

First Amendment Auditors:

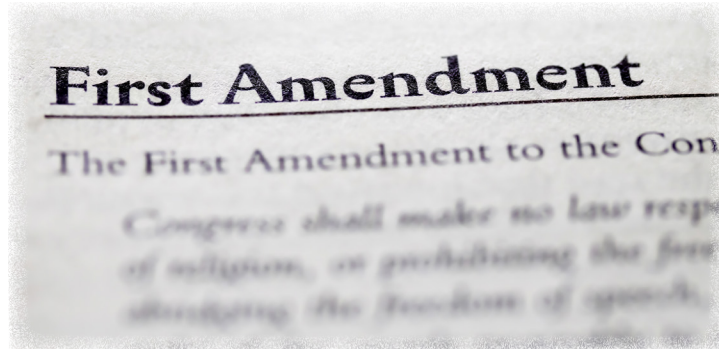
Taking The Sting Out Of Annoying Provocations

Imagine Mayberry, where the city clerk, Thelma, and two of her deputy clerks are sitting in city hall. Their office is one big room; the public is separated from them by an old wooden counter, with a swinging gate. Then two men stride in. They are wearing camouflage and tactical vests. They have guns strapped to their hips, usually wearing sunglasses. They pull out their cell phones and begin recording. They say nothing. Even when Thelma asks who they are and what they are doing, they say nothing.

This may seem like the beginning of a dark movie, but it is an altogether too common incident in city halls across Missouri. Welcome to the world of First Amendment Auditors.

What Are First Amendment Auditors?

First Amendment Auditors are individuals or groups who film or photograph city employees at work without the employees' permission. Typically, they will film inside of a city facility, but filming employees working



outside is also common. In most cases, they bring cameras or cell phones and video the employees. They then put these videos online. If you Google "First Amendment Auditors" you can see some of their work online. In many cases, they also want to provoke city officials into violating their Second Amendment rights, so they may openly carry firearms.

First Amendment Auditors all have their own reasons for engaging in this behavior. Some have anti-government views and are seeking to expose what they see as the faults in government employees. Others may genuinely believe they are performing a public service. Whatever their motivation, they do receive a great deal of attention, often having tens of thousands of viewers

when they post their videos on the internet. YouTube is the most popular platform. They also receive money for posting these videos either from ads or donations. The bigger the reaction they get from city employees, the more popular their videos.

You may think your city is too small or too remote to worry about this phenomenon, but you would be wrong. In the past, they have appeared in all sorts of towns in Missouri, from large cities to small villages. They know that small cities are less likely to be prepared for them and that means that they are likely to get more sensational footage.

Can They Legally Do This?

People have a right to take pictures in public, even of government buildings and officials.¹ This right is protected by the First Amendment (which is why they call themselves First Amendment Auditors). The First Amendment states that people have the right to free speech. Our courts have long recognized that speech is not just verbal communication, it can include many other forms of



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However, it is not enough that the Auditors are annoying, or that an employee merely feels threatened. The standard is high. There must be an actual threat or real interference.

expression, a sign, a shirt with a logo on it, a poster, a book, a video, or a photograph.² As the saying goes, a picture is worth a thousand words, and pictures are a protected form of speech.³ That being said, the constitutional protection of a photo is not worth much if the government can stop a photo from being taken in the first place. As one court put it “There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.”⁴ So the act of filming, not just the film itself, is constitutionally protected speech. Thus, in areas where the public is allowed, you cannot prohibit a particular person just because that person is exercising his or her First Amendment rights.

People also have a general right to access public property. However, that does not mean that anyone can go anywhere on city property, even for expressive purposes. Rather, the degree of access depends on the type of property.⁵ Like all citizens, First Amendment Auditors cannot go into spaces where the public is not allowed. Lobbies, council chambers, parks, sidewalks, streets, and public parking areas are all examples of public places. Remember, recording of public meetings is always permitted. The problem becomes – where is the public not allowed? In our Mayberry example, if the gate through the counter does not forbid entry, a First Amendment Auditor can reasonably argue that the area was open to the public. Even if prohibited from crossing the counter, since the Mayberry town hall is laid out as one big room, the “Auditors” can stand in the public portion and film all three employees.

