



CIRSA LIABILITY ALERT

Published by the CIRSA General Counsel's Office

SAFER TOGETHER

Will Your “Return to Normal” Include a First Amendment Audit? Be Prepared!

With City and Town offices reopening, many of our members are now “back to normal” in terms of interacting in-person with citizens, constituents and other visitors to their public buildings. And we’re hearing stories of the return of another perennial visitor—the First Amendment auditor!

We’ve written about the “First Amendment audit” phenomenon before¹ and even have our own light-hearted Safety Matters short [video](#) on this serious subject. As you’ve likely heard, a First Amendment audit typically involves a citizen visiting City or Town offices while on a video livestream. The auditor might be there to make a perfectly legitimate request for a service...or the auditor may be visiting solely for the also-legitimate purpose of simply exercising one’s First Amendment rights and “testing” municipal personnel.

But if the visit prompts an employee into making an embarrassing and/or otherwise problematic gaffe, that may be a click-worthy bonus from the standpoint of the video-taker. And if something bad happens, like an unwarranted arrest or seizure of recording equipment, then someone may be seeing dollar signs in their future—auditors who believe their constitutional rights have been trampled may not hesitate to pursue a claim. While such claims in some cases are unfounded, in other cases municipalities in Colorado and elsewhere have settled claims where an unwarranted response gave rise to a significant risk of liability².

You can find on YouTube many examples of First Amendment audit visits, including to CIRSA members³. Overall, we’re proud of our members for how their visits have unfolded. In most cases, the video-taker was allowed to complete his business without interference and in some cases staff members are complimented. In such successful audits, a well-intentioned auditor may still post a video announcing the entity “passed” their First Amendment audit—which is click-worthy from our perspective as evidence of a job well done. But, auditors generally post videos where they think an entity “failed” its audit.

With public buildings reopening and First Amendment auditors back out again—and seemingly here to stay—it’s a good time to again consider these important points about First Amendment audits:

1. The right of persons in open public places to make video recordings is well-established. And City or Town Hall is a public space, at least those areas that are open to the public. Therefore, “this is private property” is not an accurate description of City or Town Hall! And forcibly removing or citing an auditor for trespass for recording in an open public place is a clear path to a civil rights claim. If there are areas of the building where the public shouldn’t be, then those areas shouldn’t be accessible to members of the public; non-public areas need to be secured and it’s best to have them marked that way—e.g., “employees only,” etc. A First Amendment audit visit is not the first time to tell someone “you can’t go there” if the area has been otherwise unrestricted and open to public visitors.
2. If someone’s in a public space, they don’t need consent to take video there⁴ nor do they need to state their name or explain what their purpose is. So, if someone’s roaming the public areas in City or Town Hall with a camera or phone in hand, let them have at it.

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3. But, you say, there may be sensitive or confidential information that could be inadvertently captured on video. Yes, but see Point 1 above. The solution is to secure that information so that it's not within public view by video or otherwise. It is not to prohibit video recording. Just as you would not leave sensitive papers on the public reception counter, consider how computers and workstations are set up in or adjacent to publicly accessible areas, to lessen the risk of a video-taker capturing this information.
4. Certainly, there are some areas of City or Town Hall where recording would be unduly disruptive. One example might be the courtroom when Municipal Court is in session. If so, the area should be posted with "no recording" requirements that have been duly adopted by the Municipal Judge.
5. If you, a public official or employee, are in a public area of City or Town Hall, you're also subject to being captured on video. Your consent is not required! Yes, this may be uncomfortable. But it beats being embarrassed (or worse) because you incorrectly uttered something like "You can't record me without my consent!"
6. What if the situation is getting disruptive? Then be sure to sort out where the disruption is coming from. Most of the time, the video-takers are careful not to cross the line into disruptive behavior themselves. Don't attribute to the video-taker the disruptive response of someone who objects to being videotaped, and don't contribute to the escalation of the situation.
7. Far be it from us to suggest that a video-taker might behave less than impeccably during one of these visits. But it's not out of the realm of possibility that some name-calling, insults, or even profanity might happen. To borrow a thought from the founder of Lexipol, people have been trying to goad public servants into acting unprofessionally since long before video cameras were invented⁵. Particularly in the age of social media—Don't take the bait! Certainly, you don't have to continue to subject yourself to obstreperous behavior, should it start. But, to avoid that, the better course is to remove yourself from the situation and ask for assistance from your supervisor or manager in dealing with it.
8. Yet another approach is to preemptively take the highest of high roads, which may short-circuit any possibility of an ugly encounter as described in point 7. If a video-taker sees right up front that your staff is welcoming, friendly, and helpful, it's all the more likely an auditor looking for a claim-worthy encounter will conclude "there's nothing to see here," except your excellent public relations.
9. Certainly, municipal governments are rightfully concerned about the security of their buildings, the personnel who work in them, and the citizens they serve. But let's not misdirect those concerns at the First Amendment video-takers. If an interaction with any citizen escalates to threatening behaviors, then yes, seek appropriate assistance at the time. But, our experience tells us that First Amendment auditors are not out to make security threats or create security risks—so trying to suppress them is not the solution. Thus, approach building security as its own, separate issue, and the [CIRSA Loss Control Department](#) is available to help you take the proper steps to ensure that you are maximizing building security.

The prospect of a "First Amendment Audit" is stressful, to be sure. No one shows up for work at City or Town Hall thinking they might be starring in a YouTube video today, and few of us would relish such a prospect. Do your best to remain calm, avoid the missteps described above, and call on a supervisor for assistance. And watch and learn from audit videos so that you can be prepared for the possibility that a "First Amendment Audit" could happen in your City or Town Hall.

If you have questions regarding this article, please call our Liability Hotline at 720-605-8002 to speak to CIRSA's General Counsel, Sam Light.

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Return to Normal - First Amendment Audit (cont.)

¹ CIRSA has a previous [article](#) on this topic and a [webinar](#) from CIRSA General Counsel on this issue and other transparency related risks.

² For examples of some reported settlements, see these news stories: [Article 1](#) and [Article 2](#).

³ Here are examples of two “pass” audits: [Audit 1](#) and [Audit 2](#). If you click on this [popular auditor’s channel](#)—272,000 subscribers—you can access dozens of links to other “pass” and “fail” audit videos from Colorado local governments and others.

⁴ Colorado is a “single-party” consent state; thus, the general rule is that the consent of the subject being taped is not required. In the law enforcement realm, there are also two Colorado statutes (C.R.S. 16-3-311 and 13-21-128) providing that persons have the express right to record peace officers (subject to certain limitations), and officers and their employers can be liable for unlawful destruction, damage, or seizure of a recording, or for retaliating against a person making a recording.

⁵ Lexipol has an [article](#) and [video](#) on this issue.

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