CAO 2013-015

To: Scott Masington

From: Craig E. Leen, City Attorney for the City of Coral Gables

RE: Legal Opinion Regarding Prohibition On Recording Devices In Police Station

Date: February 21, 2013

The lobby of our police department is set up as a secure environment where criminal complaints can be made directly to the officer standing at the entry desk. For example, the information provided to the officer may include privileged or exempt criminal intelligence information under Chapter 119 of the Florida Statutes. Consistent with the attached opinion, it is my view that this area is a nonpublic forum, and that a prohibition on the use of recording devices therein is a reasonable and viewpoint neutral security restriction.

Hernandez, Cristina

From: Leen, Craig
Sent: Thursday, February 21, 2013 2:51 PM
To: Hernandez, Cristina
Subject: FW: Prohibition on Recording Devices in Police Station
Attachments: Memorandum Regarding Prohibition on Recording Devices in Police Station.pdf

Please place in the opinion folder.

Craig E. Leen
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From: Leen, Craig
Sent: Thursday, February 21, 2013 2:51 PM
To: Masington, Scott
Cc: 'bthornton@coralgables.com'; Figueroa, Yaneris
Subject: Prohibition on Recording Devices in Police Station

Scott,

Please see the attached opinion from my office regarding the prohibition on the use of recording devices in the police department. The lobby of our police department is set up as a secure environment where criminal complaints can be made directly to the officer standing at the entry desk. For example, the information provided to the officer may include privileged or exempt criminal intelligence information under Chapter 119 of the Florida Statutes. Consistent with the attached opinion, it is my view that this area is a nonpublic forum, and that a prohibition on the use of recording devices therein is a reasonable and viewpoint neutral security restriction.

Please let me know if you have any questions.

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To: City Attorney, Craig E. Leen
Deputy City Attorney, Bridgette N. Thornton Richard
From: Yaneris Figueroa, Esq.
RE: Public Forum Doctrine and Prohibition on Recording Devices in Coral Gables Police Station
Date: February 21, 2013

I. The Government May Restrict Expressive Activities on Government Property.

The mere fact that government owns or controls specific property does not mean that all expressive activity must be permitted on that property. "The government need not permit all forms of speech on property that it owns and controls." *Daniel v. City of Tampa, Fla.*, 38 F.3d 546, 549 (11th Cir. 1994). In fact, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated...[The] United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Adderley v. State of Fla.*, 385 U.S. 39, 47-48 (1966). Therefore, the government can restrict expressive activity conducted on its premises, so long as the restrictions are deemed to be nondiscriminatory. *Id.*

II. Extent of Permitted Government Restrictions on Expressive Activities is Based on the Public Forum Doctrine

When determining the constitutionality of restrictions placed on expressive activities conducted on government property, courts utilize the public forum doctrine. Under this doctrine, "the scope of the government's power to restrict political demonstrations or other First Amendment activity on government property depends upon the type of forum involved." *United States v. Corrigan*, 144 F.3d 763, 767 (11th Cir. 1998). Government owned and/or controlled

areas are placed in three distinct categories: traditional public fora, limited public foral, and non-public fora. Each forum classification has separate required constitutional considerations. As such, when determining the constitutionality of a restriction, the type of forum must first be established.

A traditional public forum is a place "that has traditionally been available for public expression." *Calvary Chapel Church, Inc. v. Broward County, Fla.*, 299 F. Supp. 2d 1295, 1300 (S.D. Fla. 2003). Generally, traditional public fora "have immemorially been held in trust for the use of the public and...have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *M.N.C. of Hinesville, Inc. v. U.S. Dept. of Def.*, 791 F.2d 1466, 1474-75 (11th Cir. 1986). Limited public fora are "those public areas that the government has opened for use by the public as a place for expressive activity... This type of forum can be created [by the government] for a limited purpose such as use by certain groups ... or for the discussion of certain subjects." *Calvary Chapel, supra* 299 F. Supp. 2d at 1300-01. Finally a non-public forum is one "where public property is not by tradition or designation a forum for public communication .... Such a forum exists where the Government acts in its position as proprietor to manage its own internal operations, as opposed to using its power as a regulator or lawmaker." *Id.*

Traditionally, municipal sidewalks, parks, and streets have been regarded as traditional public fora. *ISKCON Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282, 1285 (11th Cir. 1998). Limited public fora, on the other hand, have been specifically designated as such by the government. Some examples of limited public fora include university meeting facilities, school

[1] Some courts prefer to use the phrase "created public forum" as they believe the term is more descriptive than "limited public forum." For consistency purposes, the phrase "limited public forum" will be used throughout this memo.

board meetings, and municipal theaters. *M.N.C. of Hinesville, supra*, 791 F. 2d, at 14. "Nonpublic forums are areas that are not traditionally public forums and have not been opened by the government for public use." *Id.*

a. A Police Station is likely to be Categorized as a Nonpublic Forum

Currently, no caselaw clearly establishes how a police station should be classified. However, the United States' Supreme Court's decision in *Greer v. Spock* is instructive in determining a police station's classification. Using *Greer* as a guide, a court is likely to find that police stations are nonpublic fora. There, the court upheld a military base's restriction on speeches and literature of a political nature without permission. In upholding the ban, the court examined the base's primary function. The court emphasized that "the prima business of armies and navies [is] to fight or be ready to fight wars should the occasion arise...and it is consequently the business of a military installation... to train soldiers, not to provide a public forum." *Greer v. Spock*, 424 U.S. 828, 838 (1976). Furthermore, the court noted that the base had never been opened for political speeches. "It is undisputed that, until the appearance of the respondent.c.no candidate of any political stripe had ever been permitted to campaign there." *Id.* at 839. Given its primary function as a training facility and the fact that the base had not been previously opened for political campaigns, the court found that the base was a nonpublic forum.

