

Unannounced “First Amendment Audits”

What You Should Know and Do

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A Preview: What to Expect



The So-Called “First Amendment Audit”

- They are not “audits” in the typical sense.
- The goal of the auditors is to demonstrate to “the public” their constitutional rights to photograph and video record in public buildings and areas.
- They often portray themselves as “citizen journalists.”
- Audits are often quickly escalated to being confrontational in nature and are intended to provoke a response.
- Auditors film or photograph any area where their “camera” (often an iPhone) can see including within government buildings, equipment, work areas, offices, and sensitive areas.
- Confrontation is good “clickbait”!!

Why are they doing this?

- Recording interactions with public officials and employees in order to post videos to the internet, portrayed as a form of education, activism, and/or journalism.
- Especially attractive: videos where employees are “overreacting” out of fear or anger to being recorded, or telling the “auditor” to stop recording (i.e. employees who are not trained).
- Goal appears to be to provoke employees into preventing recordings, refusing entry, or otherwise violating First Amendment rights.
- Prime Targets: Police and law enforcement, front-end staff, managers/supervisors
- Money? Potential lawsuits? Clicks? Likes?

Are These “Audits” Legal?

Generally, **yes**.

- Courts that have examined the issue have found that the public is generally 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 building (such as the lobby, hallways, common areas, or publicly-accessible offices), they are typically permitted to be there.
- The Public Forum

Forums – The Law

- “In a *traditional public forum* – parks, streets, sidewalks, and the like – the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”
- “The same standards apply in *designated public forums* – spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose.”
- “In a *nonpublic forum*, on the other hand – a space that is not by tradition or designation a forum for public communication - the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speakers’ view.”
- Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201(2018)

Forums

- Traditional Public Forums – common areas inside and outside public buildings, parking lots, sidewalks, etc...
- Limited Public Forums – courtrooms, Council rooms
- Nonpublic forums – secure locations, areas marked “authorized personnel only,” private offices, etc.

Forum Guidelines

- Essentially “private” work areas – personal offices, workstations, courtrooms, waiting rooms, secure locations, and so on – can be marked and treated as nonpublic forums.
- Useful rule of thumb: Would you be required to allow traditional speech in the location? Example: could members of the public gather in the Town Clerk’s workspace behind the counter to demonstrate?
- That doesn’t always mean they can’t look in or view those areas.
 - Ex. Behind the Clerk’s counter
 - Open office door

Your Goals

- Be able to articulate reasonable justifications for excluding “auditors” from designated government property
- Ensuring the privacy rights of citizens
- Preventing disruption of government business
- Address public safety concerns
- Have a plan in the event “auditors” arrive
- Ultimately to serve the public – all of them

The Plan

- Educate your employees.
- Establish policies that serve the public.
- Understand the difference between a “public space” and a “public forum.”
- Create guidelines for conduct that regulate on “time, place, and manner – not content.
- Make sure that the policies and guidelines are transparent to the public and understood by employees.

Education: Stay Calm, Be Professional



Education: Stay Calm

- Recognize the situation.
- Understand their motivations.
- Be professional.
- Remember Mark Twain: “Never Wrestle with a Pig....”
- Just because they can do it doesn’t make it right – or wrong.
- Do not react to or return insults.
- Kill them with kindness – even if they don’t return the favor.
- More often than not, they will move on if you don’t overreact.
- Don’t be a “star.”

Education: What If You Feel Threatened?

- Disengage immediately!
- Do not tell them you are going to call the police – even if you are.
- Do not take any actions in their presence – that is what they want you to do.
 - *Make calls/confer in private areas.*
- Do not react to or return insults.
- If you feel threatened, remember your policies regarding harassment, etc...
- Municipality will support you – but be smart and remember the auditors' goals.
- What if they threaten your job, or bring a complaint?

Education: Things You May Hear...

- “I’m your boss.”
- “This is my office.”
- “What is your name/position?”
- “Who is your supervisor?”
- “What are you doing?”
- “I want to file a complaint.”
- “I’m making a FOAA request.”
- “I’m going to get you fired.”



