Global Justice Information Sharing Initiative

United States Department of Justice

Law Enforcement Guidelines for First Amendment-Protected Events

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About Global

The U.S. Department of Justice's Global Justice Information Sharing Initiative (Global) serves as a Federal Advisory Committee to the U.S. Attorney General on critical justice information sharing initiatives. Global promotes standards-based electronic information exchange to provide justice and public safety communities with timely, accurate, complete, and accessible information in a secure and trusted environment. Global is administered by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.

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Table of Contents

Executive Summary ..... **v**

Introduction **1**

Background 1

Purpose 1

Law Enforcement Process 2

Fusion Centers 2

"Red Flag" Areas 3

Pre-Event Stage **5**

Information Collection 5

Agency Leadership 5

Special Authorizations 5

Pre-Event Work Plan 6

Pre-Event Assessment 7

Permissible and Prohibited Conduct 10

Use by Other Agencies 12

Operational Stage **13**

Determination of Law Enforcement Role 13

Operations Plan 13

Components of the Operations Plan 15

Briefing 17

Post-Event Stage **19**

Evaluation of Information 19

Requests From the Media and the Public 19

Information Dissemination 19

Video and Photographic Images 20

Retention of Information 21

Evaluation and Feedback 22

Additional Resources **23**

Executive Summary

As articulated in the United States Constitution, one of the freedoms guaranteed by the First Amendment is the right of persons and groups to assemble peacefully. Whether demonstrating, counterprotesting, or showing support for a cause, individuals and groups have the right to peacefully gather. Law enforcement, in turn, has the responsibility to ensure public safety while protecting the privacy and associated rights of individuals.

To support agencies as they fulfill their public safety responsibilities, the Criminal Intelligence Coordinating Council (CICC)[1] developed this paper to provide guidance and recommendations to law enforcement officers in understanding their role in First Amendment-protected events.[2] This paper is divided into three areas, designed to provide in-depth guidance for law enforcement.

- ✓ **Pre-Event Stage**—Discusses how law enforcement will plan for an event or demonstration where First Amendment protections are involved, focusing on the activity that begins when law enforcement leadership learns of an event and must determine the level, if any, of involvement at the event, from both public safety and investigative standpoints.
- ✓ **Operational Stage**—Focuses on how law enforcement will respond to the event, based on the findings from the Pre-Event Stage, including the development and execution of the Operations Plan.
- ✓ **Post-Event Stage**—Addresses how and whether information obtained as a result of the event (both during the Pre-Event Stage and Operational Stage) will be evaluated, disseminated, retained, or discarded, as per agency policy.

As agencies respond to First Amendment-protected events, law enforcement leadership should be aware of certain "red flag" issues that may arise as they assess whether the agency and personnel should be involved in these events and, if so, what form that involvement should take. As agencies review and understand the concepts and recommendations within this paper, special consideration should be given to these "red flag" issues to ensure that law enforcement agencies and personnel do not infringe on the rights of persons and groups.

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1 The CICC is a working group under the U.S. Department of Justice's Global Justice Information Sharing Initiative.

2 In this paper, the phrases "First Amendment-protected event" and "First Amendment-related activities" refer to persons or a group who peaceably assemble or gather in a public location.

Introduction

Background

As articulated in the United States Constitution, one of the freedoms guaranteed by the First Amendment is the right of persons and groups to peaceably assemble. Persons and groups engaging in First Amendment-related activities have the right to:

- ✓ Organize and participate in peaceful assemblies, including demonstrations, rallies, parades, marches, picket lines, or other similar gatherings.
- ✓ Conduct assemblies/gatherings in public areas.
- ✓ Express their political, social, or religious views in a peaceful assembly.
- ✓ Freely associate with other persons and collectively express, pursue, promote, and defend common interests.

Law enforcement officers, in turn, must ensure the safety of the general public while protecting the privacy and rights of persons practicing their First Amendment right to assemble peacefully. To support officers as they fulfill these responsibilities, the U.S. Department of Justice's Global Justice Information Sharing Initiative tasked the Criminal Intelligence Coordinating Council with developing guidance for law enforcement in understanding their role in First Amendment-protected events.

Purpose

The purpose of this paper is to provide greater awareness and understanding of the appropriate role of law enforcement in events and demonstrations where First Amendment rights are involved. This paper provides guidance and recommendations to law enforcement officers as they prepare for, respond to, and follow up with events, activities, and assemblies that are protected by the First Amendment of the Constitution of the United States of America.

As officers address these types of events, the three-stage process identified in this paper should be incorporated into agency policies, manuals, and/or directives. This process, while focusing on law enforcement's response to First Amendment events and activities, is not designed to limit the ability of officers to engage in normal criminal investigations or public safety missions. A law enforcement agency may have special rules and procedures governing the levels of review and approval required to engage in preliminary or full investigations or other activities discussed herein; as such, officers should be aware of and understand these rules and procedures.

