

SO-CALLED “FIRST AMENDMENT AUDITS”

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Agenda

- Overview of First Amendment Audits –what is it??
- 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 and 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" Legal?

There **are** legal underpinnings to this situation – so-called Forum Analysis

Public Forum – open to the public, traditional location for self expression and speech: right to congregate in a public park or on a street or sidewalk is well established and a limitation on such expression must be compelling

Private Forum – a place that is not intended to be and is not the type of location where self expression is anticipated: right to congregate is much less compelling than the interests of the state (i.e., municipality), such as at an airport terminal or inside a school

Are These "Audits" Legal?

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: 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”

Tricky question is where is that “line” between public and private drawn, who gets to draw it, and how to evaluate it from time to time

Regulation of activity, not view point

Once a location is open to the public

i.e., the high school auditorium is used by a private party, after school hours, to present information about voting rights and barriers to access to the ballot, the meeting room in the senior center is used by a private part to provide seniors with summaries of recent world events, it cannot then be “closed” to another group with a different message

i.e., allowing one candidate to use the high school auditorium, but not others, allowing the girl scouts to sell cookies in the lobby of city hall during business hours, but prohibiting persons wishing to sell other products

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

Examples?

Are These "Audits" 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 public area 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...



"Auditor's"
frequently film
public employees &
officials on the job.



What is the point of doing a so-called Audit??

- 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 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).



“Auditors” record their interactions with public officials and post videos to social media, such as YouTube.

What can you do to prepare? Have a PLAN

Review What is “Public Facing” in the Municipality’s Office Space

- Ensure that employees know how to safeguard personal privacy matters, documents subject to the attorney-client privilege, or documents subject to the exemptions to the Public Records Law

What can you do to prepare?

Demarcate Public and “Employee Only” Areas

- Remember, if you bring a member of the public into an “employees only” area you may have converted that area into a public space at least for the same purpose.
- If you do this with a different customer while a First Amendment auditor is present, it is much less likely that the employee can bar the auditor from entering this previously private space as well.

What can you do to prepare?

Determine in Advance Who Will Provide Service During a First Amendment Audit

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

Bottom line – Cities and Towns are Customer Service Agencies

#1 Rule: Stay Calm

- Remember, there is nothing interesting about a video of an agency employee sitting at their desk, typing on their computer, and politely answering questions.
- Most of these people are looking for arguments or confrontations.
- Try to avoid being sarcastic, short, or defensive.

#2 Then, 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 not 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, employee should respond politely.
- Try to avoid immediately seeking out the support of the department head, this is the type of footage they are looking for.

De-escalation and related responses...

#3 Ensure that employees know they are not alone

- While each department should have a plan, it is imperative that those plans be coordinated with the chief executive and the appropriate police department representative
- If “de-escalation” is the goal, there needs to be an understanding of when to involve others
- Coordinating with police and chief executive, all parties should have an understanding of what their role is....

What about our other customers?

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 in each office:
 - “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!”
- However, if you do ***fear for your safety***, please ***seek assistance*** from your department head, agency executive, or the police department. How to demarcate “recording” Ideas?

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

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.

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 to do After a First Amendment Audit

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.**
 - e.g, department head, chief, or other person responsible for human resources matters (you!) for the affected department or entity.
3. **Go back to providing the great service to your agency that you do every day!**



If only it were so easy....

- 1. Report the interaction to the appropriate executive authority so they can determine whether follow-up action is needed.**
 - e.g, department head, chief, or other person responsible for human resources matters (you!) for the affected department or entity.
- 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 employees**
- 6. Consider issues that could arise – telephone calls at work and home, press, threats, etc.**

Questions?

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