



# First Amendment Audits Training Program

Presenter: Chief Keith F. Hummel (Ret.)

# Welcome to the Class!

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- Please hold all of your questions during the presentation
- We have allotted a sufficient amount of time to take questions and provide answers at the end of the presentation

# 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
- Security considerations

# 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

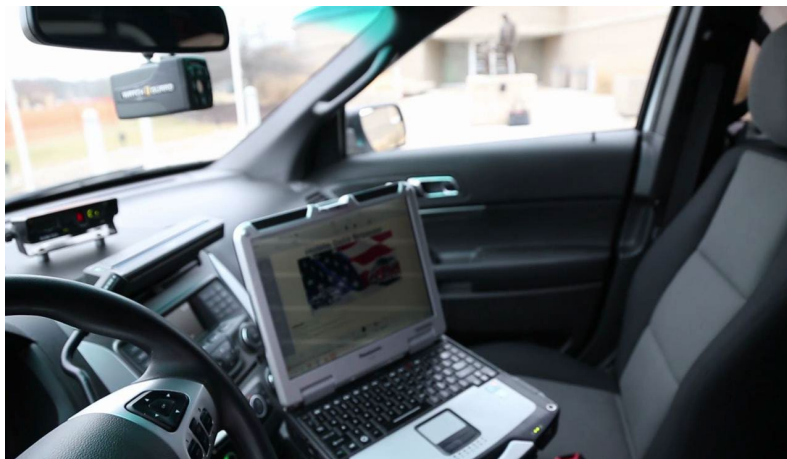
# First Amendment Auditors

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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

# Taking Pictures



# 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

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We must recognize the fact that recording devices are all around!

- Cell phones, digital cameras, GoPro Cameras....
- Instant social media access
- These encounters can affect the relationship we have with the public!
- Inappropriate actions, may affect our employment status!
- Jealousy



# 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!

# First Amendment Auditors

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- Allegations made by First Amendment Auditors
  - False arrests and assaults
  - Incompetency
  - Cameras confiscated
  - Weapons aimed at them

# Alleged Illegal Arrest

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- Charles Lanza reported that he was illegally arrested at the Lebanon County Courthouse (2018)
  - Recording with his phone, he was intercepted by security and police
  - During the encounter, the officer reported that Lanza struck him with his elbow and then reached for his waistband
  - Lanza was charged with disorderly persons and resisting arrest
  - Downgraded, convicted on a summary disorderly conduct
  - Remember - Facts matter!

# First Amendment Auditors



<https://www.ldnews.com/story/news/local/2019/01/23/judge-convicts-man-arrested-while-filming-lebanon-county-courthouse/2649876002/>

# Weapons Aimed at Auditor

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De Soto Police Officer draws weapon on man following him:

- First Amendment Auditor Charlie Dominguez was following police around and recording their activities
  - Interfered with police during a car stop, profanity laced tirade
  - Interfered with the police while they were taking a report from a crime victim (recording in close proximity)
  - He was known to attract the attention of LE officers to see if the officer would violate his right to record them
  - Uploads recordings to YouTube



**Internet Caption:** "Citizen Films Insane Cop, Threatens to Kill Innocent Man"  
Chief's comment – "very serious and concerning"

# 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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- Paradigm Shift - video cameras and cell phones are more common, and they are being used to record public events!
  - Rodney King - Los Angeles,
  - Eric Garner - New York
  - Temple Student - Philadelphia
- Police are more likely to be recorded, they are enforcing the law and those recordings are easily edited and uploaded to the internet
- Many auditors have expanded their efforts to include all government employees, looking for controversy!

# 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
- Audio must be in compliance with Federal and State Law (New Jersey Statutes Title **2A:156A**)
- The Federal and New Jersey approach is that it is permissible to record conversations as long as one of the parties involved gives consent to the recording (Auditor)

No recording in bathrooms, locker rooms, changing rooms and locations where there is a 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

# Federal Building

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- Do you have memorandums or notifications in your building or on your government authorized social media accounts?
  - Department of Homeland Security Memorandum
    - Federal Law Enforcement not to interfere or detain persons filming their facilities absent some other indicator of criminal activity
    - Many postal employees are not familiar with this memorandum, and they may seek assistance from local police
    - Legal right to be present, legal right to record

# 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

# Recording

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- The simple act of recording by itself, does not constitute interference and does not justify actions to stop, block, obstruct, coerce, or threaten recording parties with citation or arrest
  - Assume that you are being recorded at all times!



