



518 Interview and Interrogation

Virginia Beach Police Department General Order

Chapter 500 – General Operations
CALEA Standards: 1.2.3.B & C, 44.2.2.C & E, 44.2.3

Purpose:

To provide officers with legally sound procedures for conducting custodial interrogations that produce voluntary and admissible statements, and to ensure that constitutional protections of the Fifth and Sixth Amendments are not violated.

Definitions

Interview: A non-custodial conversation intended to obtain information or statements from victims, witnesses, or suspects.

Interrogation: Custodial questioning or conduct reasonably likely to elicit an incriminating response.

Custody: Circumstances in which a reasonable person in the suspect's position would feel that his freedom of action has been restricted to the same degree as a formal arrest.

Waiver: A voluntary, knowing, and intelligent relinquishment of known constitutional rights.

Policy (CALEA 1.2.3 B):

Officers and detectives shall comply with United States Constitution, relevant court decisions, and this policy when conducting interviews and interrogations to observe due process rights of suspects and to guard against coercion or intimidation during interrogation.

Officers will make every effort to stay current with changes related to Fifth and Sixth Amendment law and relevant court decisions. If there is uncertainty about the legal ramifications of questioning, an individual officer should consult with a supervisor and/or the Office of the Commonwealth's Attorney.

Fifth Amendment Rights (CALEA 1.2.3 C)

The Fifth Amendment to the U.S. Constitution states in relevant part that "No person shall be...compelled in any criminal case to be a witness against himself."

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held that the Fifth Amendment requires law enforcement officials to advise suspects of their right to remain silent and to obtain an attorney prior to interrogation while in police custody.

Without a Miranda warning, evidence obtained during custodial interrogation is generally inadmissible.¹

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Parker*, 262 F.3d 415 (4th Cir. 2001); *United States v. Hargrove*, 625 F.3d 170 (4th Cir. 2010).

Miranda rights are not offense-specific, meaning a waiver is valid even if police do not inform a suspect about all potential subjects of questioning.²

Sixth Amendment Right to Counsel

This Sixth Amendment right to counsel attaches when judicial proceedings have been initiated, whether by formal charge, preliminary hearing, indictment, information, or arraignment.³ The Sixth Amendment right to counsel is offense-specific.⁴

Miranda Rule

Miranda warnings are required and shall be administered prior to “custodial interrogation.” For *Miranda* to apply, the suspect must both be in custody and subject to interrogation.

Non-custodial situations that do not require *Miranda* warnings:

- A. Consensual encounters
- B. Investigatory detentions, including routine questioning at the scene of an incident or crime when the questions are not intended to elicit an incriminating response
- C. Questioning during a routine traffic stop
- D. Voluntary interviews at a police facility
- E. When information or statements are made spontaneously, voluntarily, and without prompting by police

Custody

When deciding whether a defendant not under formal arrest was in custody for purposes of *Miranda*, courts ask whether, “under the totality of the circumstances, a suspect’s freedom of action [was] curtailed to a degree associated with formal arrest.”⁵

This inquiry is objective and considers whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.⁶

Facts relevant to the custodial inquiry include, but are not limited to:

- A. The time, place, and purpose of the encounter
- B. The words used by the officer
- C. The officer's tone of voice and general demeanor
- D. The presence of multiple officers
- E. The display of a weapon by an officer
- F. Whether there was any physical contact between the officer and the suspect
- G. If the suspect is isolated or separated from family

² *Colorado v. Spring*, 479 U.S. 564 (1987).

³ *Brewer v. Williams*, 430 U.S. 387 (1977).

⁴ See *Texas v. Cobb*, 532 U.S. 162 (2001).

⁵ See *United States v. Hasime*, 734 F.3d 278 (4th Cir. 2013); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

⁶ See *United States v. Jamison*, 509 F.3d 623 (4th Cir. 2007); *Thompson v. Keohane*, 516 U.S. 99 (1995).

H. Physical restriction of the suspect ⁷

Simply saying a suspect is free to leave, by itself, is not sufficient to show a lack of custody unless the totality of the circumstances indicate that a reasonable person would believe the statement.⁸

Administering *Miranda*

It is the responsibility of the officer or detective who will be conducting an interrogation to advise an individual of his/her *Miranda* rights. Unless directed to do so by a supervisor, officers will not initiate an interrogation or advise an individual of *Miranda* rights unless the officer is responsible for the investigation of the case.

Miranda warnings should be read from the department-issued *Miranda* card. Officers shall not paraphrase the warnings or recite the warnings from memory. Officers shall confirm understanding and obtain an explicit waiver before questioning.

Miranda Warning

- A. You have the right to remain silent. Anything you say can and will be used against you in a court of law.
- B. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.
- C. Do you understand each of these rights I have read to you?
- D. Having these rights in mind, do you wish to speak to me?