This guidance is intended only to identify First Amendment-related issues and suggest procedures to undertake during pre-event inquiries, operational activities (such as crowd control or criminal investigations), and post-event reviews related to the event. While this paper focuses on public First Amendment-protected events, law enforcement officers should also be aware of other types of assembly that are protected under the First Amendment, including organizational meetings and gatherings that may not be open to the general public.

Law Enforcement Process

This guidance is formatted into three stages. The first stage addresses the pre-event activities, focusing on the work that begins when law enforcement leadership learns of an applicable event and must determine whether law enforcement involvement is necessary at the event and, if so, what level of response, from both public safety and investigative standpoints. The second stage addresses the development and execution of the operational plan, focusing on law enforcement's response during the event. The third stage addresses post-event activities, or law enforcement's action(s) at the conclusion of the event.

- ✓ **Pre-Event Stage**—How to assess a First Amendment-protected event to determine whether there is a law enforcement role and, if appropriate, plan for the event.
- ✓ **Operational Stage**—How law enforcement will respond to the event, based on the pre-event process.
- ✓ **Post-Event Stage**—Whether information obtained as a result of the event (both during the pre-event stage and operational stage) will be evaluated, disseminated, retained, or destroyed.

Each of these stages builds upon the other, thereby enabling law enforcement officers to provide a comprehensive, yet appropriate, response to a First Amendment-protected event.

Fusion Centers

Fusion centers can play a valuable role in supporting law enforcement's involvement in First Amendment-protected events. As part of the Pre-Event Stage, fusion centers can support state, local, tribal, and territorial agencies as they undergo a Pre-Event Assessment. This support may include the completion of an applicable assessment and the utilization of publicly available material (such as social media tools and resources) that pertains to potential threats to the event and/or organizations participating in the event, including potential counterdemonstration groups. If the Pre-Event Assessment does not identify any

risk or threat, then the fusion center should not distribute the assessment beyond those customers who are serving a public safety role for the event. Fusion centers may also support the Operational Stage by assisting in information-/intelligence-related inquiries officers may have in response to an event.

If a criminal predicate or reasonable suspicion is identified or the findings of the Pre-Event Assessment provide specific, actionable intelligence, fusion centers may support agency leadership and law enforcement officers by identifying the collection requirements[3] applicable to the event, based on the mission and role of the fusion center. In those limited circumstances, fusion centers should also be involved in any post-event activities, including the information evaluation, dissemination, and retention efforts. Fusion centers should not be involved in post-event evaluation, dissemination, and retention efforts of events that involve only routine public safety issues, such as conflicts between demonstrators or crowd-control problems.

"Red Flag" Areas

"Red flags" are issues and concerns identified throughout the three-stage process that law enforcement should carefully evaluate before proceeding. As agencies utilize the guidance identified in this paper and respond to First Amendment-protected events, there are certain areas that law enforcement leadership must be aware of as they assess whether and to what degree, if any, officers should be involved in these events. Law enforcement leadership should clearly articulate the reason, purpose, and justification for collecting information when addressing these "red flag" areas in the agency Operations Plan.

1. **Pre-Event Red Flags**
   - Collecting information based solely on participants' beliefs/groups' actions.
   - Collecting names of organizations, proposed participants, or contact organizers (other than event organizers), including counterdemonstration groups.

3 If a criminal predicate or reasonable suspicion is present or the findings of the public safety assessment provide specific, actionable intelligence, fusion centers may support agency leadership and law enforcement responders by further identifying information needed to better understand the public safety threats and risks associated with the event. This process—also referred to as the identification of collection requirements—includes the recognition of gaps in current information holdings and can guide the lawful collection of information to aid objective analysis of threats and risks.

2. **Operational Red Flags**
    - Sharing information about the group(s) with other law enforcement agencies or criminal justice entities that do not have an applicable law enforcement mission.
    - Taking pictures and videos of the event.
    - Collecting names or other identifying information (such as license plates) of participants, people in the area, counterdemonstrators, or bystanders watching the event.
3. **Post-Event Red Flags**
    - Retaining information beyond the purpose for which it was obtained or where no indication of criminal activity was found.
    - Sharing information about the group with other justice entities.
    - Not responding to reasonable inquiries regarding the role of law enforcement at the event.

It is imperative that law enforcement leadership distinguish between appropriate operational planning for activities where a criminal predicate exists and those activities protected by the U.S. Constitution. Leadership should recognize and consider these issues throughout their planning process and clearly articulate law enforcement's role (as well as what law enforcement will not be involved in) throughout the planning process. If a legal or justified basis cannot be articulated, further research should be conducted before proceeding.

As with all law enforcement response, officers should adhere to constitutional protections, both federal and state; court decision(s); state statutes; and local ordinances, as well as agency privacy policies and procedures and other relevant resources, to ensure their response is in line with agency policy and procedures.

Pre-Event Stage

The Pre-Event Stage begins when law enforcement officers learn of an event in their jurisdiction in which persons will be actively exercising their rights as granted by the First Amendment and may require a law enforcement presence. This notification may occur via event organizers who submit a request to law enforcement for assistance during the event, the governmental entity that issues permits, the media, or other means of contact.

