitutional protection before the interrogation can begin.

Critical elements to be considered before determining if *Miranda* applies include whether the environment is coercive and if the person being questioned is free to leave. 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.

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

"Spontaneous" statements made to the police before, during or after the arrest by a person in custody are admissible into 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 designed to elicit a response.

It is the policy of the Lexington Police Department that:

1. A person in police custody shall be given their *Miranda* rights prior to any police interrogation; and
2. The due process rights of persons in custody will be respected.

PROCEDURE [1.2.3(b)]

A. Definitions

1. **Custody:** When a person is under arrest, or deprived of his/her freedom in a significant manner.ⁱ (The terms arrestee and detainee may be used).
2. **Interrogation:** Express questioning of a suspect about a crime or suspected crime as well as any words or actions on the part of the police that the officers should know are reasonably likely to elicit an incriminating response.ⁱⁱ

B. Providing Miranda Warnings

1. If officers wish to interview or interrogate a person who is in custody or deprived of his/her freedom in a significant way, officers are obligated to give Miranda warnings prior to such interrogation.
 - a. The Miranda warnings shall be read from a preprinted card or form in a clear and unhurried manner prior to questioning.
 - b. Persons who do not speak English must be given these warnings in a language that they understand.
 - c. Sample Miranda Warning Language:
 - ***You have the right to remain silent;***
 - ***If you choose to speak, anything you say may be used against you in a court of law or other proceeding;***
 - ***You have the right to consult with a lawyer before answering any questions and you may have him present with you during questioning;***
 - ***If you cannot afford a lawyer and you want one, a lawyer will be provided for you by the Commonwealth without cost to you;***
 - **Do you understand what I have told you?**

- **You may also waive the right to counsel and your right to remain silent and you may answer any question or make any statement you wish. If you decide to answer questions, you may stop at any time to consult with a lawyer.**
2. Detainees undergoing the booking process shall be given Miranda warnings during the booking procedure, even if they were previously provided.
 3. 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.
 4. Whenever an officer has any doubt as to the applicability of Miranda then the warnings should be given to the detainee to avoid subsequent legal issues regarding admissibility of statements obtained.
 5. If, at any time, a suspect requests to read his/her rights or to be informed of his/her rights, these requests shall be granted.
 6. Juveniles
 - a. Before a juvenile between the ages of 7 and 17 is questioned, the Miranda warnings shall be given in the presence of the juvenile and his/her parent, guardian or other interested adult. The adult must acknowledge that [s]he understands the rights and the juvenile must be given the opportunity to have a meaningful consultation with the adult. See department policy ***44B-Handling Youthful Offenders***.
 - b. When the juvenile is under the age of fourteen, it is mandatory that a parent or interested adult be:
 - i. Present
 - ii. Understands the Miranda warnings, and
 - iii. Has the opportunity to privately explain the rights to the juvenile.
 - c. There are two situations in which the law permits a juvenile (age 14, 15 and 16) to be lawfully subject to police custodial interrogation.
 - i. The juvenile had an opportunity to consult with an interested adult (Commonwealth v. A Juvenile, 389 Mass. 128 (1983), or

- ii. Interrogations involving a juvenile who has reached the age of 14 without the opportunity of an interested adult being present, require a demonstration of a high degree of intelligence, experience, knowledge or sophistication on the part of the juvenile.

C. Non-Miranda Situations

1. Spontaneous Statements

Officers may note and use any spontaneous and 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 of any such statements in evidence at court until and unless custody occurs and follow-up questions are presented.

- 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.ⁱⁱⁱ
- Spontaneous and volunteered statements may be taken after the suspect is in custody and before, during, or after actual interrogation so long as the statements are clearly voluntary.

2. Investigatory Stop and Frisks:

Non-custodial preliminary or investigative questioning need not be preceded by Miranda warnings.^{iv} See department policy **41L - Stop and Frisk and Threshold Inquiries**.

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 request or encourage the citizen's help.^v Thus, 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.^{vi}

4. Traffic Violations or Traffic Collisions

- a. A person need not be given Miranda warnings if [s]he has been stopped for violating civil motor vehicle infractions.^{vii}

- b. An officer's request that a motorist perform field sobriety tests does not require that Miranda warnings be given.^{viii}

D. Waiver of Rights

1. Valid Waivers/Safe Harbor Rule

- a. Statements made by an arrestee more than six hours after the arrest (safe harbor period) are inadmissible unless the arrestee has been arraigned or has made a valid written waiver of his/her right to be arraigned without unreasonable delay.^{ix}
 - i. If the arrestee 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.^x
 - ii. The six-hour period is also tolled (i.e., suspended or extended) when interrogation is not possible or must be suspended for reasons not attributable to the police, such as a natural disaster or emergency.^{xi}
- b. The interrogating officers should be certain that the suspect understands the rights that have been read to him/her, as the burden will be on the prosecution to prove that the waiver was valid.^{xii}
- c. The waiver must be made voluntarily, knowingly and intelligently to meet the conditions of the Miranda decision.
- d. In determining whether a valid waiver was made, the court examines the totality of the circumstances surrounding the waiver, to determine if the statement was a free and voluntary act. The court considers the circumstances of the interrogation and the individual characteristics and conduct of the suspect, such as the length of time between the provision of Miranda warnings and the waiver, the suspect's age, mental capacity and experience.^{xiii}
- e. When the detainee waives his/her rights, the interrogating officers shall 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.
- f. Silence on the part of the suspect does not constitute a valid waiver.^{xiv}

- g. The physical and emotional condition of the person being questioned is an important consideration in determining the validity of a waiver. The police should refrain from questioning if the suspect is clearly not capable of understanding his/her rights.^{xv}
- h. The waiver of rights form can be found on the G: Drive, under forms and documents, and is attached here as attachment A.

