



# First Amendment Audits BURLCO Planning Retreat Tuesday, April 18, 2023

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# DISCLAIMER

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The training materials provided in this program are for general informational and educational purposes only and are not intended to be and should not be considered legal advice or opinions. Prior to making any policy or rule changes seek the advice of your municipal attorney.

# Training Objectives

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- Identifying the need for this type of training
- Understanding the constitutional rights of the public and the media to record governmental activities
- Identifying the person(s) and their motives for conducting First Amendment Audits
- How to deal with difficult people

# Sources of Liability

- First Amendment Audits
  - Allegations of Civil Rights Violations
  - Allegations of False Arrest
  - OPRA violations
  - Allegations of misconduct
  - Discipline
  - Reputation
  - Retaliation



# First Amendment Auditors

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- Who are they?
  - Claim to be an American social movement that usually involves photographing or filming of public spaces
  - They are known as auditors, activists and citizen journalists that are determined to test our knowledge and exercise their constitutional rights
  - They believe that the movement promotes transparency and open government

# First Amendment Auditors

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- Current Trends:
  - Visit government facilities, record and livestream public employees performing their duties
  - Film or photograph buildings, equipment, access control points and sensitive areas
  - Communication
    - Test your knowledge of the law
    - May ask questions and demand answers
    - May not engage in any conversation

# First Amendment Auditors

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- Why do you think they want to record us?
  - Their motives are across the continuum
    - Financial
    - Personal grudge
    - Altruistic - selfless concern for the well-being of others
    - Transparency
    - Watching the watchman
    - Testing & baiting governmental employees

# Current State of Affairs

## ■ Financials

- Go Fund Me page
- Advertisements on their YouTube Channels
- Banners across their social media sites
- Donations



- $\$10 \times 1000 \text{ Subscribers} = \$10,000$
- $\$20 \times 1000 \text{ Subscribers} = \$20,000$
- Can be very profitable!



# Environment

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- In today's environment it seems as if everyone is on a crusade!
  - Mass conspiracy
  - Government waste
  - Illegal use of taxpayer monies
  - Just watch the media, constant call for "Investigations"
  - When investigations reveal no improper conduct, it becomes a conspiracy and a cover-up
  - You may become stressed and unsettled

# Recorded Incidents

- Watch this video!
  - Good example of what not to do
  - Difficult situation, innocent citizen gets involved
  - Evaluate: do we need to post pictures, cute sayings, and decorations
    - What is your policy
    - Recommendation - no pictures, no cute sayings, no statutes



# History and Legal Background

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- **Fields v. City of Philadelphia (3<sup>rd</sup> Circuit)**
  - First Amendment provides the public a “*right to record – photograph, film, or audio record – police officers conducting official police activity in public areas.*”
  - Extends to all municipal - governmental employees, auditors now arrive at government buildings in groups to wander around, filming and interfering with workers and residents

# First Amendment Right to Record

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- U.S. Supreme Court has held, that the First Amendment protects the right to collect and record publically available information and to publish that information in any medium of a person's choosing
  - The public can record police, fire, EMS, government officials and employees when they are conducting business in a public place where the individual has a legal right to be present
  - The public has the same right to record as the media



# Recording Law



- Image and audio
  - Image legal in all public places

No recording in bathrooms, locker rooms, changing rooms and locations where there is a reasonable expectation of privacy

- No reasonable expectation of privacy while in public place
- Reasonable expectation of privacy

# Public Space

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- What is public space?
  - Accessible and open to the public
  - An area where an individual has a legal right to be present
    - Parks
    - Streets and sidewalks
    - Public portions of governmental buildings
      - Library
      - Post Offices
      - County and Municipal Buildings

# Time, Place and Manner

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- This right is not absolute, but rather governed by reasonable time, place and manner restrictions
  - Is the facility open to the public
  - Is the facility open for business
  - Is the location limited and non-public, material that is to be protected because of some law or rule, crime scene, etc.
  - Is the manner in which they are attempting to record, disrupting the governments' ability to conduct business with its citizens, are they blocking entrances, disrupting meetings, creating loud noises, interfering with a crime victims' ability to report an incident, etc.

