

# First Amendment Audits - What Local Governments and Staff Need to Know

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# First Amendment Audits

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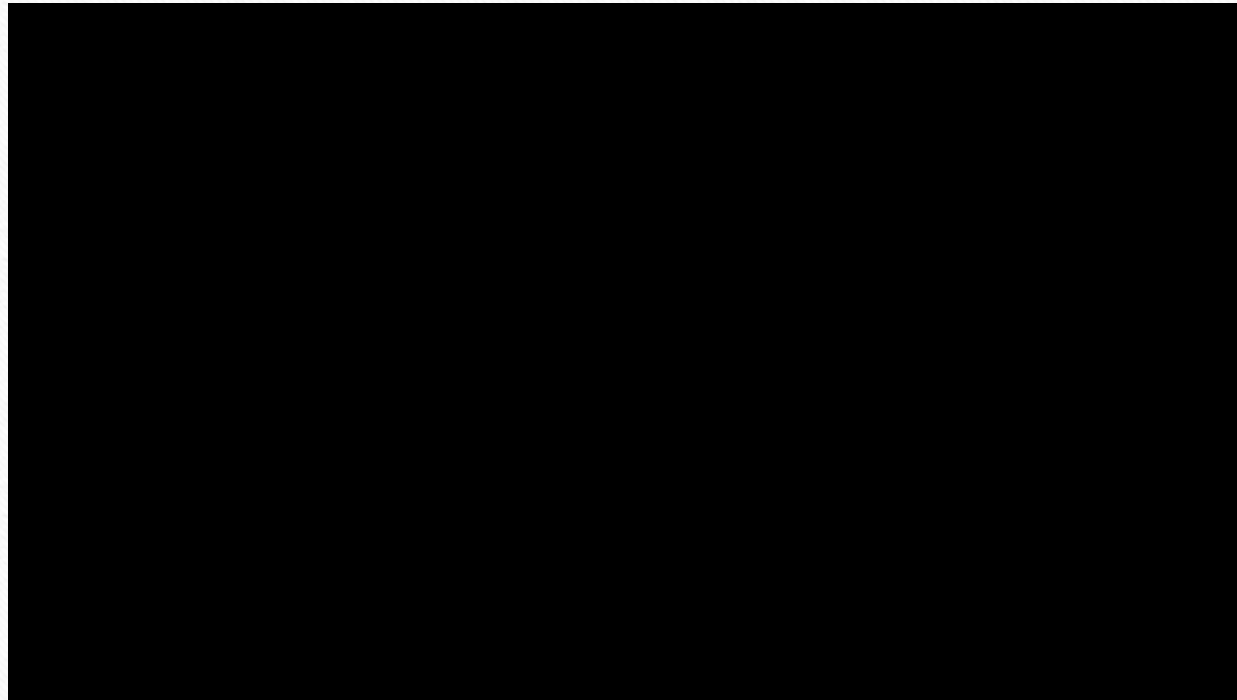
What Local Governments and  
Staff Need to Know

# What is a First Amendment Audit?

- An audit typically involves someone filming his or her surroundings from a public space
- Practitioners consider themselves to be activists and citizen journalists
- Auditors believe that the movement promotes transparency and open government – so they often include requests for public information
- The audit is supposedly designed to test whether government officials and employees will uphold the auditor's constitutional rights
  - The First Amendment right to free speech
  - The Fourth Amendment right to be free from unlawful seizures

# What We Want to Avoid – Public Officials

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What We'll  
Cover

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The scope of the First  
Amendment

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Who auditors are and why  
they do what they do

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What you can do to prepare  
for a First Amendment audit

# The Scope of the First Amendment and Its Protections

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# The First Amendment

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*“Congress shall make no law ... abridging the freedom of speech, or of the press...”*

# Recording Videos is Protected Speech

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Recording videos is ordinarily considered *expressive conduct* or *information gathering* and is deemed protected speech under the First Amendment

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Auditor doesn't have to be a member of the "press" in the traditional sense

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Numerous courts have recognized the rights of bystanders to record the interactions of law enforcement officers and the public at large

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Holdings interpreted to include recording of any public employee in any public place, including public areas inside of public buildings



# Forums

For our purposes, there are three different types of forums where people might engage in speech:

- Public forum
- Designated public forum
- Non-public forum

# Public Forum

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- An area that has traditionally been used for expressive activity like assembly or debate

Streets	Sidewalks
Public Parks	Steps of Town Hall
Town Square	Social Media???

- The government's ability to restrict speech in these locations is severely limited
- Can only enforce reasonable time, place, and manner of expression restrictions, which are ***content neutral***, *narrowly tailored to serve a compelling government interest*, and *leave open other ample alternative channels of communication*

# Limited Public Forum

A location where government has intentionally reserved a forum for certain groups or discussion of certain topics

Examples include inside of schools after school hours, the interior of city hall, and public meetings

Can impose some limits on speech provided they are viewpoint-neutral and reasonable in light of the purpose of the forum

# Non-Public Forum

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- Public property which is not by tradition or designation a forum for public expression

Private Offices	Jails
Polling Places	Public Hospitals
Military Bases	Courtrooms

- The government can enforce reasonable time, place, and manner of expression restrictions, which are *content neutral* and *compatible with the intended use of the property*
- For example, courts have allowed limitations that prevent employees from being interrupted while performing work in a government building

Who Auditors Are and  
Why They Do What They Do

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# Why Is the Audit Recorded?