# 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

# Protecting Privacy

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- Taking action to protect the private information of victims and witnesses
  - Shielding them
  - Moving all parties to a private area



# Open Public Meetings - N.J. Stat. § 10:4-8(a)

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- New Jersey Open Public Meetings Act
  - Applies to public bodies, any commission, authority, board, council, committee or any group of two or more persons organized under the laws of the State of New Jersey
  - Collectively empowered as a voting body to perform a public governmental function...or collectively authorized to spend public funds.
  - Meetings can be held by written, telephonic, electronic, wireless, or other virtual means
    - Electronic meetings are still subject to advertisement requirements
    - Right to attend and or participate

# Open Public Meetings

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- Questions they may “challenge” you on!
  - Question you about the required “notifications” of public meetings, the who, what, where and when!
    - Posting, official newspapers, filed with appropriate clerk, mailed to any person who requests it
  - Question you about meeting minutes and recordings, are they available for inspection and copying
  - Question you on the exceptions: closed meetings and or sessions
    - Exemptions under N.J.S.A. 10:4-12(b)
    - Familiarity with these exemptions – no explanation

# Open Meetings - N.J. Stat. § 10:4-8(a)

## Request

**DENIED**

- If you deny their request for information, you need to know the processes they can go through to remedy their denial
- Maintain reference documents and or “cheat cards”
- Advise them you just want to make sure that all of their options are identified

# Case Study - Probable Cause

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**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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- During a public meeting he 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”

- 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



# U.S. Supreme Held in Lozman

## ➤ Intersection of Principles

- When arrests are lawful and principles prohibiting the government from retaliating against a person for having exercised free speech

## NO IMMUNITY FOR VIOLATING A PERSON'S CIVIL RIGHTS

- 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!

➤ **Discussed:**

- Purpose of a First Amendment Audit
- Legal Background
- Open Public Meetings
- Probable Cause and Retaliation



➤ **Switch Gears:**

- Tactics
- Responses
- Training

# 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



Dealing With People You Can't Stand: ISBN: 978-0-07-178572-3

# Tactics

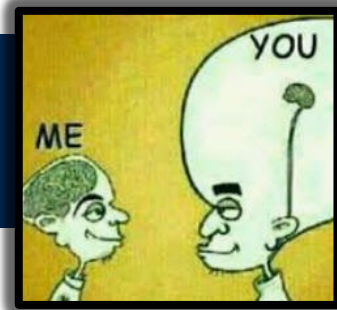
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- **The Grenade** – after a brief period of calm, the grenade explodes into unfocused ranting and raving about things that have nothing to do with the present circumstances
  - They may blame you for being racist, homophobic, Anti-Semitic, misogynistic 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

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- **“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

# Motive!

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- They feel entitled!
  - Monitoring is legal but their intent is what makes dealing with these people so difficult
  - Their behavior can be persistent and annoying!

# Motive!

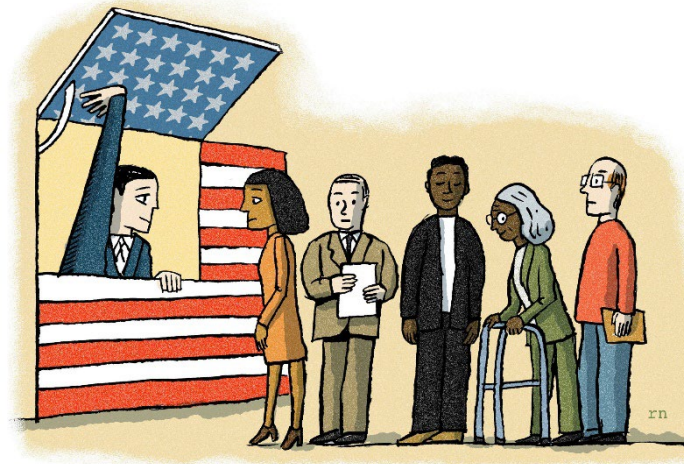
- It's not rational, not about the facts and or reason, it's political for First Amendment Auditors, entitled beliefs
  - Most interactions have either a positive or negative affect on people – something gained something lost
  - If they do not like your answers, they may get angry and try to shift blame or change the topic



- **Allegations of misconduct – you are hiding something, your taking kickbacks!**
- **Excessive Force - you beat down a friend its on the internet!**

# Dealing with First Amendment Auditors

- Working with these people can be messy and complicated
- We do our job well!