# Time, Place and Manner

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- Very fact sensitive!
  - Evaluate each incident on the facts and circumstances that are documented
    - Location, time, activity
    - Statutes, administrative law, and ordinances
  - Complete and thorough report
    - Details, details and more details!
    - Threats, physical actions



# Theft of Property

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- Do not grab the recording device, they will file a complaint!
  - Theft from a person is a 3<sup>rd</sup> degree crime
  - Theft over \$200 is an indictable offense
  - Do not destroy the recording device!

# Limitations on Place

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- Cannot enter a restricted area
- Cannot enter a crime scene
- Cannot enter a closed meeting, properly advertised and motions being made to approve this process
- Materially interfere with governmental / police operations

# Case Study - Probable Cause

## Lozman v. City of Rivera Beach, Florida



- Riviera Beach City Council Meetings
- Lozman was an outspoken critic, attended several public meetings and shared his concerns
- Reported that the governing body violated the open public meetings act when it came to developers

# “Probable Cause versus Retaliation”

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- Made allegations of corruption, ordered to stop by a councilman, and refused to stop, a Council member asked the city’s police officer who was in attendance for help
  - Lozman was arrested for a “Disorderly Persons” offense for allegedly violating the City’s rules and procedures and refused to leave
  - The charges were dropped, but the prosecutor determined that probable cause existed to make the arrest

# “Probable Cause versus Retaliation”

## Lozman v. City of Rivera Beach, Florida

Questions raised - was this retaliation for exercising his First Amendment speech rights?

Did the governing body have “Immunity against a Tort Claim?” when probable cause existed to make the arrest

# Probable Cause versus Retaliation

- U.S. Supreme Court held
  - Intersection of Principles
    - When arrests are lawful and principles prohibiting the government from retaliating against a person for having exercised free speech
    - City argued probable cause bars a retaliation claim
  - Court held the existence of probable cause does not bar a First Amendment Retaliation claim – limited to facts under *Lozman* (Fact Sensitive)
  - The government entities policies can help provide the framework for proper enforcement at public facilities!

# Building Relationships

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- Most times we are interested in building a relationship
  - Promotes understanding and respect
- Many First Amendment Auditors are not interested in building a relationship!
  - Do not psycho-analyze these people
  - Don't take the position that they are lost, and you can save them
  - Just follow the rules, answer their questions and they will leave when they have determined that they are not going to get an animated response that will create "hits" on their social media sites

# Tactics

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- Tank – verbal attack, may be vulgar, confrontational, pointed, and angry, the ultimate in pushing you to react poorly by engaging in aggressive behavior
  - “You are an idiot, a moron, a drone, a slave to me
  - Fighting words, loud and abusive
  - Hand gestures, “universal high sign”
  - I own you!





# Tactics

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- Sniper – they engage you in conversation but are looking for an opportunity to make you look bad on camera
  - Rude comments in response to your explanation, biting sarcasm, or a well-timed roll of the eyes
  - Trying to make you look foolish is their specialty

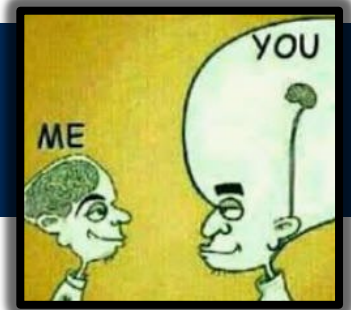
# Tactics

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- The Grenade – after a brief period of calm, the grenade explodes into unfocused ranting and raving about things that have nothing to do with the present circumstances
  - They may blame you for being racist, homophobic, Anti-Semitic, misogynistic or spew out other slanderous names in order to divert attention from the topic
  - We need to be careful that we don't become the grenade – stay calm and carry on!