After *Miranda* warnings, there are three basic options a suspect can choose: (1) waive his rights and agree to talk, (2) invoke his right to remain silent, or (3) invoke his right to counsel.

The suspect's response determines whether, and under what circumstances, he can later be re-approached by law enforcement officers to obtain an admissible statement.

Miranda Waiver

Officers must ensure that suspects understand the *Miranda* warnings before proceeding. A suspect must affirmatively waive one or both *Miranda* rights before interrogation.

After an intelligent and voluntary waiver of *Miranda*, the mere passage of a reasonable amount of time does not require readvising a suspect of their rights.⁹

The mere passage of time, however, does not compromise a *Miranda* warning. Courts have consistently upheld the integrity of *Miranda* warnings even in cases where "several hours" have elapsed between the reading of the warning and the interrogation.

In evaluating whether a *Miranda* waiver was made voluntarily, courts will consider whether the waiver was verbal or written.

⁷ *Hashime*, 734 F.3d at 283 (quoting *United States v. Day*, 591 F.3d 679 (4th Cir. 2010)).

⁸ *United States v. Hargrove*, 625 F.3d 170 (4th Cir. 2010).

⁹ *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996) (holding the defendant's initial *Miranda* warning was in no way compromised by the passage of two and one-half hours between the issuance of his warning and the point at which he began to confess his crimes and cooperate with the police).

Whenever possible, officers should ensure that individuals read and sign the legal rights waiver form. Officers must also ensure that the waiver process is captured on their body-worn camera

Voluntariness of Waivers

Miranda waivers must be voluntary, knowing, and intelligent; that means a waiver must have been made freely, without any coercion or intimidation on the part of the police or their agents. Threats, false promises, or coercion to induce a statement is prohibited.¹⁰

If an individual waives their Fifth or Sixth Amendment rights, the burden is on the prosecution to prove that the decision was knowing and intelligent.

When determining the voluntariness of a *Miranda* waiver, courts examine factors such as the person's age, intelligence, familiarity with the criminal justice system, and whether they consumed drugs or alcohol.

No one factor alone is dispositive. *Miranda* waivers have been found voluntary in a number of diminished capacity cases:

- A. *Yeatts v. Commonwealth*, 242 Va. 121 (1991) (holding *Miranda* waiver voluntary despite defendant's "low intelligence" and "stress" he suffered from "drugs, alcohol, and loss of sleep").
- B. *Simpson v. Commonwealth*, 227 Va. 557 (1984) (holding *Miranda* waiver voluntary despite that defendant had an IQ of 78 and "functioned at the second-grade level").
- C. *Terrell v. Commonwealth*, 12 Va. App. 285 (1991) (holding that the "confession was voluntary" even though defendant had "an IQ between 71 and 75").
- D. *Goodwin v. Commonwealth*, 3 Va. App. 249 (1986) (holding *Miranda* waiver voluntary even though defendant read at a first-grade level and had an IQ of 56, demonstrating significantly below-average intellectual functioning).

Misleading a suspect can lead the suspect to agree to waive their *Miranda* rights based on false pretenses. The following are situations where a waiver was found involuntary and the result of police coercion:

- A. When a suspect was intentionally misled to believe he was not "in trouble," and that he could only get his vehicle returned if he submitted to questioning, his *Miranda* waiver and subsequent statement to police were deemed involuntary and the result of police coercion.¹¹
- B. If the prosecution intentionally leads the accused to hope and believe that he will not be charged if he confesses and testifies against others, the confession is inadmissible.¹²

Invoking the Right to Silence

When a suspect clearly and unambiguously invokes the right to remain silent, all questioning shall cease immediately. Silence alone is not an invocation.¹³

¹⁰ *Culombe v. Connecticut*, 367 U.S. 568 (1961).

¹¹ *United States v. Giddins*, 858 F.3d 870 (4th Cir. 2017).

¹² *Belcher v. Commonwealth*, 160 Va. 891 (1933).

¹³ *Berghuid v. Thompkins*, 560 U.S. 370 (2010).

The suspect in custody must clearly state that they want to remain silent or that they do not want to talk to the police.

Officers shall not reengage a suspect who has invoked their right to remain silent unless:

- A. The suspect has been left alone by police for at least several hours¹⁴
- B. The suspect initiates new discussion with police about their involvement in criminal activity, or
- C. The suspect leaves custody.

Before reattempting custodial interrogation, officers must readminister *Miranda* warnings and obtain a valid waiver. If the suspect is no longer in custody, *Miranda* warnings are not required.

Invoking the Right to Counsel

When a suspect unambiguously invokes the right to counsel, all interrogation must cease immediately.¹⁵ Ambiguous statements may be clarified but do not require cessation.¹⁶

Suspects who are arrested and remain in custody may not be interrogated again unless:

- A. Counsel is present at the questioning, or
- B. The suspect initiates new discussion with police about their involvement in criminal activity.