# 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!

# Make Good Choices

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## ➤ Make good choices!

- You must live with them, you are bound by a code and an oath of office
- There is no code of conduct for the average citizen who wants to express their opinion!
- Need clarity – asking questions is OK, they may not answer, that is their right
- Dealing with these people may make you uncomfortable

# 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



# Follow the Rules

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- **Boundaries!**

- Don't offer additional information
- Don't bend the rules, the rules were made to protect you!

- **Conflict resolution**

- Most people look at this type of confrontation as a win-lose scenario
- Mutual understanding and respect are not there
- Resolution for us is to provide the information requested and respect their rights, we may not like their attitude or demeanor but under these circumstances we win!

# 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

# Deflection and Disengagement

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- Don't try to bully them
- Don't talk over them
- Don't be sarcastic
- Don't yell
- Remember you have a valuable position, and you are the gatekeeper for valuable information

# 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 you comport yourself!

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- Tone and gestures
- Smile and ignore
- Go about your business
- They have difficulty controlling their emotions
- Bizzarro people
- Politely speak with the person even if they are vulgar, ask them to refrain from that language, we can get this done without the personal attacks

# 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

# Protect Yourself

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- **SURVIVE** – keep cool, take it slow, protect yourself at all times, write it down, think long term, and seek assistance if necessary
  - Supervisor
  - Municipal Attorney
  - Experienced fellow employee
  - Police



# ———— Balancing Act

## Terrorism & Security Threats

- We need to be able to assess the situation - Are they First Amendment auditors or are they persons conducting surveillance for nefarious reasons?
- Incidents where Auditors have openly carried firearms, contact the police for assistance



Protect your every day.

# RECOGNIZE THE SIGNS OF TERRORISM-RELATED SUSPICIOUS ACTIVITY



## ACQUISITION OF EXPERTISE

Gaining skills or knowledge on a specific topic, such as facility security, military tactics, or flying an aircraft



## MISREPRESENTATION

Presenting false information or misusing documents to conceal possible illegal activity



## SURVEILLANCE

A prolonged interest in or taking pictures/videos of personnel, facilities, security features, or infrastructure in an unusual or covert manner



## TESTING OR PROBING OF SECURITY

Investigating or testing a facility's security or IT systems to assess the strength or weakness of the target



## BREACH/ATTEMPTED INTRUSION

Unauthorized people trying to enter a restricted area or impersonating authorized personnel



## ELICITING INFORMATION

Questioning personnel beyond mere curiosity about an event, facility, or operations

We need to be able to assess the situation? Are they First Amendment auditors or persons conducting surveillance for nefarious reasons?

# When calling for assistance!

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➤ Remember the Five-W's when calling 911!

1. What is happening?
2. Who is doing it?
3. Where is it taking place?
4. When did you observe it?
5. Why are you suspicious?

See something – Say something (NJ Office of Homeland Security)

<https://static1.squarespace.com/static/54d79f88e4b0db3478a04405/t/5d77f463e5141614bf725375/1568142435539/Signs+of+Terrorism-Related+Suspicious+Activity.pdf>

# Common Areas & Security

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- Remember these are public buildings, not private property
  - Secure and mark those areas that are not intended to be public
    - Signage and an ordinance authorizing the signs
    - Enforcement action and penalties
  - Consent is not required to record you in a public place
  - Bathrooms are not public places for recording
    - Call the Police!

# CPED

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## Crime Prevention through Environmental Design

- Goal is to create a secure workplace through architectural and engineering controls
  - Controlled Access
  - Surveillance
  - Lines of Sight
  - Communications
  - Structural
  - Lighting

# Signage

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- Prosecutors and Judges like signage and proper notification
- Ensure that all of your signs are supported by Municipal Ordinance or State Law

# Signage

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# Considerations



## Self Serve Forms:

- OPRA Requests
- Fingerprinting
- Grants
- Tax payments
- Other programs

# Considerations

## Signage:

- Terms of Conduct
- Statutes to protect employees
- Statutes against trespassing



# 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

# Considerations

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## Surveillance:

- OPRA
- Signage
- Archiving
- Destruction

Seek the advice of  
your Municipal  
Attorney!