The goal of the Pre-Event Stage is to determine the appropriate role, if any, for law enforcement at the event. Based on the size and nature of the event, a public safety response may be needed, or if a threat of criminal activity is identified, there may be a need for investigative or intelligence operations. Once the Pre-Event Stage is complete, leadership should have the appropriate information to develop an Operations Plan, if required.

Information Collection

Most public gatherings will require that law enforcement leadership review at least a limited amount of information in order to make an assessment of the potential impact of the event on public safety. As part of this assessment, leadership must consider the need to preserve the peace, the need to deploy officers for crowd and traffic control and other public safety purposes, and the need to protect persons' rights to assemble and express their opinions. For the public safety assessment, information collection must be limited to that which is relevant to the agency's decision as to the need to take action to facilitate event-related activities and provide a public safety response. The information sought should be clearly identified as needed solely to plan an adequate response to ensure public safety and health and to protect the public and those exercising their First Amendment rights. Additionally, this information should be collected in an open, transparent manner and may be obtained from the event organizers or via publicly available materials, as appropriate.

Agency Leadership

Throughout the Pre-Event Stage, agency leadership should be knowledgeable and involved in all assessment and, if appropriate, planning of response to the event. Additionally, agency legal counsel should be involved in all stages and be accessible for providing advice during all law enforcement activities.

Special Authorizations

Prior to any pre-event activities, agency leadership should consult all relevant policies and guidelines to determine whether any special authorization is required for the particular type of event. Examples of these special authorizations include reasonable

restrictions on time, place, and manner of conducting the event. Additionally, prior to an event being permitted or authorized, protocols should be established by the approving authority to evaluate the law enforcement concerns, which may affect the issuance of permits or viability of the event taking place. If constitutionally allowed restrictions are to be imposed on the activity, these restrictions should be clearly communicated to event organizers prior to the event.

Pre-Event Work Plan

Once any applicable special authorizations are identified and obtained, a Pre-Event Work Plan should be developed for the purpose of defining the scope of any pre-event activities related to First Amendment-protected activities.

The work plan should clearly state the scope and objective of the Pre-Event Assessment, emphasizing its reasonable law enforcement purpose as well as permissible and impermissible conduct for those officers assigned to any pre-event activity. A reasonable law enforcement purpose means that the information collection process is intended to address unlawful conduct—either past, present, or future—or to address public safety issues, whether these issues amount to criminal conduct or not. A reasonable law enforcement purpose would also include the need to acquire information or intelligence that may be useful in allocating resources for public safety or future criminal investigations.

The Pre-Event Work Plan should identify reasonable law enforcement purposes:

- ✓ Agency activities must be within the scope of the law enforcement agency's mission.
- ✓ The work plan and associated procedures cannot be or appear to be arbitrary or contrived and should be transparent to a degree that does not impair law enforcement operations or officer safety.
- ✓ The work plan and law enforcement action must be well documented.
- ✓ The information sought and the investigative methods used to obtain it must be lawful and focused in scope, time, and manner to achieve the underlying purpose.
- ✓ The information being sought should focus on the behavior(s) from prior events (regarding the potential for criminal activity), with the goal of ascertaining the need for a law enforcement response to potential criminal activity. The information should not focus solely on the exercise of rights guaranteed by the First Amendment or any other applicable rights protected by the U.S. Constitution or the state constitution. For example, the following activities **may not** serve as the <u>sole</u> basis for an investigation:

- Persons or groups communicating with each other or members of the public in any form in pursuit of social or political causes, such as opposing war or foreign policy.
- Persons or groups protesting government actions.
- Persons or groups promoting certain religious beliefs.

✓ Information may not be sought based solely on race, ethnicity, national origin, or religion (or any other characteristic unrelated to criminal conduct or the identification of a criminal subject).

✓ Agencies must articulate that even when an event involving constitutionally protected activities is authorized, the event must not materially interfere with the ability of other persons or groups to engage in the exercise of their constitutionally protected rights (such as counterdemonstrations) or endanger public health or safety.

✓ An investigation implicating the exercise of First Amendment rights that is undertaken for a reasonable law enforcement purpose must be reasonable in scope and must not be intended to punish or discriminate or retaliate against any person on the basis of expressions or conduct protected by the First Amendment. No files or dossiers on persons are permitted without some nexus to criminal conduct.

Pre-Event Assessment

Once the work plan is developed and reasonable law enforcement purposes are defined, agency command staff should conduct a Pre-Event Assessment. The Pre-Event Assessment should address the scope of the pre-event activities, which may include:

✓ Determining the time, location, and type of activities planned.

✓ Estimating the number of persons expected to participate or observe.

✓ Analyzing the expected means and routes of travel for participants and expected times of arrival and departure.

✓ Partnering with the state and/or major urban area fusion center to conduct a public safety assessment of the event and its organizers, when the local law enforcement agency lacks resources to conduct appropriate research to determine what public safety concerns might be associated with the event and whether violence or other criminal conduct is anticipated or might reasonably occur at the event.