2. Competency

- a. 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.
- b. The competency issue is more likely to be raised under the following circumstances:
 - i. If the suspect is distraught or very disturbed because of mental health or emotional condition;
 - ii. If the suspect has been wounded or is the victim of shock or other physical impairment;
 - iii. If the suspect is so intoxicated or influenced by alcohol or drugs that [s]he cannot think rationally or act sensibly; or
 - iv. If the suspect's intelligence level is so low, or his/her learning and education levels are so minimal, or if the person is developmentally disabled that [s]he does not have the capacity to comprehend his/her rights.
- c. In any of the circumstances enumerated above, the court will carefully scrutinize any waiver obtained.

3. Assessing Competency Prior to Interrogation

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

- The detainees age;
- If under the influence of any drugs or alcohol;
- Is suffering from any mental or emotional problem;

- His/her education and learning;
- His/her employment;
- Whether [s]he has ever been given Miranda warnings previously; and
- Understands the words used by the officer in reciting the Miranda warnings and what they mean.

E. Access to Counsel

1. Request for Counsel

- a. If a detainee requests consultation with an attorney:
 - i. Questioning by police must stop until there has been an opportunity to consult an attorney.
 - ii. If the suspect initiates statements or conversation, the police may respond to those statements or conversation, but should refrain from asking additional questions.
- b. If a detainee has voluntarily waived his/her right to remain silent, [s]he may still invoke this right at any time by refusing to answer questions or by requesting an attorney. If this happens police questioning must cease.
- c. A detainee 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 invoke their right to remain silent or to stop questioning or consult with a lawyer.

2. Representation by Counsel

- a. 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.
- b. Once so informed, the suspect may waive his/her right to have his/her attorney present.

3. Post Arraignment: Once a suspect has been arraigned, the suspect has an absolute right to counsel, while in custody or otherwise. Questioning in the absence of counsel cannot take place unless initiated by the

person to be questioned and after a waiver of the right to counsel is obtained.

F. Setting of the Interrogation

1. Generally

- a. An interrogation is a controlled process, controlled by the officer conducting the interrogation. It should be conducted in a setting that provides a degree of privacy as well as safety and security for the officer and the suspect as well.
- b. All rooms used for conducting interrogations including rooms designated for this purpose shall be inspected for security issues prior to bringing the suspect into the room and conducting the interview. **[42.2.10(b)]**

2. Designated Interview Room

- a. The interview room should be sparsely furnished with chairs for the officer(s) and suspects, and a small table.
- b. If a telephone is in the room, the ringer should be switched off.
- c. Writing materials, department forms, recording equipment and media will be maintained in the interview room. **[42.2.10(e)]**
- d. Other items should not be left in the interview room.
- e. Weapons must not be allowed inside of the interview room. **[42.2.10(a)]**
 - i. Persons being interrogated should be pat-frisked for firearms and other weapons prior to being admitted into the interview room.
 - ii. Police firearms should be secured in a designated firearm locker outside of the room. **[42.2.10(b)]**

3. Personnel

- a. Usually, no more that two officers should be present during an interrogation. **[42.2.10(c)]**
- b. Live audio and video capability is available for other officers to observe an interrogation even if it is not recorded.

41K-Interrogating Detainees and Arrestees

- c. Interrogations should never be conducted by a single officer without a back-up officer readily available in the event that the interviewing officer needs help.
4. Means of Summoning Assistance [42.2.10(d)]
 - a. If two officers are conducting an interrogation, no other backup officers are required. Depending on the suspect, additional backup officer(s) may be advisable.
 - b. A backup officer shall be located in the immediate vicinity of the interrogation, within audible distance, for the duration of the interrogation, in the event that the interviewing officer(s) summons assistance.
 - c. Live audio and video is available for other officers to observe an interrogation for the safety of the officer(s) conducting the interrogation.^{xvi}
 - d. A duress button may be installed in the event that an officer needs assistance.
 - e. Police radios may be used to summons assistance in certain areas of the building.
 5. Breaks: If an interview or interrogations is of long duration, officer(s) must make arrangements for access to restrooms, water, and provide for other comfort issues while continuing to provide for the security and safety of all parties involved. [42.2.10(f)]
- G. Documenting Statements and Confessions
1. Recording Requirements
 - a. In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), the Supreme Judicial Court has expressed a preference that interrogations conducted in a custodial setting be recorded whenever practicable.
 - b. In the absence of recording the court will issue jury instructions that jurors “should weigh evidence of the defendant’s alleged statement with great caution and care.”
 - c. This jury instruction is required regardless of the reason that the police did not record the interrogation. Failure to record may create an unnecessary burden for the prosecution.

