

DO'S AND DON'T'S OF FIRST AMENDMENT AUDITS



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What are “First Amendment Audits”?**

- A person or group exercising or claiming to exercise their First Amendment right to video record in public spaces such as libraries, police stations, town halls, and parking lots.
- Auditors post their recordings online to be viewed by others.
- Goal is to provoke public officials or employees into violating the 1st Amendment.
- “Successful” audits are where the person recording is treated the same as if they were not recording.

What are “First Amendment Audits”?**

(cont.)

- “Failed” audits involve confrontations with public officials or employees where the auditor is told to stop recording, threatened with arrest, removed from the property, charged with trespass.
- Largely an American social and political movement
- Auditors get paid by fundraising to post videos of their audits
- Auditors compete with each other for views (and \$), resulting in more confrontational behavior to provoke a negative response and get more views

**Taken from University of Georgia School of Law, First Amendment Clinic, <https://firstamendment.law.uga.edu/first-amendment-audits-respecting-the-right-to-record/>

New Hampshire Example of First Amendment Auditors

- [NH Press Now](#) claims in its youtube channel to “ hold everyone in our government accountable under our first amendment rights to free Press.”
- Watching just a few of the many videos posted to this channel it becomes apparent the main objective of the auditor is to provoke local officials with demeaning and derogatory comments.
- This confrontational behavior is designed to have local officials overreact to the auditor and have the recording situation demonstrate a violation of the First Amendment that protects local information gathering activities.

Federal Constitutional Protections for Freedom of Speech & Press

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.

1st Amendment, U.S. Constitution.

New Hampshire Constitution

- **[Art.] 22. [Free Speech; Liberty of the Press.]** Free speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved.
- **[Art.] 8. [Accountability of Magistrates and Officers; Public's Right to Know.]** All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government.

Statutory Right to Record Public Meetings

“. . . all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. . . *Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings.* RSA 91-A:2, II

WMUV Channel Nine v. N.H. Dep't Fish & Game, 154 N.H. 46 (2006) – Fish & Game Executive Director illegally denied television station right to video tape proceedings on the revocation of hunting license

Right to Record Public Meetings Caselaw

- *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir., 1999) Citizen video recording meeting of Historic District Commission arrested for disturbing the peace found to have been falsely arrested and a jury awarded compensatory and punitive damages
- Massachusetts' Open Meeting Law requires that "all meetings of a governmental body . . . be open to the public," and confers a right to videotape such meetings on "any person in attendance." The right to videotape is not unfettered: the camera must be "fixed in one or more designated locations determined by the governmental body," and the taping may not actively interfere "with the conduct of the meeting."

Right to Record Public Officials in Public Places

- *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir., 2011) - The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, is an essential part of the First Amendment as it protects the right to receive information and ideas, which includes the right to gather news from any source by means within the law.
- It is of no significance that the present case involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press.

Does the NH Wiretap Statute Prohibit Audio Recording by a First Amendment Auditor?

- *Gericke v. Begin*, 753 F.3d 1 (1st. Cir, 2014) - Carla Gericke attempted to film Sergeant Joseph Kelley as he was conducting a late-night traffic stop. Shortly thereafter, she was arrested and charged with several crimes, including a violation of New Hampshire's wiretapping statute.
- the district court ruled that the police lacked probable cause to believe that Gericke had committed illegal wiretapping because "that statute provides that, for a crime to occur, the victim of an intercepted oral communication must have had a reasonable expectation 'that such communication is not subject to interception under circumstances justifying such expectation.
- II. "Oral communication" means any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation.
RSA 570-A:1

Where can the public video record at municipal offices/Town halls?

- Town Hall public parking areas
- Lobbies/waiting areas of Town Hall/town offices
- Interaction with government employee/official in public area of Town Hall/town offices

Where can the public video record at municipal offices/Town halls? (cont.)

- Filming other “customers” in these areas
 - Filming allowed, and audio allowed if conversation in this “public” place could otherwise be heard by others – the “auditor” cannot use magnification to capture conversation
 - Customers have a right to privacy in the personal facts they must disclose to receive governmental services
 - Audio and video recording could be prohibited if it interfered with the customer’s privacy or invaded protected rights and privileges

Where can municipalities prohibit video recording?

- Employee offices, cubicles, or workspaces
- Non-public areas of Town Hall (where the public is not generally permitted un-escorted)
- Public restrooms
- Posted town properties where the public is generally not permitted
 - Note that these spaces should be posted

What should you do to be ready for a First Amendment Audit?

- Clearly mark which areas of municipal buildings are not public areas
- Ensure that any confidential or non-public information is never visible from the public areas
 - Computer screens should be turned so as not to enable viewing from the public areas
 - Confidential papers, files should be covered or stored
- Train your officials and staff on what you've learned today

What should you do to be ready for a First Amendment Audit? (cont.)

- Consider:
 - Designating at least 2 people who are more comfortable dealing with these auditors and being filmed so if an auditor shows up, the designated person(s) can be called to interact with them
 - Have commonly requested documents “at the ready” – this may limit the amount of time for an audit encounter. (Things like latest meeting minutes, board agendas, policies and procedures)

What should you do during a First Amendment Audit?

- Be welcoming, friendly, and helpful. This will prevent escalation and will likely shorten the encounter.
- Remember: they (generally) have a right to record in these public areas, and can record you without your consent.
- They want a reaction. They will be condescending, rude, intimidating, and may even insult you. Your anger is their money-maker.

What should you do during a First Amendment Audit? (cont.)

- Answer their questions calmly. If the encounter becomes lengthy and you need to get back to work, let them know and then resume your work.
 - They do not have a right to disrupt the operation of government, or prevent government employees from carrying out their duties.
- Frustrated and upset? Stay calm and polite, and call the designated response person, or take a break in a restricted area.

How should you handle Right to Know requests during a First Amendment Audit?

- If the person refuses to write down their request, you write it out and date it with the person present and confirm what you've written
- If anything is immediately available for review at that time, provide it right then.
 - Meeting minutes in binders, board agendas
- If records cannot be produced immediately, provide an estimate for when the records will be available for inspection, and ask for the person's contact information to contact when the records are ready.
 - (You may need legal review, the records may be held by another office, may not be easily accessible, or there may be voluminous records that need to be compiled).

How should you handle Right to Know requests during a First Amendment Audit? (cont.)

- Does the person want the records electronically?
 - If the records are already in electronic format, follow your procedure for providing electronic records. (You are not under an obligation to provide them in a specific electronic format.)
 - If the records are not in electronic format already, but it is reasonably practical to copy the records to electronic media, then copy them to electronic media and follow your procedure for providing electronic records.



*for attending this legal lunch and learn webinar***



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