

FACT Risk Management Annual Conference 2024 Sandestin Golf and Beach Resort, Walton County October 3 and 4, 2023

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First Amendment Auditors

- Who are they?
 - Constitutional activists?
 - Citizen journalists?
 - Modern cop-watchers?
 - Antagonists of government?
 - Internet attention-seekers?

First Amendment Auditors

- What do they do?
 - Record government officials and employees
 - Record in or on government buildings and facilities
 - Basis for their activity? Grounded in concept that the courts have recognized that there is a First Amendment right to "film public officials in public places"
 - That is broadly speaking an accurate statement of the law, but these auditors incorrectly conflate "public buildings" with "public places"
 - They contend <u>public places</u> means **all** public property, not just streets, sidewalks, parks, etc.

First Amendment Auditors

- What do they do?
 - Descend on your district offices unannounced-often in a group
 - Initiate contact with your staff- Refuse to identify themselves, purpose of visit or context of what they are doing- "Just filming for a story"
 - Often belligerent and condescending-especially if they encounter any resistance
 - Interrupt, demean, threaten federal lawsuits if they don't get their way
 - Alarming for your employees if they don't know to expect it and, do not have clear simple plan for handling if and when it occurs

First Amendment Auditors



Internal Affairs REFUSES To Do





County Police Try To VIOLATE



Parole Officers Try To INTIMIDATE 361K views • 12 days ago



Apparently We The People Need PERMISSION To Exercise Our Righ... 311K views • 2 weeks ago



Police Officers TASE & Arrest Man For Exercising His Rights! Officer... 423K views • 2 weeks ago



Corrupticut State Marshals Tried To CENSOR This Video...Let's Make It ...



Will The State's Attorney Do His Job & Charge Sgt. Bryan Fahey Or Will I... 336K views · 3 weeks ago



If This Continues I Will Be Out Of A



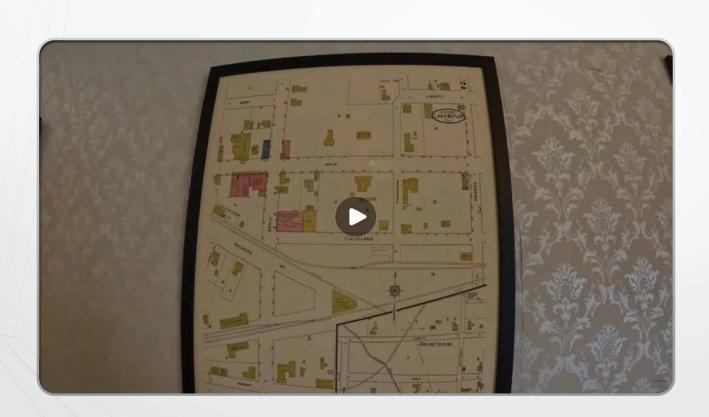
Never Before Seen Body Camera Footage EXPOSES Sgt. Bryan Fahe...



CT. State Police KEEPING Body Camera Footage From Journalist!...

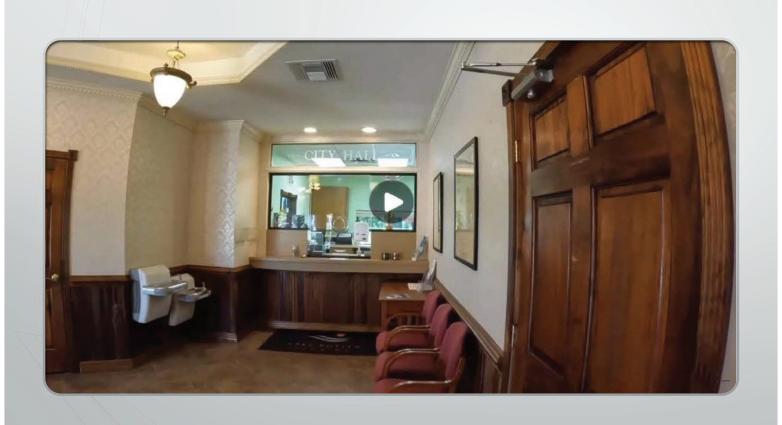


County Administrator Posts Divisive Signage In The People's Office!...



• Why?





First Amendment Auditors

- What's the basis for this Activity?
 - The First Amendment to the United States Constitution
 - Important to recognize that governmental entities such as a County are political subdivisions of the State of Florida and as such, are subject to the constitutional protections contained in the Bill of Rights.
 - Precluded from certain conduct which is perfectly acceptable in the private sector.
 - Concept that video recording someone is a form of speech is a little odd
 - Courts have found that it does- First Amendment also protects freedom of the press, which is why a lot of these auditors will refer to themselves as "citizen journalist"

Right to Record under the First Amendment

- There exists a right under the First Amendment to gather information about what public officials do on public property, and specifically, a right to record matters of public interest
- This includes a right to record and photograph police—subject to reasonable time, place, and manner restrictions
- This has been clearly established in the Eleventh Circuit since 2000, and the Eleventh Circuit
 has repeatedly reiterated that holding since then
- However, the First Amendment is limited and does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired
- Governments, like private property owners, have the power to preserve the property under its control for the use to which it is lawfully dedicated

Right to Record under the First Amendment

- Some examples:
 - Protected: Video recording police/citizen encounters- provided you are not interfering or obstructing the officer in the performance of his duties
 - Protected: Recording public meetings subject to Florida's Sunshine Law
 - Not protected-filming within a jail or other secure area of governmental facilities
 - Not protected-filming county facilities not otherwise open to the public

What Restrictions on Recording are Permitted?