# Tactics



- “Know It All” – seldom in doubt, the know-it-all has a low tolerance for perceived incompetency or contradiction, if something goes wrong, they will blame you for not knowing your job and their rights
  - Will read your posters, check case law, review information on the internet
  - Goal – to challenge you and to make you look stupid and incompetent
    - What are we paying you for?
    - Dominate and embarrass you, in person or on social media posts

# Dealing with First Amendment Auditors

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- Develop Communication Skills
  - Understand their motives and develop response strategies
  - Remember they are trying to destroy your self-worth – it's their style!
  - Know yourself and your self-worth
  - Beware of what triggers you – no one is perfect
  - Everyone has limits, call for help!
  - Know when your fellow employee has had enough!

# Deflection and Disengagement

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- Expect adversity, distractions and insults
  - May make inflammatory comments
  - Testing your resolve, trying to bait you
  - Conversation is unnecessary and counter productive
- Develop tactics that help you disengage
  - Act as if you didn't hear it
  - Deflect provocative questions
  - Disengage, walk away
  - Work on it, words, actions, and facial expressions



# Communication

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- May make wild accusations about personal and political issues, you may not be able to ignore these accusations?
  - Problem is if we do not deny this, they will post it with allegations claiming you didn't deny these allegations so you must be a hateful person
  - Remember they are trying to make it personal, don't take the bait – they want you to suffer

# Communication

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- Programmed Response:

***“I am disappointed to hear you make that statement about me, because it is certainly not true in any fashion, NOW, lets get back to your request***

- Move on

- Redirect the conversation
- Determine if you can help them

# What should we do?

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- Define the problem
  - You may ask clarifying questions, but you may not get an answer
  - State the obvious, if you could clarify what you are looking for, I can offer you guidance as to what information you can obtain
- Actively listen
  - Don't roll your eyes
  - Don't give the "disgusted" sigh
  - Don't give the "really" answer
  - Don't say, "I will do it, but you are wasting my time"



# How to comport yourself!

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- Do not allow your emotions or feelings to take over the moment!
- If you become confrontational you will have to deal with the consequences
- No magic bullet
- No guaranteed results from our efforts – Let it go!

# No easy solution

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- New era of being nasty, mean and vile (language and attitude)
- Approach everyone in a professional manner – must be taught!
- Improve ourselves and prepare for these situations
- These people can be stupid, annoying, detestable, entitled, uppity, arrogant, insensitive, contemptible, vulgar, powerful, spoiled and toxic

# Recording the Auditors

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- You may decide to record the auditor
- What is your Municipal policy?
- Don't use your personal phone, it may be subject to the laws and rules of OPRA
- Always arm yourself with good information

# Plan of Action

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- Contact your municipal attorney for assistance
  - The rules are complex, and violations of the First Amendment can result in embarrassing videos and monetary liability
- Contact your local police department for assistance
- Understand your limitations
  - Federal & State Laws and Municipal Ordinances
- Determine what signage would be effective
- Ensure that ordinances are in place to enforce signage
- Put an action plan together as to who will be notified if assistance is needed

# Good Advice for Staff

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- Except for work areas, photography and/or video is permitted in public buildings – even if the person stares at a clerk with their camera for 10 minutes or more. It's infuriating, but it's legal.
- Be professional and polite. If they say they don't need help, do your best to ignore them and go back to your job.
- Be calm. I know it's like holding back the ocean but be calm.

# Stay Calm and Carry On!

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- One last video!
- We commend these public employees for doing a good job!
- According to the First Amendment Auditors they passed the test!

# Summarizing Points

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- Audits are legal
- Be careful of your verbal & physical responses – remember you are being recorded!
- Seek assistance if needed
- Don't break the rules
- Develop a policy and seek the advice of your Municipal Attorney
- Know the law, know your responsibilities
- Cheat sheets, canned responses, who to call, 911 – what to say
- Train for these types on incidents

# Questions

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I know we have covered a lot of material today, feel free to ask questions or email me at [khummel@jamontgomery.com](mailto:khummel@jamontgomery.com) for further assistance.