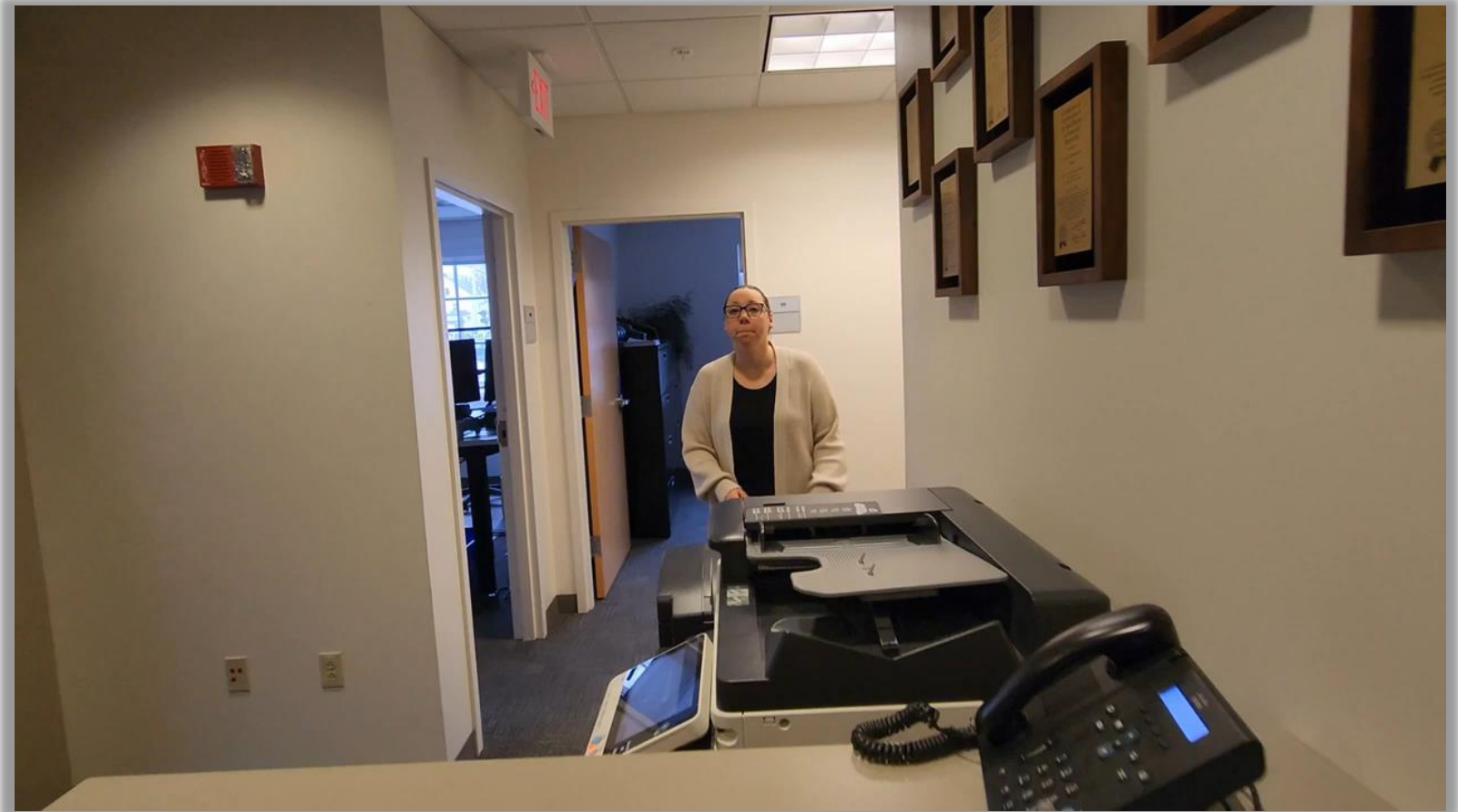
Education: Do Not



- Tell them they cannot video in a common, non-private area
- Tell them to stop recording
- Ask them why they are recording
- Insist they identify themselves
- Touch them or approach them
- Threaten them
- Try to exchange insults

