

FIRST AMENDMENT AUDITS & FOIA FOR FINANCE OFFICIALS

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**OF EXCELLENCE
and COUNTING**

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Jason Brokaw of the firm of Giffin, Winning, Cohen & Bodewes, P.C. prepared this presentation on behalf of IGFOA.

<http://www.giffinwinning.com/>

Introduction

- Giffin Winning Cohen & Bodewes, P.C.
 - Springfield, IL
 - Established 1911
 - Currently, 11 practicing attorneys
 - Diverse practice areas (topics and geography)
 - Long history in government and local government
- Jason Brokaw
 - Partner
 - Predominantly Local Government and Municipal Practice
 - Registered Lobbyist
 - Lifetime Cubs fan

First Amendment to U.S. Constitution

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

IL Constitution – Bill of Rights (Art. I)

- SECTION 4. FREEDOM OF SPEECH
 - All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.
- SECTION 5. RIGHT TO ASSEMBLE AND PETITION
 - The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances.

First Amendment? News Gathering?

- The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected. Am. Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012)

First Amendment? News Gathering?

- The First Amendment protects the public's right of access to information about their officials' public activities. It “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) citing First Nat'l. Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

What is a 1st Amendment Audit?

- Someone films in public spaces to “test” a public body’s willingness to accommodate and adhere to First Amendment principles
- Generally posted on social media.
- Uneventful audits are akin to “passing a test”
- Confrontational audits, usually where an employee interferes with the filming, gets a failing grade.
- “Controversial ‘First Amendment Auditors’ Test the Right to Film in Public Spaces” <https://firstamendmentwatch.org/deep-dive/controversial-first-amendment-auditors-test-the-right-to-film-in-public-spaces/>

Who Are The Auditors?

- Not led by a particular organization
- Economics - Clicks/views = \$\$\$
- Ideology – Doing Good or Exposing Bad in the World
- Academic – Teaching Others

Process of Audit

- Auditor appears at a public location with some means to record
- Generally, seek to engage with an employee or official
- Instead, may linger to encourage an employee or official to engage them
- If encounter results in an actual/perceived violation of First Amendment or other protected rights, then the video likely will be posted on social media and/or serve as the basis for a claim or suit.
- A violation may come about if the auditor is:
 - Denied ability to access public areas,
 - Denied ability to take record in a public place,
 - Detained for “suspicious” activity or other reasons.

1st Amendment Audits Are Legal

- Provided that members of the public are in public spaces during hours of operation, courts will usually uphold their right to record officials and employees who are in those same public spaces

1st Amendment v. FOIA

- “There is an undoubted right to gather news ‘from any source by means within the law,’ *** but that affords no basis for the claim that the First Amendment compels others-private persons or governments-to supply information.” Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (citing Branzburg v. Hayes, 408 U.S. 665 (1972))
- Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control – Other laws provide such rights.

1st Amendment v. FOIA

- Freedom of Information Act - 5 ILCS 150/1 *et seq.*
- Document production statute
- All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt. (5 ILCS 140/1.2)
- All records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public. (5 ILCS 140/2.5)

1st Amendment v. FOIA

- Requests for inspection or copies shall be made in writing and directed to the public body.
- May be submitted via personal delivery, mail, or other means available to the public body.
- A public body **may** honor oral requests for inspection or copying.
- All requests received by a public body shall immediately be forwarded to its FOIA officer or designee.
- Either comply with or deny a request for public records within 5 business days after its receipt of the request, unless properly extended.

1st Amendment v. FOIA

Each public body shall prominently display at each of its administrative or regional offices, make available for inspection and copying, and send through the mail if requested, each of the following:

(a) A brief description of itself, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its functional subdivisions, the total amount of its operating budget, the number and location of all of its separate offices, the approximate number of full and part-time employees, and the identification and membership of any board, commission, committee, or council which operates in an advisory capacity relative to the operation of the public body, or which exercises control over its policies or procedures, or to which the public body is required to report and be answerable for its operations; and

(b) A brief description of the methods whereby the public may request information and public records, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees allowable under Section 6 of this Act.

A public body that maintains a website shall also post this information on its website. 5 ILCS 140/4

FOIA Tips

- Know what, if any, records your public body produces without a request
- Have copies of frequently requested items on hand – minimize the interaction
- Not required to accept verbal requests (but know your policy)
- Cannot require requester to utilize your specific form

Audit Videos

- <https://www.youtube.com/watch?v=VWCs-7hbJsl>
 - WXYZ-TV Detroit – 1st Amendment Auditor Segment
- <https://www.youtube.com/watch?v=AsxNf54ep1Q>
 - Supervisor, Town Hall in Ramapo, New York

Parting Advice

Do

- Identify & Provide Notice of Restricted Areas (Signage, etc.)
- Develop & adopt reasonable content-neutral rules on recordings (Think time, place, and/or manner)
- Stay Calm
- Call Law Enforcement if Physically Threatened or the situation has gotten out of control
- Use common sense – Position of monitors with sensitive information, covering documents, etc.
- Train/Discuss audits before one takes place.

Do Not

- Leave doors to non-public or restricted areas open or unsecured
- Adopt blanket prohibitions
- Escalate, Antagonize, Overreact
- Threaten to Call Police or other Law Enforcement
- Record with your own personal device(s) without compelling reason
- Confuse private space with restricted areas
- Leave sensitive information in plain view
- Tell the auditor to stop
- Take the recording device

Parting Advice

Do

- Document the Encounter – notes, email, official recording
- Assist if requested
- Know the law and policies
- Return to regular duties
- Let the auditor record

Do Not

- Order someone to leave just for recording
- Demand identification
- Bring auditor into restricted or non-public areas
- Forget they are recording

Thank you & Questions

Jason Brokaw

Partner

Giffin Winning Cohen & Bodewes, P.C.

JBrokaw@gwcblaw.com

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Illinois Government Finance Officers Association
800 Roosevelt Road, Building C, Suite 312
Glen Ellyn, IL 60137
Phone: 630-942-6587
Email: info@igfoa.org
Visit <http://www.igfoa.org>