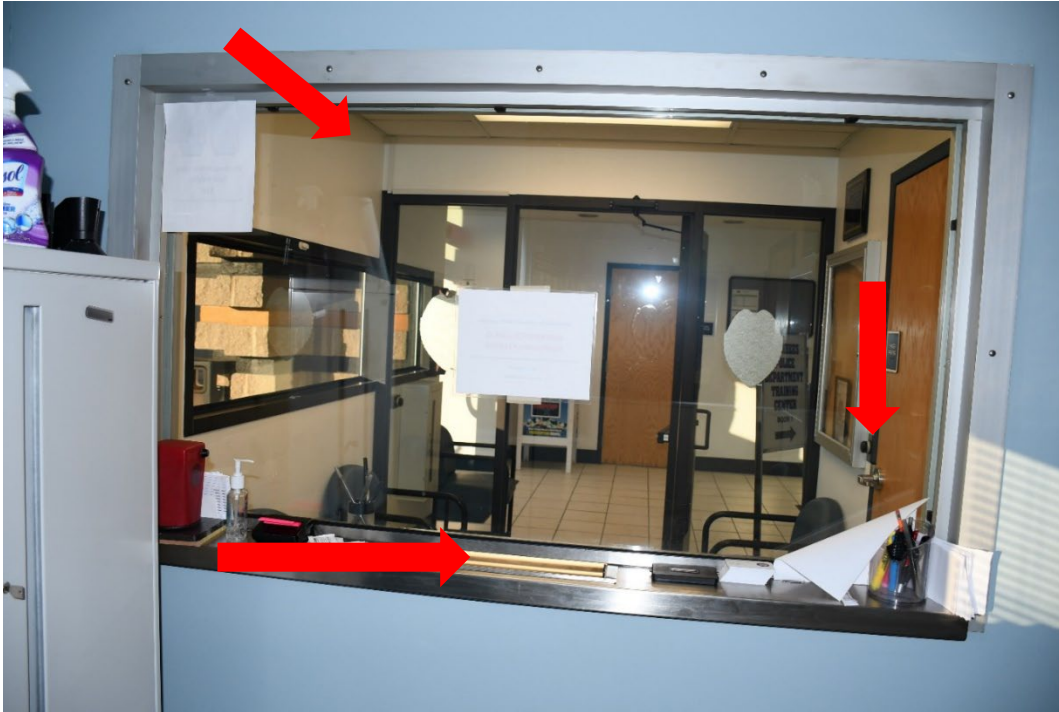
# Considerations



Preparing for the visit!

# Considerations

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## Security:

- Paper slot
- Bullet resistant glass
- Clear sight lines
- Electronic locks
- Lighting

# Considerations

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# Considerations

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# 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

# Plan of Action

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- Fulfill your obligations as it applies to OPRA
- Supervisors - provide strong policy guidance
- Conduct a “Tabletop Exercise”
  - Include: recognition of the auditor, rules that govern your conduct, answering questions, recording the auditor, know the law, ask for help!

# Plan of Action

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- Search the Internet for examples:
  - Ensure that your security software is up to date and working – viruses, ransomware and malware may be used by these websites to infiltrate your computer database
  - Be prepared, language content may be offensive
  - Be prepared to see yourself verbally criticized

# 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.

# Good Advice for Staff

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- Be aware of your tone and body language.
- Don't tell them they can't photograph or video and don't try to take their recording device.
- Don't argue, don't use profanity and don't physically touch anyone!
- Call the police if you feel threatened.

# Example: Table-Top Exercise

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- The city clerk is busily preparing council meeting minutes when an unexpected and confrontational visitor arrives. The person gives no reason for their visit and will not provide any identification. They start by demanding answers:
  - What is your name?
  - What is your job?
  - What's in that room over there?
  - The person is also recording the encounter with a mobile phone (video and audio) and begins to walk down the hallway into the private office area
- What do you do?

# Comments & Banter

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## Example of Tabletop Exercises

- The auditor sees a computer monitor, where another employee is working. Everything is plainly visible on the screen to the Auditor. They are recording from a public place that is not restricted. The employee advises the auditor that the information on the screen is confidential, and you need to stop recording.

# 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.