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The objective reason – because that's the point of the audit, to see if the right to record will be honored and protected

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The cynical reason – to create a video that can be posted on YouTube or Facebook

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The better the recording – the more clicks – the more money ad revenue it generates

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To create situation that may give rise to a lawsuit for monetary damages

Auditors come in all shapes, sizes, ages, colors, races, religions, ethnic backgrounds and genders

They may be dressed like they just came from the gym or are ready to go to work

Some auditors work alone, others work in pairs or as part of a team

They may be a member of your community but likely won't be

# Who Can You Expect?

# Who Do Auditors Target?

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Public employees – particularly “front facing” staff



Elected officials



Law enforcement officers – both at the police station and while they are on patrol



Anyone who might react negatively to their presence and call the police



# Where Do Auditors Video?

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PUBLIC  
SIDEWALKS,  
PARKING LOTS,  
AND PARKS



THE EXTERIOR  
OF ANY  
GOVERNMENT  
BUILDING OR  
WORKSPACE



THE INTERIOR  
OF A  
GOVERNMENT  
BUILDING OR  
WORKSPACE  
THAT THE  
PUBLIC HAS  
ACCESS TO



TRAFFIC STOPS  
AND CRIMES  
SCENES



POST OFFICE,  
SHOPPING  
CENTERS, AND  
OFFICE  
BUILDINGS

# How Do Auditors Behave?

Some are pleasant and respectful and will explain who they are and why they are there in a non-confrontational way

Some refuse to self-identify or explain why they are there and may not say anything

Some will try to talk to you so long as they can control the conversation

Some will come in to ask for public information act or complaint forms

Some will ask lots of questions but refuse to answer any

Some are confrontational and will use abusive or dismissive language

# The Dark Side of Audits

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Auditors typically post their videos on YouTube or Facebook and have regular followers

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Some followers will call or email employees or officials to share their thoughts and ideas regarding the outcome of an audit

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Some followers are rude and disrespectful and go so far as to make death threats

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Some followers have posted critical comments on the private social media feeds of employees depicted in audit videos

# How to Prepare For a First Amendment Audit

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Who  
Should  
Expect to  
Audited?

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Every local government should expect to be audited at some point

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No town, city, or county is too big or too small

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Governments in urban, suburban, and rural areas are all just as likely to be audited

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No workspace is too small, remote, or isolated

# Preparing Workspaces for an Audit

- Identify which buildings / parts of buildings are accessible to the public and make it clear to staff that video recording is allowable in those areas
- Identify areas that, because of their use, should be deemed as non-public and install “Authorized Personnel Only” or “Restricted Area – Authorized Employees Only” signs
- In “public counter areas” and office suites install “For the Privacy of Our Customers, Please Wait Here Until Called” or “Authorized Persons Only Beyond This Point” signs



# Preparing Staff for an Audit

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- Determine which employees might encounter an auditor

Front Facing Staff	Law Enforcement / Security
Public Works / Parks & Rec Staff	Staff that Regularly Interacts with the Public
All Supervisors	Elected Officials

- Make sure all employees understand that an auditor doesn't need their consent to film them – an auditor's First Amendment rights outweighs an employee's privacy concerns
- Train employees how to respond if they encounter an auditor

# Responding to an Auditor – What You Should Do

Breathe	Take a moment to breathe and calm yourself if necessary
Secure Information	If you have private / confidential information at your work-station – cover it up or turn your monitor or computer
Practice Patience	Be patient and polite – don't be rude or dismissive
Respectfully Disengage	You don't have to talk to an auditor – simply go about your regular duties
Limit Conversations	If you <i>choose</i> to speak to the auditor – keep it short, sweet, and to the point
Just Let Them Be	So long as the auditor isn't disrupting the workplace or use of the property, let him or her record – but discretely contact supervisor



# Responding to an Auditor – What You Shouldn't Do

Don't  
Intimidate

- Don't do anything that might intimidate the auditor

Don't  
Touch

- Don't attempt to take the auditor's recording device or otherwise initiate physical contact

Don't  
Detain

- Don't detain the auditor in any way

Don't Engage in  
a Lengthy  
Conversation

- Avoid getting into a lengthy discussion or argument with the auditor – it may not end well

Don't  
Intervene

- Don't view yourself as a "protector" – don't get involved as a manager if you don't have to

Don't  
Antagonize

- Don't take photos or videos of the auditor – even though you can

# Special Note About “Safety”

1

There is no auditor exception to – “If you see something, say something”

2

Auditors are typically not a threat – but that objective fact doesn’t matter – your subjective belief does

3

If an auditor’s behavior seems unusual or causes you any concern – contact law enforcement

The mere use of a video recording device is not grounds to detain or arrest an auditor

Unless you are in a “stop and identify state” – an officer typically can’t demand that the auditor identify himself or herself

A law enforcement officer can’t detain an auditor unless he or she has reasonable articulable suspicion to do so

An auditor can’t be arrested unless a law enforcement officer has probable cause to believe a crime has been or is being committed

Therefore, in most instances, there’s likely very little, if anything, that an officer can do about an auditor

## Special Notes

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# Interaction Between Auditors and Law Enforcement

# What We Want to Avoid – Police Officers

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Questions,  
Comments,  
or Concerns?

Thank You for  
Your Time and Attention.

