# "FIRST AMENDMENT AUDIT" WEBINAR

**Practical Tips for Preparation** 

Massachusetts Municipal Association

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THE LEADER IN PUBLIC SECTOR LAW

ATTORNEYS AT LAW

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# Topics:

- Overview of First Amendment Audits–what are they?
- Planning for a First Amendment Audit
- Experiencing a First Amendment Audit
- What happens after a First Amendment Audit?



## What is a "First Amendment Audit"?

- A first amendment audit is NOT an audit
- There is nothing "official" about these events they are initiated and carried out privately
- They do not wear signs typically just people coming into City or Town halls, police stations, DPW garages, libraries and the like
- The difference between them and other people is that they are there to RECORD public employees doing the people's work

## Are These "Audits" Even Legal?

- Typically, yes.
- In Massachusetts the public is permitted to record certain public officials in public places as they undertake official business.
- If they are recording in a <u>public area</u> of a public entity's building (such as the lobby or publicly-accessible offices), they are typically permitted to be there.
- There are cases that suggest that a policy could be adopted to prevent recording altogether in public places HOWEVER, the risk of a civil rights lawsuit may outweigh a municipality's willingness to take a risk...



"Auditors" frequently film public employees & officials on the job.



## What is the point??

- Recording of interactions with public officials and employees and posting videos to the internet as a form of activism.
- Typically posted videos are those where employees are "overreacting", whether out of fear or anger, to the fact of being recorded.
- Goal appears to be to "test" knowledge about the First Amendment; perhaps provoke employees into unlawfully detaining, refusing entry, or otherwise violating First Amendment rights.
  - •Or...just to provoke a reaction.
- A wrongful detainment can expose a public entity to *serious liability* (e.g., \$41,000 settlement in Colorado Springs for wrongful detainment of auditor filming outside of a police station).



# What is the First Amendment?

"Congress shall make no law...abridging the freedom of speech..." (That's it!)

•Applicable to states through Fourteenth Amendment

•Implemented by categorizing public spaces into

- "forums"
- •Each category has its own rules



## What's the legal context?

Public Forum – a place open to the public and traditional location for self expression and speech

Any limitation on such conduct in a public forum must be compelling

### **Examples**:

- Right to congregate (public park, street or sidewalk)
- Right to hand out materials
- Right to stand with a sign outside of a public place in an area open to all

Private Forum – a place not intended to be, and not, the type of location where self expression is anticipated

Rights to self expression and speech much less compelling than the interests of the state (i.e., municipality)

#### Examples:

An airport terminal Inside a school



How do you know whether you are in a public, private or designated forum?

### **Designated/Limited Forum**

-an area that is open to the public, but where there are private interests that generate different levels of tolerance for public expression and congregation: City or Town hall lobby as compared to public official's storage room, the "service areas" in a public building as compared to the areas "behind the counter"

# Regulation of activity, not view point

# ANOTHER GROUP WITH A DIFFERENT MESSAGE

### **EXAMPLE SCENARIOS**

Use by the public of:

High school auditorium

Senior center meeting room

Library meeting rooms

City or Town Hall lobby

Community Building meeting rooms



# Regulation of activity, not view point

So-called "time, place and manner restrictions" can be applied to regulate constitutionally protected behavior, provided that such restrictions are content neutral, i.e., the regulations target only how an activity is carried out

## What can you do to prepare? Have a PLAN

# Part A. Review What is "Public Facing" in your Office Space...

Safeguard personal privacy matters, documents subject to the attorney-client privilege, documents subject to the exemptions to the Public Records Law, or otherwise private/confidential documents



# What can you do to prepare?

# Part B. Demarcate Public and "Employee Only" Areas in office areas and generally

- •Are there physical markers between public and private physical space?
- If there is no "counter" how can a space be marked to show that customers should "wait here for service"?

# Signage Examples

By Appointment
Only
Staff Only

Employees
Only Beyond
This Point

AUTHORIZED PERSONNEL ONLY

Non-Public Area

Private

## What can you do to prepare?

# Part C. Determine in Advance Who in your Department/Office Will Provide Service During a First Amendment Audit

•Some employees may be more comfortable being taped or dealing with confrontational situations than others.