- ✓ Reviewing permits sought by groups planning or sponsoring the event. This may include identifying the group or groups organizing the event and contacting the event organizers to:
  - Determine the purpose of the event.
    - **Special consideration**: When analyzing the purpose of the event, an agency should determine whether the event is likely to involve the exercise of First Amendment rights. An event or gathering in public may be held concerning ideas or beliefs about public or social policy or political, educational, cultural, economic, philosophical, or religious matters. However, the First Amendment does not necessarily apply to gatherings or public assemblies unrelated to the right to hold and express ideas and beliefs. For example, a public fireworks display, absent some First Amendment-protected component, does not give rise to First Amendment significance. Alternatively, actions such as flag-burning are "symbolic speech" and fall within First Amendment protections.
  - Discuss law enforcement's role in the event, if any.
    - **Special consideration**: Absent an investigative necessity based upon a criminal predicate, when agency members initiate contact with organizers, they must clearly identify themselves as law enforcement officers. In limited instances, law enforcement officers may be in contact with event organizers as part of an undercover investigation, based on a criminal predicate.
    - **Special consideration**: Law enforcement leadership or a designee should also assess whether the public is potentially at risk because of the event, whether other groups might take advantage of the event, or whether the event participants might need protection from counterprotestors or the general public.
- ✓ Conducting an assessment to determine whether violence or other criminal conduct is anticipated or might reasonably occur at the event.
  - **Special consideration**: When acting in concert to violate the law, members of groups or organizations may present a threat to public safety. An investigation of organizational activity, however, presents special problems when First Amendment activity is involved. Generally, membership or participation in a group or organization that has engaged in illegal activities in the past with respect to protests or demonstrations does not alone establish reasonable, articulable suspicion of criminal activity with

respect to each of its members. Thus, caution must be exercised in distinguishing a group's members who are engaged in protected First Amendment activities from those who advocate or engage in violence or other criminal conduct. Higher levels of agency review and authorization, including legal counsel, should occur before conducting investigations pertaining to groups that may involve these constitutional sensitivities.

✓ Utilizing publicly available material.

- **Special consideration**: Agencies should consider collaborating with the state and/or major urban area fusion center (if applicable) to assist in locating and utilizing publicly available material as part of the Pre-Event Assessment.
- **Special consideration**: Agencies should determine whether they have any restrictions or limitations on the collection and use of publicly available material. In the absence of an agency policy restricting access to or use of this type of material, officers may generally gather information about public gatherings, including information that is openly available to the public on Internet sites. Officers may examine both publicly available and agency information on prior public gatherings when useful to determine what risks are or may be present and what police resources might be necessary to adequately protect demonstrators, bystanders, and the general public and to enforce all applicable laws.
- **Special consideration**: Caution should be used when Internet sources (which are sometimes inaccurate) are the sole basis for making law enforcement decisions, especially when constitutional rights may be involved. When publicly available information is used, the source should be evaluated as to its reliability before the information is utilized. In addition, officers should not base their conclusions and findings on one source of information.
- **Special consideration**: While publicly available information may be collected for the Pre-Event Assessment, it cannot be retained after the event if it is not relevant to a reasonable law enforcement purpose.
- **Special consideration**: All publicly available information obtained should be properly referenced as to its source.

- ✓ Determining whether publicly available information collected justifies contacting other law enforcement agencies or fusion centers to determine whether other agencies have had any prior related events or prior contact with event organizers.

- ✓ Use of law enforcement information.

  - **Special consideration**: Based upon the type of event, additional law enforcement information may be included in the Pre-Event Assessment. For example, if the event includes dignitary protection, agencies should utilize their internal records systems to identify whether there have been previous threats made to the dignitary.
  - **Special consideration**: Based on the location of the event, law enforcement agencies should also refer to applicable regional crime analysis information, location-specific crime information, and other risk assessments related to critical infrastructure and key resources. The purpose of this type of information is to ensure that agency leadership is fully aware of any historical criminal activity that may need to be addressed in the Operations Plan (developed in the next stage).

- ✓ Assessing whether law enforcement participation in the event will be required.

Permissible and Prohibited Conduct

The Pre-Event Assessment should also define permissible and prohibited conduct for officers involved in any pre-event activity.

Permissible conduct may include:

- ✓ Communicating openly and directly with any person involved in a public gathering regarding the number of persons expected to participate and similar information regarding the time, place, route, and manner of a public gathering and reviewing documents submitted for such purpose, such as parade permit applications.

- ✓ Investigating proposed activities for a reasonable, articulable, authorized law enforcement purpose, even though First Amendment rights are implicated.

- ✓ Collecting information about persons or groups who have indicated an intention to attend or are known to attend this type of event and who are known to be or reasonably suspected of advocating or engaging in violence or other unlawful acts in order to determine whether they are inciting or planning violence or other unlawful activities at this event.

- ✓ Conducting all permissible investigations in a manner that is least likely to impact a person's First Amendment rights by using the least intrusive methods whenever possible.

