

CLIENT ALERT: First Amendment Audits
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We have been hearing from public sector clients about a new trend, sometimes referred to as “First Amendment Auditing.” These “audits” typically involve individuals taking a camera (usually in the form of a smartphone) into a public building, such as a town office, school or other local government building, and filming the employees—and their reactions. In many of these videos, the person filming will refuse to say who they are or what they are doing, and they may try to goad the employees into reacting negatively. Sometimes the focus is questioning the public employee about citizens’ First Amendment rights, hoping to expose a lack of knowledge.

These audits have been occurring across the country, and they have made their way to Maine. It is important to educate public employees on how best to respond to such situations—to avoid violating First Amendment rights and the costs of a lawsuit for allegedly violating the civil rights of a citizen.

CAN MEMBERS OF THE PUBLIC ENTER AND TAKE VIDEOS IN PUBLIC OFFICES?

As a general proposition a person does have the right to record in public spaces and public buildings. One important consideration is the nature of the area where the filming takes place. While public buildings are generally open to the public, there are certain spaces in public buildings where access is restricted. Work areas (like the area behind a service counter) or areas where confidential information is held are both examples of spaces in a public building where access is restricted. Many schools also limit public access to certain areas because of student safety concerns. You might want to add signage to these areas; doing so will make it clear to “auditors” that they don’t have unrestricted access to film here. Further, should an “auditor” enter one of these areas despite the signage, they should be instructed to leave to protect the confidential information and other items being stored there.

It is also key to ensure that confidential documents, such as personnel records, are not visible from areas open to the public. Despite a confidential record being stored in an area where access is restricted, it could still be filmed by an “auditor” if it is visible from an area open to the public.

EMPLOYEE RESPONSE

If an “auditor” is in an area open to the public, they have the right to record. While it may well be disconcerting and unpleasant to have a camera stuck in your face, employees should treat “auditors” with respect, just like they would treat any other patron. Even if the “auditor” uses provocative and accusatory language, responding negatively will fall right into the “auditor’s” trap.

FOAA REQUESTS

If an “auditor” makes a Freedom of Access Act (FOAA) request during an audit, it must be treated as any other citizen making an FOAA request. Remember that FOAA responses are limited to providing public

records, not creating or editing records, and the FOAA generally does not require an immediate response if time is needed to process a request.

CROSSING THE LINE

If the “auditor” is threatening, abusive, or interfering with public business, supervisors or, potentially, police officers should be involved—especially if the public business being interfered with is law enforcement business. Public employees do not have to tolerate an unsafe situation.

AVOID PHYSICAL CONTACT

The public employee should not initiate physical contact with the “auditor” and should not try to take the camera. The *only* time an employee might resort to initiating physical contact with an “auditor” is if it is necessary to prevent imminent physical harm to the employee or another person.

BOTTOM LINE

First Amendment audits will continue to occur in public buildings in Maine. We wanted to make sure that you and your staff are well prepared in case they visit your offices.

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