Many people are surprised to learn that people can take your picture without your permission. First Amendment Auditors do not need your permission, and they are not required

to get a release signed by you as long as you are in a public place. They cannot photograph people in places where there is a reasonable expectation of privacy, such as a bathroom or private office. Because of these areas where the public is not allowed should be clearly marked (such as “employees only”) or even kept locked. There should be a reason why the area is closed to the public such as money lying around or confidential information. Safety and COVID exposure are also valid reasons. Videotaping is never allowed in courtrooms, but this prohibition applies only when the court is in session.

Since the Auditor’s activity is protected expression, interfering with their exercise of their rights can result in the employee being sued under Section 1983 of the Civil Rights Act of 1871, commonly just called Section 1983. Section 1983 creates a cause of action when a person violates another person’s civil rights “under color of law.” An example would be a police officer

ordering an Auditor to stop filming in a public place. Section 1983 not only allows the person to seek damages, but if they are successful the defendant may have to pay the plaintiff’s attorney’s fees pursuant to Section 1988.

For these reasons, city employees, from police officers to office staff need to know how to deal with these Auditors.

There are, however, limits. If Auditors, make actual threats or interfere with the conduct of public business; they can be removed. However, it is not enough that the Auditors are annoying, or that an employee merely feels threatened. The standard is high. There must be an actual threat or real interference.

Preparing Your City For First Amendment Auditors

First, consider your physical facilities. Where could a person walk in? Be sure that all non-public areas are properly marked. What access could a person get to facilities besides city hall? You



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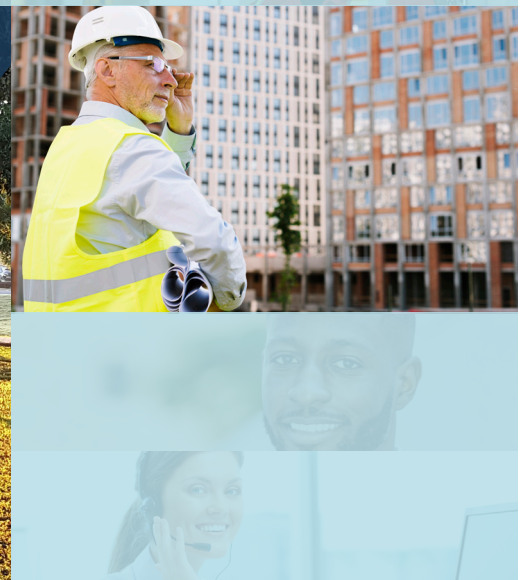
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should consider windows with blinds rather than a long open countertop. This gives employees the ability to close the window and prevent filming when they become uncomfortable. Make sure that computer screens are not readily viewable by patrons.

Second, you should train your employees. Training staff to be prepared is essential. Remember, the Auditors are deliberately trying to provoke a response. How your employees react will determine whether this is a boring video or a potential lawsuit. For example, below are some “Dos and Do Nots” for employees:

Finally, you should have a policy in place directing how employees should handle First Amendment Auditors. In addition, it is wise to have ordinances in place prohibiting unauthorized access and disrupting public business.

With a little knowledge and preparation, you can take the sting out of these so-called audits. 🍃

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End Notes

¹ *Askins v. U.S. Dept. of Homeland Security* 9th

Circuit Case No. 16-55719, Decided August 14, 2018; see also *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).)

² see *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011)

³ *Animal Legal Defense Fund v. Wasden* (9th Cir. 2018) 878 F.3d 1184, 1203, but see *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999) for a contrary view.

⁴ *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017)

⁵ *Cuellar v. Bernard*, No. SA-13-CV-91-XR, 2013 U.S. Dist. LEXIS 43145, at *8 (W.D. Tex. Mar. 27, 2013)

DO	DO NOT
Be friendly and courteous. Ask if you can help them. If they say no, leave them alone.	Ask them for identification.
Answer any questions that you can answer.	Do not immediately call a supervisor or the police.
Try to ignore them and continue on with your work.	Sit and do nothing. Remember, this will be online.
If you become uncomfortable, you can leave. Be sure that someone is watching the area and do not leave confidential information unguarded.	Do not argue or antagonize them. Remember: their goal is to make you react in such a way that it looks as if the city is doing something wrong. Tactics that First Amendment Auditors may try in order to get an adverse reaction are: name-calling, videotaping, getting in employees' faces, following employees with their cameras, etc.