Prohibited conduct may include:

- ✓ Investigating and collecting, maintaining, using, or sharing information regarding persons or groups solely because they are involved in constitutionally protected activity.

- ✓ Investigating and collecting, maintaining, using, or sharing information regarding persons or groups solely because of the content of their speech (e.g., if there is no reasonable law enforcement purpose, such as criminal conduct advocated or planned or threat to public safety).

- ✓ Investigating and collecting, maintaining, using, or sharing information regarding persons' or groups' exercise of their First Amendment rights for a purpose unrelated to the event.

- ✓ Instructing the debriefing of or questioning witnesses, event participants, or arrestees regarding their social, political, or religious views unless specifically related to criminal conduct and then only as necessary to achieve the clearly stated objective in the Pre-Event Work Plan.

- ✓ Collecting, maintaining, using, or sharing information that is outside the scope of the stated objectives of the investigation unless exigent circumstances justify modification of those objectives.

- ✓ Collecting, maintaining, using, or sharing information without evaluating it and marking it for source reliability and content validity prior to maintaining, using, or sharing it.

- ✓ Collecting, maintaining, using, or sharing information (such as names) in political petitions, mailing lists, organizational memberships, or writings espousing a particular view that is protected by the First Amendment.

- ✓ Investigating persons or groups solely because of:
  - Advocating a position in their speech or writings that an officer finds to be offensive or disagreeable.
  - Support for unpopular causes.
  - Ethnic background, race, or national origin.
  - Religion or religious affiliations.
  - Noncriminal personal habits.
  - Associations with persons that are not of a criminal nature.
  - Association with or being related to persons belonging to an organization espousing views protected by the First Amendment.
- ✓ Investigating, disrupting, interfering with, or harassing any person for the purpose of:
  - Preventing the person from engaging in conduct protected by the First Amendment.
  - Retaliating against the person for engaging in conduct protected by the First Amendment.
  - Discriminating against the person on the basis of conduct protected by the First Amendment.

Use by Other Agencies

Once the Pre-Event Assessment is complete (or during the assessment as exigent circumstances necessitate), the agency should determine whether it should provide its findings to agencies in other jurisdictions. This determination should be based on a criminal predicate or other law enforcement purpose to justify sharing of information, such as:

- ✓ The size of the event (multijurisdictional).
- ✓ Reasonable law enforcement purpose related to persons or groups associated with the event planning to engage in criminal activity in connection with the event or who have engaged in criminal activity during past events.
- ✓ Whether the event will also take place in another jurisdiction.

Operational Stage

Determination of Law Enforcement Role

Once the Pre-Event Stage is complete, law enforcement leadership must determine whether the agency will have a role in the event and, if so, specify the role of law enforcement at the event. This determination will be based on the findings of the Pre-Event Assessment. If the determination is made that a law enforcement presence is necessary, an Operations Plan should be created to define and articulate the role of law enforcement in responding to the event.

Operations Plan

The Operations Plan should include four main parts: (1) discussion of the level of law enforcement involvement required at the event, (2) statement of the operational objectives based on the results of the Pre-Event Assessment, (3) discussion of the information to be collected during the event, if any such collection is legally justified and in a manner narrowly tailored to achieving operational objectives, and (4) contingencies should the event prompt a greater law enforcement response than anticipated.

1. **Level of Law Enforcement Participation**—Agency leadership, based on the Pre-Event Assessment, should define the level of law enforcement involvement during the event. This may include identifying:
   - Whether a uniformed presence is required to maintain public safety.
   - Whether an investigative response is required.
     - **Special consideration**: If an investigative response is necessary, the Operations Plan should define the reasonable law enforcement purpose (such as reasonable suspicion or criminal predicate) that justifies the investigative response.
   - Whether intelligence resources[4] or some other support is required.
     - **Special consideration**: If intelligence-related support is required, the Operations Plan should further specify the role of officers assigned to this function, including their information collection responsibilities.

4 Intelligence resources can refer to the use of the state or major urban area fusion center and/or the identification of officers to gather information that may have an intelligence-related purpose.

2. **Operational Objectives—**Based on the findings of the Pre-Event Assessment, the Operations Plan should articulate the agency's operational objectives during the event. Although there are certain objectives that will be consistent in all events, every event has unique characteristics that may require a unique response. **As such, all objectives should be clearly stated. The operational objectives may include:**
   - Maintaining crowd control.
   - Engaging in traffic control.
   - Preventing criminal activity.
   - Dignitary protection.
   - Protecting persons and property.
   - Ensuring compliance with permits and reasonable restrictions on time, place, and manner for conducting the event as described in the permits and local ordinances.
   - Assessing the need for additional personnel or other response (e.g., emergency medical response).
3. **Information Collection, if Any—**The Operations Plan should articulate whether collection of information by law enforcement officers at the event is permissible; the reason for any collection, including specifics regarding the criminal behavior that is suspected (collection of information without a legitimate criminal predicate should be prohibited); and how information may be collected, used, or retained, as appropriate. If information will be collected, the plan should specify the type of information collection that is permissible, who will collect information (uniform or plainclothes officers), and the permissible acts of collection.