2. Recording Interrogations

- a. Officers shall video and or audio record all suspect interrogations whenever possible.
- b. Before recording an interrogation, the suspect shall be notified that the conversation will be recorded.^{xvii}

3. Suspect Refusal to be Recorded

In the event a detainee refuses to be recorded, the refusal should be documented (on the recording if possible) and then the recording equipment will immediately be stopped. The refusal will be documented by:

- The investigating officer in his/her written report.
- Asking the suspect to sign a refusal form and/or by having the suspect include in any written statement his/her refusal to be recorded.

4. Note Taking

- a. Notes should be taken in a manner that does not interrupt the interviewing process. Some interviewees are reluctant to talk if they notice that the officer is taking down every word they say.
- b. Brief notes can be made without deterring or distracting the interviewee. However, if a statement appears highly informative due to its nature and content, a verbatim account should be made.

5. Written Statement or Confession

- a. Obtain a written statement from the witness/victim, if appropriate.
- b. The preferred method is to have the Department's "Voluntary Statement" form completed. The voluntary statement form includes the following necessary information:
 - i. Name of the writer,
 - ii. Writer's age and address, and
 - iii. Date and writer's signature.
- c. The detainee should recount the incident in his/her own words.
- d. The detainee should review the statement; correct any errors, and sign and date the statement when complete.

- e. The interrogating officer(s) shall sign the statement or confession as witnesses.
 - f. If the person giving the statement cannot write the statement due to injury, illiteracy, or other reason, the statement may be dictated and written, word for word, by a companion, or by a police officer.
6. Transcribed Statement
- a. Types of Transcribed Statements
 - i. An oral statement transcribed from a recorded interview is preferred.
 - ii. A statement may also be transcribed by writing down the suspect's words as the statement is being dictated.
 - b. Written Statements or Confessions as Evidence
 - i. The transcribed statement shall be reviewed by the person who gave the statement, any errors or omissions corrected, and then signed by that person.
 - ii. The interrogating officer(s) shall sign and date all written statements and confessions.
- H. Conducting the Interview or Interrogation
- 1. Beginning the Interview
 - a. At the beginning of the recorded interview, verbally record the following:
 - i. The name(s) of officers present during the interview.
 - ii. Date and time of the interview.
 - iii. The location of the interview.
 - iv. The name of the witness being interviewed.
 - b. If the interview is not being recorded, the information shall be recorded in writing.

2. Conducting the Interview
 - a. Ask the person being interviewed to fully describe the incident.
 - b. Ask specific questions to clarify the statement or to fill in any omissions or unknowns.
 - c. Note:
 - i. Any relationship or connection the suspect might have with the victim, other perpetrator or the property or premises involved in the crime;
 - ii. The overall credibility of the witness/victim;
 - iii. His/her opportunity to make observations; and his/her ability to recall details as opposed to general impressions, etc.
3. Observations: Observe and note any emotional outbursts, inflections of the voice and nervous reactions that may indicate areas requiring further probing or clarification.
4. Terminating the Interview: Interviews should be ended in a courteous manner. It may be necessary in the future to conduct a second or subsequent interview therefore ending the first interview in good standing is important.
5. Documenting the Interview

The circumstances surrounding the conduct of interrogations and recording of confessions shall be fully documented. This includes:

- Location, date, time of day and duration of interview;
- Identities of officers or others present;
- Miranda warnings given, suspect responses and waivers provided, if any; and
- The nature and duration of breaks in questioning to provide the suspect food, drink, use of the restroom, or for other purposes.

ⁱ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

ⁱⁱ *Com. v. Morse*, 427 Mass. 117, 691 N.E.2d 566 (1998)

ⁱⁱⁱ *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711 (1977)

-
- iv *See, Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *Com. v. Podlaski*, 377 Mass. 339, 398 N.E.2d 1379 (1979)
- v *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199 (1964)
- vi *Com v. Gajka*, 425 Mass. 751, 682 N.E.2d 1345 (1997)
- vii *Berkemere v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984)
- viii *Com. v. Wholley*, 429 Mass. 1010, 709 N.E.2d 1117 (1999); See also, *Vanhouton v. Com.*, 424 Mass. 327, 676 N.E.2d 460 (1999)
- ix *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)
- x *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)
- xi *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)
- xii *Com. v. Nom*, 426 Mass. 152, 686 N.E.2d 1017 (1997)
- xiii *Com. v. Nom*, 426 Mass. 152, 686 N.E.2d 1017 (1997); *Com. v. Hooks*, 38 Mass. App. Ct. 301, 647 N.E.2d 440 (1995)
- xiv *Com. v. Roy*, 2 Mass. App. 14, 307 N.E.2d 851 (1974)
- xv *Com. v. Hosey*, 368 Mass. 571, 334 N.E.2d 44 (1975)
- xvi M.G.L. c. 272, s. 99(D)(e)
- xvii M.G.L. c. 272, s. 99