Officers shall reasonably cooperate with efforts by counsel to contact or meet with the suspect in custody.

This prohibition is in place to ensure that officers will not take advantage of the mounting coercive pressures of prolonged custody by repeatedly attempting to question a defendant who previously requested counsel until the defendant is badgered into submission.¹⁷

Before reattempting custodial interrogation, officers must readminister *Miranda* warnings and obtain a valid waiver.

14 Day Break-In-Custody Rule

If a suspect is released from custody, officers must wait 14 days before reattempting custodial interrogation to prevent law-enforcement officers from releasing a suspect only to promptly bring him back into custody for reinterrogation.¹⁸

The 14-day Rule only applies to custodial interrogation. If a suspect is not in custody, *Miranda* warnings are not required.

¹⁴ *Michigan v. Mosley*, 423 U.S. 96 (1975) (holding reinterrogation more than 2 hours later did not violate *Miranda* when suspect was read his rights a second time and voluntarily waived those rights).

¹⁵ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹⁶ *Davis v. United States*, 512 U.S. 452 (1994).

¹⁷ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹⁸ *Maryland v. Shatzer*, 559 U.S. 98 (2010).

Exceptions to the Miranda Requirement

- A. Public Safety Exception: Questioning necessary to prevent immediate danger may occur before Miranda, these statements are not considered a Miranda violation and are admissible in court.¹⁹
- B. Routine Booking Questions: Routine questions normally attendant to arrest and custody do not require Miranda. This exception allows for administrative, routine background questions, such as the suspect's name, address, etc., to be asked, but police may not ask questions during the booking process that are designed to elicit incriminating answers.²⁰

Violations of *Miranda*

The practical effect of the *Miranda* case is that no confession obtained during a custodial interrogation is admissible in evidence unless (1) the person who made the statement was first advised of their Fifth Amendment rights, and (2) the police observed those rights in the process of obtaining a statement.

Confessions will be found inadmissible if officers intentionally attempt to achieve an “end run” around *Miranda* through two-stage interrogations, meaning officers may not intentionally conduct custodial interrogation in hopes of drawing out a confession and then only read the *Miranda* warnings in order to review the previous unwarned admissions.

However, an unintentional or “good faith” *Miranda* mistake that produces a voluntary but unwarned admission will not taint a subsequent confession made after proper *Miranda* warnings are given and waived.²¹

Remedy for Violations

The remedy for illegally obtained confessions is suppression, meaning the statement is inadmissible in court. Confessions are inadmissible if obtained through the following means:

- A. Illegal Search or Seizure
 - 1. If a confession is the product of an illegal search or seizure, the confession can be excluded from evidence if (1) the person seeking suppression of the confession has standing to challenge the search, and (2) the confession is tainted by the illegal search.²²
- B. *Miranda* Violations
 - 1. Statements obtained in violation of *Miranda* cannot be used in the Commonwealth's case-in-chief. However, such statements may be used to impeach the defendant.²³

¹⁹ *New York v. Quarles*, 467 U.S. 649 (1984) (holding that a police officer's request for the location of a gun was prompted by an immediate interest in assuring that it did not injure an innocent bystander and therefore the failure to reading the *Miranda* warning did not violate the Constitution).

²⁰ *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

²¹ *Oregon v. Elstad*, 470 U.S. 298 (1985).

²² *Wong Sun v. United States*, 371 U.S. 471 (1963).

²³ *Oregon v. Hass*, 420 U.S. 714 (1975).

2. Physical evidence obtained in reliance on statements taken in violation of the *Miranda* rule, without a due process violation, is admissible.²⁴
- C. Due Process Violations
1. A confession obtained in violation of Due Process (that is, a confession that is coerced or involuntary) is deemed “fruit of the poisonous tree” and will be completely suppressed, meaning the confession is not admissible in the Commonwealth's case-in-chief or for impeachment against any defendant or witness.²⁵
- D. Sixth Amendment Right to Counsel
1. Incriminating statements obtained after indictment and in the absence of counsel cannot be used against the defendant, even if they were gathered secretly.²⁶
 2. Confessions obtained when a government-paid informant is placed in a jail cell with an indicted defendant who deliberately elicits incriminating information without counsel present violates the Sixth Amendment, and the statements will be suppressed.²⁷

Use of Ruse Tactics During Questioning

- A. A ruse that replicates, alters, or uses any certificate, letterhead, or format belonging to an agency outside of the Virginia Beach Police Department is not permissible during any part of an investigation, including during interviews and/or interrogations.
- B. All written materials used in investigative deception must be approved by a supervisor.
- C. Officers shall not make false statements of material fact to secure cooperation, confession, or conviction, especially with juveniles.