- Forum analysis is necessary Courts have recognized four separate Fora
 - Traditional public forum
 - Designated public forum
 - Limited public forum
 - Nonpublic forum / no forum

Traditional Public Forum

- Government properties that have traditionally been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.
- Examples: Public streets, parks, and sidewalks- Speaker's Corner, Hyde Park, London
- Citizen has greatest First Amendment rights in this forum
- Ability of government to regulate speech in this forum is very limited

Traditional Public Forum

- Restrictions permitted: reasonable time, place, and manner restrictions that are:
 - Content neutral
 - Narrowly-tailored to serve a significant government interest, and
 - Leave open ample alternative channels of communication
 - Note "viewpoint" restrictions are never authorized

Designated Public Forum

- Government property that has not traditionally been regarded as a public forum but is intentionally opened up as a forum to the public at large
- Does not have the historical pedigree of a traditional public forum
- Expressive activity in a designated public forum can be limited to a particular class of speakers instead of the general public
- Example:
 - A public university's so-called Free Speech Area, in which non-sponsored members of the general public were allowed to speak
- Restrictions allowed: same as for traditional public forums

Limited Public Forum

- Where a government has reserved a forum for certain groups or topics
- Cannot be open to the public at large for discussion of any and all topics
- Each individual member of the class must obtain permission from the governmental proprietor of the forum, who in turn has discretion to grant or deny permission
- Examples:
 - The public comment portion of meetings subject to Florida's Sunshine Law
 - A public university's sidewalks, pedestrian mall, and rotunda
- Restrictions allowed: content-based restrictions permitted as long as they are not viewpoint based
- Can place restrictions on amount of time to speak, relevance i.e., limited to district business, no disruptive behavior/profane speech

Limited Public Forum

Important to note the distinction between viewpoint-discrimination and content-discrimination- which are separate but related concepts.

If a county banned all speech about the big election- that would be considered to be content discrimination.

But if a county banned all negative comments about Politician Doe, that would be invidious viewpoint discrimination.

While the former may be allowed in a limited public forum, the latter typically is not. *Jenner v. Sch. Bd. of Lee Cnty.*, No. 2:22-cv-85, 2022 WL 1747522, at *6 (M.D. Fla. May 31, 2022).

Nonpublic Forum / No Forum

- Where the government acts as proprietor, managing internal operations
- Examples:
 - Business offices and restricted work areas for county staff
 - Bathrooms/Locker rooms
 - IT/records facilities-private, protected information
- Restrictions permitted: any unless arbitrary, capricious, invidious, or viewpoint-based

Forum Analysis

- To determine the type of forum:
 - Physical characteristics of the location
 - Traditional use of the property
 - Government's intent and policy concerning the usage
 - Presence of any special characteristics
 - The property's designation
 - The property's compatibility with expressive activity
- Consider all factors. No single factor is dispositive.
- A government does not create any type of public forum by inaction or by permitting limited discourse—only by intentionally opening up a nontraditional forum for public discourse
- Government owned or operated property does not become a public forum simply because members of the public are permitted to come and go at will
- There may be multiple forums at a single location, scene, or campus

Common Places for First Amendment Audits

- Lobby areas of government buildings: limited public forum/nonpublic forum
- Offices and workspaces for government employees: nonpublic forums
- Interior of police departments: nonpublic forums
- Interior of polling places: nonpublic forums
 - However, different answers for streets and sidewalks immediately adjacent to polling places
- Public hospitals: nonpublic forums
- Public schools: generally nonpublic forums but can become limited public forums if opened for expressive activity of student groups or the outside public
- Courthouses: nonpublic forums

Common Places for First Amendment Audits

- Ultimately the First Amendment protects the act of recording government officials in public spaces
- So filming will be allowed in those areas of your facility which are open to the general public
- Your staff who routinely interact with the public are subject to being confronted by these auditors- going to have to know how to deal with them- need to know how to handle these encounters
- Even if they are annoying or distracting-cannot be unreasonably disruptive-prevent employee from completing their work
- Remember they are looking to instigate a confrontation-if they cannot provoke a reaction-they will likely go away
- Like the Brits say-Keep calm and carry on!

