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First Amendment Audits - What You Need to Know

A clerk for a Maryland municipality is busily preparing council meeting minutes when an unexpected and confrontational visitor enters town hall. The person gives no reason for the visit and refuses to even provide his or her name, but starts questioning the employee demanding answers: “What is your name? What is your job here? What's in that room over there?” During this encounter, the person is also recording the employee and the facility with a mobile phone and begins to walk down the hallway into the private office areas.

What should the clerk do under these circumstances?

This scenario is playing out more and more often across the United States and is having an impact on governmental offices, facilities, and employees. Maryland's local governments have not been spared from these occurrences. Social media activists, armed with mobile devices and a YouTube channel, have been pushing the boundaries of the First Amendment by entering public buildings, disrupting business, and recording reactions. These “First Amendment auditors” are loosely organized, but aggressive; and their primary goal is to provoke a reaction. Law enforcement personnel are most often their targets, but other government personnel are not immune to an encounter.

Today, nearly every person has a video camera in the form of a mobile phone. In some states, it has already been determined that video recording of police encounters is a form of speech protected by the First Amendment. A federal court outside of Maryland has held that the First Amendment provides the public a “right to record — photograph, film, or audio record — police officers conducting official police activity in public areas.” The U.S. Court of Appeals for the Fourth Circuit, which includes Maryland, has not yet directly addressed this issue, so it is not exactly clear how Maryland's federal or state courts would rule on the issue.

Although such “auditing” initially developed as a way to monitor police activity, First Amendment auditors soon began exploring other possibilities. Since the language of the federal cases found a First Amendment right to film “public officials” in “public places”, First Amendment auditors claimed the right to film public employees going about their business in public buildings. For example, auditors now arrive at government buildings in groups to wander around, filming, and interfering with workers and residents.

The First Amendment is not absolute. There are instances where government can limit access to public spaces and as a result speech. The Supreme Court has recognized that there are certain



places, known as "forums," in which the government can limit speech. The key factor here is the definition of a public forum vs. non-public forum. The strictest First Amendment protected areas are "traditional public forums" such as streets, sidewalks, parks, and town squares, where governments may impose very limited speech regulations. Other areas within public property are known as "nonpublic forums," such as military bases, police and fire stations, public schools, courthouse/city hall lobbies and hallways, and the interior of government office buildings. In those locations, governments may impose significantly more restrictive regulations.

Practical Responses

A First Amendment audit can be disruptive, but there are practical ways to prepare and respond:

- **Educate employees** – All public-facing employees should have some familiarity with First Amendment audits and how to respond. Although the auditors often exceed their rights under the First Amendment, they do have the right to film public employees in public places.
- **Don't overreact** – Auditors are trying to provoke a negative reaction that they can post on social media. A video of a public employee responding calmly is not going to result in much traction. The best defense is simple patience, a name, job title, and basic response to the auditor's questions. The auditors' actions are all designed to provoke a negative reaction. Don't fall into their trap. Maintain your composure. If applicable, answer basic questions. If necessary, limit their movement into restricted areas. If the situation escalates, contact the police department, city, county, or town administrator, or security to handle the situation.
- **Identify and mark nonpublic forums** – In many cases, auditors will try to enter restricted areas, hallways or offices. The local government has a right to mark these areas as not accessible to the general public and impose reasonable regulations concerning public right to access and film in them. Nonpublic forums can include any areas into which, under ordinary circumstances, visitors must be invited before entering. Have clearly visible signage delineating those areas of buildings/facilities that are not open to the public. **Nonpublic forums examples include hallways, cubicles, offices, and workspaces.**
- **Rules about harassment** – Some auditors may engage in conduct that rises to the level of harassment. They may claim that they can demand answers or invade the personal space of staff and employees. Maryland's local governments have harassment policies. These policies should address harassment from individuals outside of the local government's employment. For example: vendors, delivery persons, and citizen/visitors.
- **Implications concerning Maryland's Wiretap Act** – The Maryland Wiretap Act permits a party to any private in-person conversation, or any telephone or electronic communication, to record it with the consent of all parties to that conversation or communication. § 10-402(c)(3) of the Courts Article. The consent requirement, however, only applies to a "private conversation," which the Maryland Court of Appeals — the

state's highest court — has held only includes conversations in which parties have a reasonable expectation of privacy. § 10-401(13)(i) of the Courts Article; *Agnew v. State*, 197 A.3d 27, 35 (Md. 2018).

Encounters with auditors typically occur in public spaces. Therefore, they likely would not be deemed private conversations and would not implicate the Wiretap Act. No federal or state court here in Maryland has ruled on the issue however, so it is unclear whether an auditor violates the Wiretap Act when he or she records a conversation with a government employee without the employee's permission.

Before adopting any specific regulations regarding interactions with First Amendment auditors, a local government should consult with its attorney. The rules are complex, and violations of the First Amendment can result not only in an embarrassing YouTube video, but also a potentially costly liability claim. The most important thing to remember is to keep calm and make sure that employees are familiar with the correct policies and protocols when encountering a First Amendment auditor.

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