### De-escalate as a rule!!

# #1 Rule: Stay Calm

- •Remember, there is nothing interesting about a video of a City/Town employee sitting at their desk, typing on their computer, and politely answering questions.
- •Most of these people are looking to test First Amendment rights may be looking for arguments or confrontations.
- •Try to avoid being sarcastic, short, or defensive.



# **Bottom line – Cities and Towns are Customer Service Agencies**

# #2 Engage in business as usual...

- You need not do more or less than you would for any other member of the public.
- Public employees are <u>not</u> required by the Public Record Law to answer questions (although customer service is, of course, a priority).
- •If they ask for the employee's name, respond politely.
- Try to avoid immediately seeking out the support of the department head or Town Manager/Administrator, this is the type of footage they are looking for.



## De-escalation and related responses...

# #3 Know what to expect and what to "do"

- •While each department should have a plan, it is imperative that those plans be coordinated with the Town Manager/Administrator, and, as appropriate, a Police Department representative
- •If "de-escalation" is the goal, there needs to be an understanding of when to involve others
- •Coordinating with Police Department and Town Manager/Administrator, all parties should have an understanding of their role

### What about our other customers?

# #4 Be Mindful of the Needs of Other Customers

- If other customers express discomfort about being around the First Amendment auditor, offer to speak with them by phone or invite them to come in another day.
- Consider posting a similar message:
  - "Be advised that in Massachusetts, persons may record certain public officials in public places as they undertake official business. If such a recording is being made, and you are uncomfortable, please feel free to call the office to address your issue, make an appointment, or come back at a different time. Thank you for your understanding!"
- •If you do *fear for your safety*, please *seek assistance* from your department head, Town Manager/Administrator or Police Department.



# What should an employee "do" if there is an audit?

## **#5.** Public Record Requests

- Offer the individual the opportunity to commit the request to writing.
- If they do not want to file it, write it up and date it yourself.
- If it is reasonable for you to provide the requested record at that time, then do so.
- If the request is large and will take time to analyze, ask the requestor to leave their contact information or ask them to follow up in five days.

# #6. Complaints about Employees

- Follow the typical protocol by referring the individual to the relevant department head or executive.
- You are not expected to resolve the complaint yourself!



### What comes afterward?

- 1. Take a deep breath, that was stressful!
- 2. Report the interaction to the appropriate executive authority so they can determine whether follow-up action is needed.
- 3. Debrief as a department, and as needed, city or town-wide
- 4. Respect reactions of colleagues...not everyone reacts the same way
- 5. Go back to providing the great service you do every day!





### If only it were so easy....

- 1. Report the interaction to the Town Manager/Administrator so they can determine whether follow-up action is needed.
  - e.g, department head, Town Manager/Administrator, Assistant Town Manager/Administrator or other person responsible for human resource matters
- 2. Employees can feel extremely stressed and vulnerable after an audit
- 3. Provide support remind them of an existing EAP or other resource; provide on-site support
- 4. Measure the negative fallout is there a video posted? Does it paint the municipality in a negative light?
- 5. Consider security issues for involved employees
- 6. Consider additional issues that could arise and plan for them, such as follow up e-mails, telephone calls at work and home



### First Amendment - Recent Significant Case Law

#### **Public Comment Policies:**

•On March 7, 2023, the Massachusetts Supreme Judicial Court issued its much-anticipated decision in <u>Barron</u> v. <u>Kolenda</u>, 491 Mass. 408 (2023) concerning the constitutionality of a select board policy addressing participation during "public comment" periods of its meetings. The Court concluded that the policy, which sought to implement standards of civility for public comment periods by limiting critique and rude or disparaging remarks, violated Articles 19 and 16 of the Massachusetts Declaration of Rights. In short, the SJC observed that "[a]Ithough civility can and should be encouraged in political discourse, it cannot be required."

### Flag Policies:

•On May 2, 2022, the U.S. Supreme Court issued its much-anticipated decision in <a href="Shurtleff">Shurtleff</a> v. <a href="City of Boston">City of Boston</a>, 596 U.S. 243 (2022), finding that the City's rejection of a request from a religious group to fly a religious flag on City Hall Plaza was inconsistent with the protections of the First Amendment. This decision has important implications for all public entities, and consideration may be given to reviewing flag-raising practices and policies to ensure consistency with the Shurtleff decision.



### Any questions?

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