Common Places for First Amendment Audits

- Lobby areas of government buildings- Courts have recognized the ability of government to place reasonable restrictions on filming in areas of government offices which are open to the public
- In Sheets v City of Punta Gorda, 415 F. Supp. 3d 1115 (M.D. Fla. 2019) the federal court held that an ordinance which prohibited video or audio recording at City Hall, without the consent of those being recorded (employees or public), was a reasonable restriction
- Premise of the ordinance is that recording persons on the premises who did not consent to being recorded constituted a
 disruption of the City's business operations.
- Court noted that the ordinance did not entirely preclude recording within public places of the agency because auditor could have filmed in any public part of City Hall, as long as he was not recording a person who did not consent- i.e. the premises or other patrons/employees who did not object to being filmed
- Recommendation is that if you elect to adopt a similar rule (no recording of individuals who do not consent) that you prominently post a sign to that effect in the lobby or other affected area.
- Other courts have found that a complete prohibition on video recording in a limited public forum was constitutional because it was reasonable and viewpoint neutral- but not clear that rationale would ultimately be followed in the Eleventh Circuit.

Common Places for First Amendment Audits

The constitutionality of City of Punta Gorda's ordinance which prohibits recording video or audio in City-owned, controlled, and leased property without the consent of persons being filmed was more recently upheld in *Hoffman v. Delgado and City of Punta Gorda*, 2023 WL 6161796 (M.D. Fla. 2023).

Court recognized that ordinance designated police department lobby as a limited public forum. That designation meant the City could regulate the time, place, and manner of speech if it uses content-based regulations that are viewpoint neutral. *Crowder v. Housing Auth. Of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993)

Court determined that the ordinance was viewpoint neutral, as it made no distinction based on any viewpoint of the individual recording, and therefore the Ordinance was constitutionally permissible under the First Amendment.

Accordingly, the court found that Hoffman's recording in the Police Department was not activity protected under the First Amendment and dismissed the free speech claims.

City of Punta Gorda, FL- Code of Ordinances- Chapter 15-48-Offenses & Miscellaneous Provisions- https://www.ci.puntagorda.fl.us/government/city-clerk/code-of-ordinances





Handling Auditors

- "Audit and harden" your facilities
- Designate and clearly mark nonpublic areas
 - Signs- "Restricted Access-Employees and invited guests only beyond this point"
 - On all potential ingress points- rear/side of building
 - Physical access controls- locked doors; key cards/controlled access
 - Obstruct views- blinds/window tint



Handling Auditors

- Train employees and officials
 - Stay calm-Avoid confrontation-Do not provide the desired negative reaction or hostility
 - Provide guidance on where recording is and is not permitted and other applicable rules in facilities
 - Be familiar with the public and nonpublic areas of the workplace
 - Consider having a designated person to respond to an auditor-if not likely to escalate the situation
 - Anticipate the recording will be on the Internet
 - Provide simple, consistent instruction to the auditor

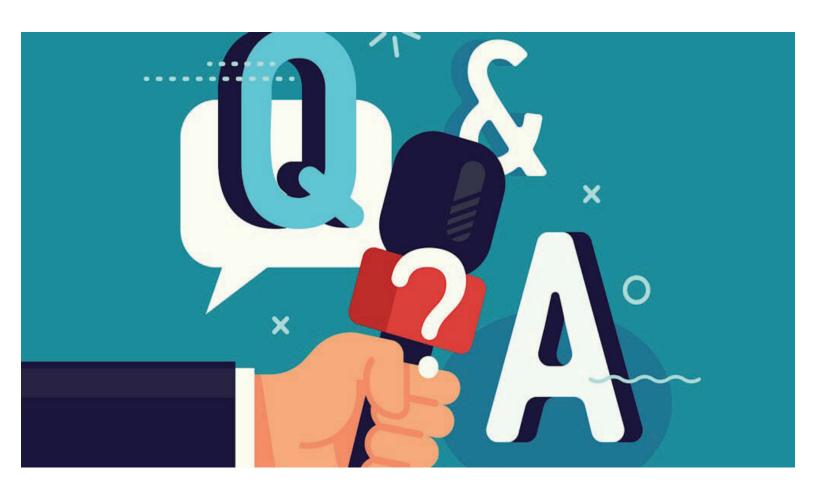
Handling Auditors

- Do not debate or engage in Q&A with the auditor
- Expect to be interrupted, demeaned, antagonized
- Do not restrict the auditor's activity in any way related to viewpoint
- Don't touch them
- Don't be triggered by profane phrases or writings on t-shirts or signs- Particular First Amendment protections for use of profanity- particularly in context of political speech – Cohen v. California- invalidated disorderly conduct conviction based on wearing a jacket in courthouse with a patch reading "F the draft"
- If feel unsafe or threatened contact law enforcement, but as a last resort

Importance of Appropriate Response

- Video will likely be posted on the Internet
- May attract attention from traditional media
- Official complaints against employees may require you to conduct an investigation
- Lawsuits
 - Common auditor claims:
 - First Amendment violation
 - First Amendment retaliation
 - False arrest
 - Excessive force/battery
 - Malicious prosecution
 - Federal claims carry liability for attorney's fees and litigation expenses, too.





FIRST AMENDMENT AUDITS WHAT ARE THEY AND HOW BEST TO RESPOND

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