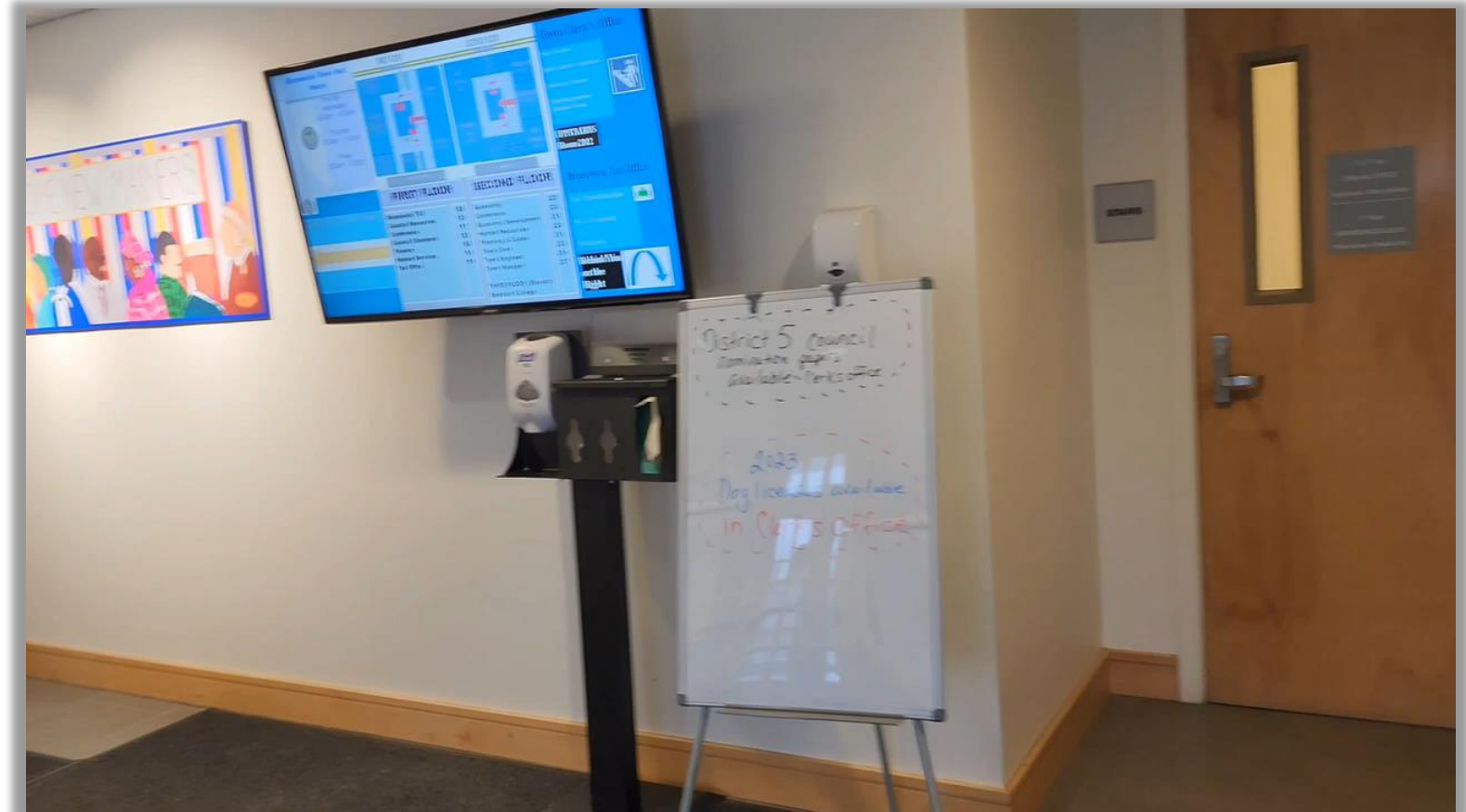
Education: Do

- Be professional
- Ask them if you can assist them
- Wish them a good day
- Treat them like any other person



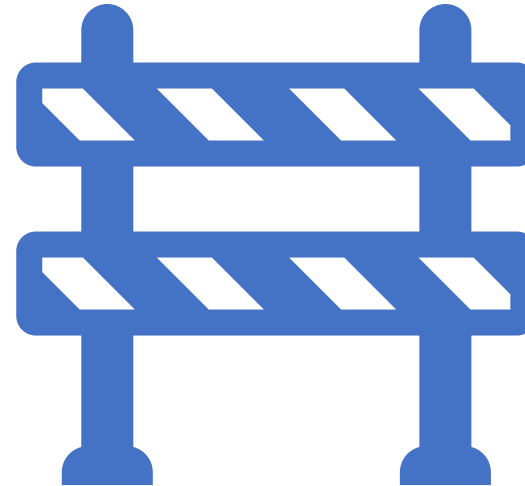
Signage – an Important Tool

- ✓ Visible
- ✓ Clear
- ✓ Understandable
- ✓ Frequent



Physical Barriers

- Closed doors
- Chains/ropes
- Plastic shields
- Cubicles
- Combine with signage



Floor Plans

- Review with team
- What can/should you close to the public?
- Does the public need to be there?
- Do the areas/spaces include:
 - Confidential records?
 - Personal items?
 - Potential safety concerns?
 - Dangerous areas?
 - Children/minors?
- Policy regarding non-public spaces?



Model Policy: Limited Access

Limited Access Areas shall be accessible only to the following:

- (i) employees, elected officials, and appointed officials of the Municipality; and
- (ii) private parties but only on a limited, as-needed, or by-invitation basis, to include those private parties accessing a Limited Access Area for the express purpose of conducting business with Municipality employees.

Model Policy: Limited Access

- Employees should refrain from engaging with auditors whenever possible. Municipality employees should monitor auditors on Municipality Property but should refrain from engaging them unless they violate any Rule of Conduct. In the event that engagement is necessary, every effort should be made to respond calmly without escalating the encounter.
- An employee who does not wish to be photographed or recorded should go to a Limited Access area.
- Employees are not required to respond to questions or demands from an auditor and should refrain from doing so if possible.
- Employees may invite a private third-party conducting business with the Municipality and who do not wish to be filmed to retire to a more private Limited Access Area in order to complete any business or transaction.
- Employees should treat FOAA requests in the same manner as with any other requestor.

Freedom of Access Requests

- They will make them, particularly about any employee who challenges them.
- If you film them, they will request that video and/or devise.
- Treat them the same as any other person.
- Know your FOAA basics!
 - Public Records.
 - You do not have to provide information, just records.
 - You do not have to create records.
 - Do not engage in debates about the parameters of FOAA.



Members of the Public

- Generally speaking, it is legal to video a private citizen doing business on public property as long as they do not have a reasonable expectation of privacy.
- Maine law permits recording conversations without consent.
- Possible Exceptions
 - Children
 - People receiving medical care, domestic abuse victims.
 - Bathroom/locker rooms
 - Information contained on confidential record

Specific Areas

- Police Stations
- Fire Stations
- Public Works
- Water/Sewer
- Libraries
- Parking Lots
- Work sites off-premises

Thank you!



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