   Law enforcement personnel should not collect the following types of information if no reasonable law enforcement purpose (such as criminal predicate or reasonable suspicion) is identified:

   - Photos (if a photo is taken because of unlawful conduct, there may be a need to blur out certain individuals unrelated to the law enforcement investigation).
   - Literature.
   - Videos.
   - Personally identifiable information on persons and identification of participating groups.
   - Audio recordings of the event.

Components of the Operations Plan

As part of the operational process, the Operations Plan should articulate law enforcement's role during the event. These provisions may include:

- ✓ **Public safety response**—Law enforcement has a duty to protect the public. The plan should articulate the public safety risks and who is at risk; e.g., event participants, counterdemonstrators, the media, or the general public.

- ✓ **Officer roles**—The role(s) of uniform officers, intelligence collectors, and undercover officers should be defined. For example, uniformed officers will be responsible for crowd control and public safety, not information collection.

- ✓ **Investigative/intelligence element**—Based on the results of the Pre-Event Assessment and the determination of a reasonable law enforcement purpose, there may be an investigative or intelligence element. This element must be clearly defined.

- ✓ **Professional conduct**—The presence of law enforcement officers at an event may arouse concern. Therefore, emphasis should be made regarding the importance for officers to be courteous and respectful. Officers should not:

  - Harass, confront, or intimidate persons attending public gatherings or make comments about the views they express.
  - Interview or otherwise question event participants engaged in First Amendment-related activities, unless directed by a supervisor as part of an authorized investigative effort.
    - Exception: If an officer witnesses a crime being committed or has reasonable suspicion that a crime may be committed (such as an expressed threat), based on the Operations Plan, agency policy, or state law, the officer may question participants, as appropriate.
  - Seize participants' or onlookers' cameras, cell phones, or materials unless during the course of placing the person under a lawful arrest.

- ✓ **Disclosure of identity**—If consistent with the Operations Plan, officers may attend public rallies and walk in public parades without disclosing their identity provided that their purpose is solely to monitor the rally or parade for public safety and criminal conduct issues. In this capacity, officers will not direct or influence the participants of the event and will not affirmatively represent themselves to be a participant or a member of an organization participating in the event (such as wearing clothing indicating their involvement with the organization). If there is an investigative element based on criminal activity, undercover tactics may be applied to officers attending the event based on agency policies and procedures.

- ✓ **Media interaction**—The Operations Plan should specify the nature and level of engagement with the media. It is recommended that if officers are approached by the media, the Operations Plan should provide instructions for officers to direct any questions or comments to agency leadership or the agency public information officer.

- ✓ **Permissible and prohibited conduct**—Permissible and prohibited conduct listed in the pre-event plan applies to the operational phase as well.[5]

- ✓ **Permissible video, sound, or photographic recording**—All use of video or photographic recording of the events should be specially authorized by agency leadership in advance of the event. Any videotaping or photography:

  - Should be conducted only in a manner that minimizes interference with the exercise of First Amendment rights by persons lawfully participating in the event.
  - Should be used only for crowd control training or evidentiary purposes.
    - Evidentiary purposes shall include only:
      - Evidence that is reasonably likely to be used in administrative, civil, or criminal proceedings or investigation.
      - Evidence related to allegations of misconduct by officers.

5 See additional law enforcement conduct parameters on page 17 under "Briefing."

- Should include only the recording of locations that are in public view and where there is no reasonable expectation of privacy.
- Should be conducted only in a manner that protects a person's anonymity and free association or circumstances or when there exists a reasonable expectation of privacy (for example, a conversation on a cell phone or writings or readings in a person's possession when that person is not involved in a crime or the subject of a relevant criminal investigation would not be permissible).
- Should not include the targeting or observation of persons based solely upon race, gender, ethnicity, disability, religion, or other classifications protected by law.
- Should authorize the recording of personsonly when the officer using the equipment has reasonable suspicion that the person is involved in criminal activity.

Some law enforcement purposes may be stated generally in the Operations Plan or communicated to officers, but objectives that may risk interfering with the exercise of First Amendment rights should be stated narrowly and be expressly tied to a specific law enforcement function (e.g., public safety, investigative).

Briefing

As part of the operational briefing, agency leadership and command staff are encouraged to outline the role of law enforcement officers at an event.[6] It is the duty of law enforcement officers to uphold the United States Constitution. As such, they have the responsibility to protect persons engaged in their First Amendment right to peaceably assemble. Public safety is the primary mission of officers assigned to these events, and as a part of this mission:

Officers ***will***:

- ✓ Protect life and property.
- ✓ Ensure that all privacy, civil rights, and civil liberties protections are upheld.
- ✓ Practice fair and impartial enforcement of laws, statutes, and ordinances.

6 A *Law Enforcement Line Officer* reference card is available for distribution to line officers that identifies the role of the officer in a pocket-sized format.