Questioning Juveniles (CALEA 44.2.2 C, E, 44.2.3 A, B)

Juveniles interviewed or interrogated by the police are afforded the same Fifth and Sixth Amendment protections as adults. The physical size of the juvenile, the seriousness of the offense, or whether or not the juvenile is considered a suspect does not change the legal requirements during interviews and interrogations.

Officers should recognize that juveniles are generally more impressionable than adults and may be more susceptible to intimidation caused by the situation and/or presence of police officers. When determining the voluntariness of statements made by juveniles, courts will examine all the circumstances surrounding the encounter between the officer and the juvenile. Some of the factors the court will consider include:

- A. The environment where the interview or interrogation is conducted.
- B. Any prior experience the juvenile has with the criminal justice system.

²⁴ *United States v. Patane*, 542 U.S. 630 (2004).

²⁵ *Mincey v. Arizona*, 437 U.S. 385 (1978).

²⁶ *Massiah v. United States*, 377 U.S. 201 (1964).

²⁷ *United States v. Henry*, 447 U.S. 264 (1980).

- C. The juvenile's maturity, education, and intelligence level.
- D. The juvenile's capability to understand their legal rights and the consequences of waiving those rights.
- E. Whether or not a parent (or guardian) and/or legal counsel were contacted and permitted officers to question a juvenile, or the parent and/or counsel was present during the interview/interrogation.

If in doubt, officers should consult with a supervisor or the Office of the Commonwealth's Attorney.

Interrogation of Juveniles

In accordance with the Code of Virginia §16.1-247.1 and *General Order 514 Juvenile Operations*, prior to any custodial interrogation of a child who has been arrested, the parent, guardian, or legal custodian shall be notified of the juvenile's arrest, and the child shall have contact with his parent, guardian, or legal custodian. This notification and contact may be in person, electronically, by telephone, or by video conference.

The only exceptions to this requirement for parental contact prior to custodial interrogation are as follows:

- A. The parent, guardian, or legal custodian is a codefendant.
- B. The parent, guardian, or legal custodian is suspected of committing a crime against the child.
- C. After every reasonable effort has been made, the parent, guardian, or legal custodian cannot reasonably be located or refuses contact.
- D. If the law-enforcement officer believes the information sought is necessary to protect life, limb, or property from an imminent danger, and the questions are limited to those that are reasonably necessary to obtain that information.

Specific Directives Related to Questioning of Juveniles

- A. No more than two officers will conduct a custodial interrogation of a juvenile unless authorized by a supervisor.
- B. Interrogations of juveniles should be limited to the minimum amount of time required to obtain the information needed. While there are no rigid time limits established for the interrogation of juveniles, officers should be cognizant that courts will closely scrutinize extended interrogations, especially when it appears officers continue the interrogation after it is clear that all available information from the juvenile has been gathered.
- C. Officers should make complete notes concerning all the circumstances and events surrounding the interview or interrogation of a juvenile. Whenever possible, interrogations of juveniles will be audio- and video-recorded.

Use of Ruse Tactics During Juvenile Interrogation

Code of Virginia §16.1-247.1(C) specifically prohibits law enforcement from knowingly and intentionally making false statements about any known material fact, including by use of inauthentic replica documents, prior to or during a custodial interrogation of a child in order to secure the cooperation, confession, or conviction of such child.

As used in this subsection, "inauthentic replica documents" means any document, including computer-generated documents, created by any means, including artificial intelligence, by a law-enforcement officer or his agent that (i) contain a false statement, signature, seal, letterhead, or contact information or (ii) materially misrepresent any fact.

Parental Notification After Custodial Arrest of Juvenile Suspects

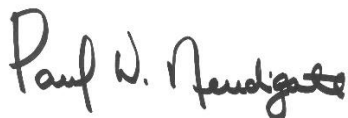
In accordance with *General Order 514 Juvenile Operations*, officers who make custodial arrests of juvenile suspects, whether the juvenile is returned to a parent or guardian, or turned over to Juvenile Intake or the court, shall explain police department and juvenile justice system procedures to the juvenile, and if possible, the parent or guardian. Such notification shall take place whether or not the juvenile suspect is interrogated.

Interviewing and Interrogating Mentally Ill Persons

When interviewing or interrogating individuals known or suspected to have a mental illness:

- A. Evaluate the person's ability to understand and waive rights.
- B. Use calm, non-confrontational communication.
- C. Avoid interpreting mental illness symptoms as deception.
- D. Consider recording all such interviews for accuracy and protection.
- E. Consult a supervisor or mental health liaison if voluntariness or comprehension is uncertain.

By the Authority of the Police Chief:

Handwritten signature of Paul W. Neudig in black ink.