

What is a First Amendment Audit and How do I Deal with One?

A First Amendment “audit” is conducted by a member of the public and targets a government facility, employee, or event. In a typical First Amendment audit, the “auditor” records his or her encounter with a government employee through audio and/or video means (usually a cell phone). The intended purpose of the audit is to “test” the government’s response to these encounters to see if the government employee will violate the individual’s First Amendment rights. The encounter is then broadcast to the public, usually via social media. Examples of First Amendment audits can be found on YouTube.

The government employee’s reaction to the encounter is the intended consequence, and the questions asked and the documents requested by the auditor are secondary to the audit process. Encounters are given a “pass” or “fail” score depending on how the government employee reacts to the encounter. A government might “fail” the audit if the employee tells the auditor to turn off their recording device (usually a cell phone), informs the auditor that they will not allow the auditor to record the employee, tells the auditor to leave the public space, or calls the police.

Legal Background

The First Amendment to the U.S. Constitution states as follows:

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.

The First Amendment has been interpreted to protect the right to record encounters with public employees in public spaces in these First Amendment audits. The Seventh Circuit Court of Appeals (the federal circuit court that covers Illinois) upheld the right of the public to audio and video record an encounter with police officers and to “publish” those recordings online. So long as these recordings were made in a public place where the government employee does not have an expectation of privacy, the court found no violation of the Illinois eavesdropping statute or other privacy protections.

Although most of the audits initially involved the recording of police officers, recent First Amendment audits have expanded to include the recording of other government employees on public property while employees are working. It is generally accepted that the First Amendment would apply in these circumstances based on court decisions finding that recording public employees and publishing these encounters are protected by free speech.

What Can or Should a Public Employee Do?

It is important that government employees understand that it is not illegal for members of the public to record their activities and encounters in public spaces during their work day. So, government employees should be careful in how they deal with auditors who may have constitutional rights to record their encounters with government employees. There is little to no expectation of privacy in a government employee’s activities in public spaces while they are working. That does not mean, however, that the auditors can violate the law in their audit activities (i.e., trespass into non-public spaces, become physically violent, or be unreasonably disruptive to an employee’s ability to serve other citizen needs).

Government employees will rarely have any advanced notice that they are the subject of a First Amendment audit, although employees at neighboring government bodies will often reach out to give a heads up that an auditor is working a particular area. These audits are often uncomfortable for the employee and can also be disruptive. The auditor will often try to provoke the employee into some action or statement that can be used to “fail” the government body in the audit. Tactics may include asking repeated questions and not being satisfied with the responses, requesting documents, and sometimes even using profanity. The auditor may even try intimidation to provoke a police presence.

Advance Preparation is Key

There are a few ways governments can be prepared for a First Amendment audit encounter, including taking the following actions:

- All public-facing employees should be aware of the potential for a First Amendment audit and understand that members of the public do have the right to record their encounters with government employees in public places while the employee is working. Regular training is key.
- If an auditor is becoming disruptive, the employee can call a supervisor to assist with the auditor’s requests. This can also provide a needed break in the encounter to allow the government to best respond to the auditor’s requests and attempt to resolve the audit quickly and without incident.
- Auditors are trying to provoke a negative reaction they can post on social media. A video of a public employee responding calmly to questions or requests for records will not provide much traction on social media. So, it is important that employees remain calm in their responses to questions and requests for records.
- Government employees do *not* have to allow auditors into non-public areas, such as employee offices or other areas of government buildings not open to the public. Keep all audit encounters in public areas, and if possible in areas where there are cameras. Identify or mark staff-only areas and other areas where recording is not permitted (i.e., where an individual would have an expectation of privacy).
- Because auditors will often request the ability to inspect government records, it may be helpful to have commonly requested documents available for inspection such as the following:
 - Bylaws and Policies
 - Budget/Appropriation Ordinance
 - Meeting Minutes
 - Total Compensation Chart Required by the OMA

Having certain commonly requested documents “at the ready” might limit the amount of time for the audit encounter, which can reduce the likelihood that the encounter will create the type of reaction that the auditor is looking for. To the extent records are not easily or immediately available for inspection by the auditor, the employee can refer the auditor to a FOIA officer to request these records in the normal course of business. That will give the government 5 business days to compile the records and respond to the request.