- ✓ Adhere to the event Operations Plan, unless otherwise directed by supervisors. Any expanded activity will not be conducted without supervisory approval.
- ✓ Enforce reasonable time, place, and manner restrictions as discussed in the Operations Plan.

Officers ***will not***:

- ✓ Engage in unauthorized enforcement activities, including unauthorized information collection.
- ✓ Document information on persons solely on the basis of:
  - Ethnicity, national origin, or race.
  - Religious, political, or social beliefs or associations.
  - Sexual orientation.
  - Support for unpopular causes.
- ✓ Conduct investigative activity without direct supervisory authorization.
- ✓ Allow personal beliefs and opinions to interfere with their duties as a law enforcement officer.
- ✓ Express personal, political, or religious views during the assembly while on duty.
- ✓ Infringe on any person's right to peaceably assemble and associate with others.

Post-Event Stage

Once the event has concluded, the Post-Event Stage should be initiated to address the handling and use of any information that was collected in the Pre-Event Assessment or during the event.

Evaluation of Information

Information collected as part of the Pre-Event Assessment or during the event should be evaluated to determine whether certain pieces of information should be retained to facilitate planning and preparation for future events or whether there is a criminal predicate that may necessitate the need to retain the information. Information regarding First Amendment activities should not be retained to facilitate planning and preparation for events that are unlikely to recur or for other administrative purposes, unless needed for criminal prosecution or if the information reaches the threshold for inclusion into a 28 CFR Part 23 criminal intelligence database. Likewise, personally identifiable information should be removed from information retained to facilitate planning and preparation for foreseeable and likely events. As part of this evaluation process, consideration should be given to the treatment of information about groups and individuals when criminal predicate is identified. Such information should be retained in agency case or intelligence files. If information is gathered regarding groups and individuals when no criminal predicate is identified, personally identifiable information should not be retained, other than contact information for event organizers for administrative purposes (such as future event preparation).

Requests From the Media and the Public

At the conclusion of the event, agency leadership should determine how the agency will respond to requests from the media or members of the public regarding law enforcement's response to the event.

- **Special consideration**: Agencies should involve the public information officer in all facets of the event and should direct all media inquiries to that officer.

Information Dissemination

Agency leadership should identify whether and how any information (or files) regarding the event will be retained for a valid law enforcement purpose or disseminated. This determination should be made in the context of the state's Freedom of Information Act or Sunshine laws and considering the value of transparency and open government. If it is determined that information will be disseminated, it is recommended that information be disseminated in accordance with the agency's dissemination plan, policy, or Standard Operating Procedure unless there are specific requirements with respect to the event or investigation of incidents

related to the event. Agencies may also want to consider dissemination of a summary/press release that may be available to the public.

Prior to dissemination, agency leadership should consider the following issues:

- ✓ All requests for information shall be evaluated and approved prior to dissemination by agency leadership or designee.
- ✓ Determine whether the requesting agency is reliable in treating the information with the requisite care and sensitivity if the requesting agency is not a criminal justice agency.
- ✓ Dissemination of information related to the event should be made by written transmittal in compliance with applicable law.
- ✓ The first page of any document in which information regarding the event is transmitted to a recipient agency shall contain a notice limiting dissemination to the specific purpose for which the document was transmitted and conditioning further disclosure (if allowed under the jurisdiction's law) on the third-party recipient first getting the agency's permission.
- ✓ Nothing in this section limits the dissemination of information regarding the event to a government official or to another individual, when necessary, to avoid imminent danger to life or property.

Video and Photographic Images

Agency leadership should specify that all video or photographic images taken at the event shall not be sold or freely transmitted to any other entities without the approval of the event or agency supervisor. Leadership should also specify whether the video or images will be retained by the agency, for what valid law enforcement purpose, and the length of retention.

Retention of Information

The retention period for information regarding the event (including the Pre-Event Assessment, the Operations Plan, information obtained during the event, etc.) should be specified by agency leadership based on policy and whether a reasonable law enforcement purpose has been established.

The retention policy relating to First Amendment-related events should articulate when any records related to the event shall be purged pursuant to agency policy from the last date of entry, with the following exceptions:

- ✓ Information may be maintained if it is part of an ongoing investigation.
- ✓ All written memoranda requesting authorization to commence an investigation and subsequent authorizations shall be maintained for not less than a specified set of years, based on agency policy, state expungement laws, and whether the information is part of an investigative/intelligence record, after termination of the investigation.
- ✓ Records showing violation of these guidelines shall be destroyed only in accordance with agency policy and/or expungement laws/orders.
- ✓ The chain of custody for destroyed files shall be established and documented to provide a record establishing that the files have been destroyed.

If a criminal predicate is identified, agencies should reference their policies and procedures regarding applicable information retention. If information is retained in a criminal intelligence system, agencies should review the system policies and procedures regarding the retention of information and the threshold for retention (e.g., 28 CFR Part 23).