A police station has a similar function to the military base in *Greer*. The primary business of the military is to fight wars just as the primary business of police is to fight crime. Given the primary business of the military, bases primarily function to ensure that soldiers are ready for these wars. Similarly, given the primary business of police, police stations primarily function to ensure that police officers are ready to fight crime. As such, because the court in *Greer* held that military bases are nonpublic fora given their primary function, and police

stations serve the same primary function as a military base, it follows that a police station would also be a nonpublic forum.

Furthermore, as in *Greer*, the police station has never been opened to the public as a forum. The court in *Greer* used the fact that the military base had never been opened as a forum as indicative that the base was a nonpublic forum. Therefore, because the police station has also not been opened to the public as a forum, it follows that a court would find this fact suggestive that the police station is a nonpublic forum.

b. Reasonable and Viewpoint Neutral Restrictions on Expressive Activities in Nonpublic Fora are Lawful.

"[T]he regulation of speech in non-public fora is examined for reasonableness and viewpoint neutrality." *Calvary Chapel Church*, 299 F. Supp. 2d 1295, at 1300-01. Because police stations are likely nonpublic fora, any expressive restriction should be examined for its reasonableness and viewpoint neutrality. Absent a showing that the restriction is unreasonable or not viewpoint neutral, the restriction must be upheld.

Thus, the first step in determining whether a restriction on expressive activity is constitutional is determining whether the restriction is content-neutral. The restriction must then be analyzed for its reasonableness. If the restriction is ***both*** content-neutral and reasonable, the restriction will be deemed constitutional and as such a valid exercise of governmental power.

i. The Coral Gables Police Station's Prohibition on All Recording Devices is Content-Neutral.

"Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech'." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Furthermore, "a content-neutral conduct regulation applies equally to all,

and not just to those with a particular message or subject matter in mind." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1254 (11th Cir. 2004).

The United States Court of Appeals for the Eleventh Circuit recently discussed whether a restriction on expressive activity was content-neutral. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006). There, the court found that 90-day permit requirements for all festivals held in a city park were content-neutral. In reaching their conclusion, the court emphasized, "[t]he requirement that festival applicants apply 90 days in advance is content-neutral because it applies equally to all festival permit applicants without reference to the content of the festival." *Id*. at 1281. The court found this fact persuasive that the restriction was content-neutral.

Using *Camp Legal Defense Fund* as a guide, a court is likely to find that the ban on all recordings in the Coral Gables Police Station is content neutral. The prohibition on recordings in the police station is on ***all*** recordings. Anyone, regardless of the intended purpose, would be equally prevented from recording. As such, because the court in *Camp Legal Defense Fund* held that permit requirements were content-neutral because they were applied evenly to everyone, and the police station's prohibition applies equally to everyone, the restriction is likely content-neutral.

ii. The Coral Gables Police Station's Ban on All Recording Devices is Reasonable.

In addition to being content neutral, restrictions on speech in public fora must also be reasonable. The Eleventh Circuit Court of Appeals addressed the reasonableness of a restriction

in *United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983).[2] There, the court upheld a complete ban on recordings in federal criminal trials. The court emphasized that the restriction was reasonable given the nature of a trial. In arriving at that conclusion, the court noted that the restriction did not impede on the public's access to trials. Furthermore, the court noted that the purpose for the ban was to promote efficiency of the trial system. The court stressed that the ban would not prevent the media from attending or reporting trials. Rather, it merely prevented journalists from video recording the proceedings. "In the upcoming trial here, journalists will be able to attend, listen, and report on the proceedings as they always have. No part of the trial has been closed from public scrutiny." *Id.* at 1278. As such, the court found that the restriction was reasonable.

Just as in *Hastings*, the Coral Gables Police Station still allows public access. Recordings are prohibited merely to promote the efficiency of the station. There is no evidence that individuals or the media would be prevented from entering the station and reporting their findings, if they wished to do so. As such, because the court in *Hastings* found that a ban on recordings of federal trials was reasonable given that access to attend and report trials was still available, and the Coral Gables Police Station's prohibition on recordings also allows access to the station, the prohibition in the police station is reasonable.

III. The Police Station Prohibition on all Recording Devices is Consistent with Florida State Statutes.

In addition to complying with constitutional requirements for nonpublic fora, the Coral Gables Police Station's prohibition is consistent with Fla. Stat. § 934.03, Interception and disclosure of wire, oral, or electronic communications prohibited. In pertinent part, section

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[2] are still allowed to enter the police station and report on what they witnessed, if they wished, but in order to promote efficiency and the functions of the police stations, recordings would not be allowed.

934.03 states: "Except as otherwise specifically provided in this chapter, any person who...intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication...is guilty of a felony of the third degree."[3] There are limited exceptions to this statute, namely, if consent is given for the interception of the communication.

Through the prohibition on all recording devices in the police station, the police department has effectively placed visitors on notice that consent to intercept communications occurring in the police station has not been granted.

IV. Conclusion

For the foregoing reasons, the Coral Gables Police Station is likely to be held as a nonpublic forum. As a nonpublic forum, restrictions on expressive activities are permitted so long as the restrictions are reasonable and content-neutral. Given the above discussion, it is likely that the prohibition on all recordings in the police station will be deemed content-neutral and reasonable.

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[3] Fla. Stat.§ 934.02 Defines Oral Communications and Intercept as follows:
(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.
(3) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.