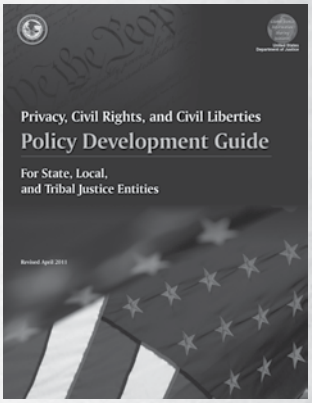
Agencies should limit the retention of information as much as possible to avoid the perception of maintaining files on groups or persons who engage in protected First Amendment activities. If deemed appropriate to retain, contact information of event organizers and event logistical information, along with the response summary and any press releases, should be placed only in an administrative file. This type of information can provide law enforcement with historical perspective on the activity, in the event that event organizers or other organizations seek to hold additional demonstrations or other law enforcement agencies request information on the event.

Evaluation and Feedback

At the conclusion of the event, agency leadership should initiate a review of the full process that was undertaken for the event, including the Pre-Event Stage, Operational Stage, and Post-Event Stage. The purpose of this review is to ensure that law enforcement conducted an appropriate public safety assessment and properly responded to the event. Further, the review should evaluate the execution of the Operations Plan and identify any deficiencies or lessons learned.

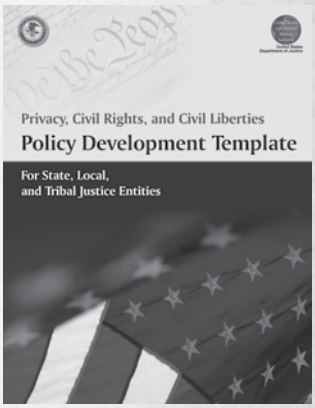
Additional Resources

Along with the guidance depicted in this concepts and issues paper, there are many additional resources to assist agencies in responding to First Amendment-related events and demonstrations.

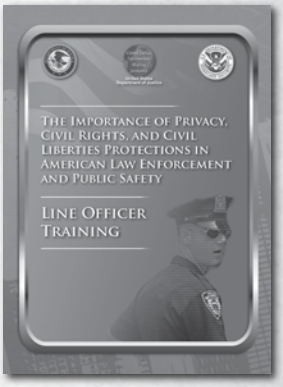


Law Enforcement Line Officer

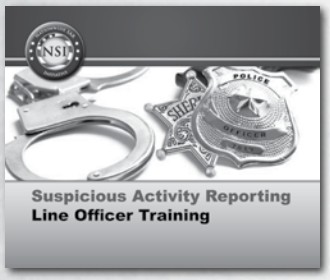
***Privacy, Civil Rights, and Civil Liberties Policy Development Guide for State, Local, and Tribal Justice Entities* (Privacy Guide)—**This guide is a practical, hands-on tool for state, local, and tribal justice practitioners charged with drafting the privacy policy and providing sensible guidance for articulating privacy obligations in a manner that protects the justice agency, the individual, and the public. This guide provides a well-rounded approach to the planning, education, development, and implementation of agency privacy protections. Also included are drafting tools, such as a policy template, a glossary, legal citations, and sample policies.



***Privacy, Civil Rights, and Civil Liberties Policy Development Template for State, Local, and Tribal Justice Entities* (SLT Policy Development Template)—**Included in the Privacy Guide is the SLT Policy Development Template, which was developed to assist SLT agencies in drafting a privacy policy to address the information the agency collects, receives, maintains, archives, accesses, and discloses. The provisions suggested are intended to be incorporated into the agency's general operational policies and day-to-day operations and to provide explicit and detailed privacy protection guidance to agency personnel and other authorized source and user entities. Each section represents a fundamental component of a comprehensive policy that includes baseline provisions on information collection, information quality, collation and analysis, merging, access and disclosure, redress, security, retention and destruction, accountability and enforcement, and training. Sample language is included for each provision.



***The Importance of Privacy, Civil Rights, and Civil Liberties Protections in American Law Enforcement and Public Safety* Training Video—**This short video serves as a training tool to educate viewers, particularly line officers during roll call, on the privacy and civil liberties issues they may confront in their everyday work. The video also addresses the liabilities associated with the failure to adhere to sound policy and practice. This overview reviews and proactively emphasizes the role line officers have in the ongoing protection of citizens' and community members' privacy, civil rights, civil liberties, and other associated rights in the course of officers' daily activities and calls for service.



***Suspicious Activity Reporting Line Officer Training* Video—**This suspicious activity reporting (SAR) video was developed through a joint effort of the Bureau of Justice Assistance, the U.S. Department of Justice, and the International Association of Chiefs of Police to educate law enforcement line officers not only on what kinds of suspicious behaviors are associated with pre-incident terrorism activities and how to document and report suspicious activity but also on how to ensure the protection of privacy, civil rights, and civil liberties when documenting SAR information. The CD also provides information about the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) requirement that NSI sites have privacy policies in place prior to NSI participation.

***Criminal Intelligence Unit Guidelines for First Amendment Demonstrations*—**Developed by the Association of Law Enforcement Intelligence Units, these guidelines address interaction between a law enforcement intelligence entity and citizens engaged in public demonstrations. This document complements the guidance identified in the concepts and issues paper.