

SMILE, YOU'RE ON CAMERA: SURVIVING YOUR ENCOUNTER WITH A FIRST AMENDMENT AUDITOR

Legal Points and Practical Tips

The First Amendment to the United States Constitution generally protects free speech and individuals' right to take photographs and record videos in public spaces. First Amendment auditors record encounters with public employees and officials to explore the outer limits of these rights. The rise of social media has enabled First Amendment auditors to profit financially from these encounters by uploading their videos on platforms like YouTube and TikTok.

This reality has led some auditors to employ increasingly aggressive or hostile tactics to provoke the subjects of their videos. Auditors will then post compressed clips of their interactions with shocking captions to garner engagement from their followers. From the auditor's perspective, the more inflamed an interaction becomes, the more clicks they get and the more money they make. Nevertheless, because the First Amendment offers robust protections for freedom of speech and the press, it is important to handle confrontations with First Amendment auditors carefully.

The recent uptick in First Amendment auditor interactions prompted the Municipal Research and Services Center (MRSC) to provide guidance to public agencies in Washington, analyzing auditors' rights as public citizens. In preparing this material, we have relied on and adapted the MRSC's guidance to apply to school districts and their employees. For a more in-depth understanding of the issue, please refer to the MRSC article included in the provided materials.

In sum, encounters with First Amendment auditors can leave district employees feeling intimidated, harassed, and uncomfortable. This material seeks to provide districts and staff with practical guidance on handling these encounters safely and successfully without violating the First Amendment.

LEGAL TAKEAWAYS

First Amendment Auditors have rights.

- The United States Supreme Court has not yet definitively ruled on whether the First Amendment grants the right to record public officials or employees. However, most federal appeals courts, including the Ninth Circuit Court of Appeals, have recognized that an individual enjoys the right to "film matters of public interest."¹

¹ See *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that officers could not "prevent or dissuade" the plaintiff "from exercising his First Amendment right to film matters of public interest").

- Although Washington law makes it a crime to *audio* record any *private* conversation without the consent of all the participating parties, this law does not apply to video recording (without audio) or to public conversations.² For example, an individual may record a readily audible conversation between two people on a public street without consent, but they cannot record that conversation if it takes place inside a private home unless all parties involved consent.³ The takeaway here is that auditors have the right to film public conversations with district employees.
- Washington courts have interpreted the First Amendment to protect verbal criticism that may accompany a First Amendment audit.⁴ Even where language directed at a public official is disrespectful, discourteous, or annoying, without something more, the speech is protected by the First Amendment.⁵ For example, irately yelling profanities at public officials and calling them abusive names is protected speech.⁶

The rights of First Amendment Auditors are limited.

- While employees may have to tolerate unpleasant speech, not all speech is protected by the First Amendment. If an auditor’s speech or conduct makes it impossible for the district to conduct business in an orderly fashion or interferes with the ability of other members of the public to use the facility, the auditor may be removed. This requires a sufficient disruption beyond mere recording and profane language—the auditor must make a physical threat, use “fighting words,”⁷ or disrupt agency business to be removed.⁸
- If an auditor violates an established facility restriction, they may be removed. For example, a person can be removed from a public facility if they bring drugs onto the premises in violation of the facility's restriction against illegal activities.⁹
- Auditors may properly be excluded from secured areas, and the district can prevent filming in areas not open to the public. This includes “employee only” areas, areas behind secured access doors, bathrooms, or other areas where there is a “reasonable expectation of privacy.” If an auditor films in these areas, they may be removed and trespassed. For

² See RCW 9.73.030; see also *Lewis v. State Dept. of Licensing*, 157 Wash.2d 446 (2006).

³ RCW 9.73.030; See, e.g., *Fordyce*, 55 F.3d at 440 (explaining that Washington law does not criminalize the recording of conversations held in a public street, in voices audible to passersby, using a readily apparent device); *State v. Clark*, 129 Wn.2d 211 (1996) (holding that a conversation between two people on a public street is not private).

⁴ *State v. E.J.J.*, 183 Wn.2d 497, 503, 354 P.3d 815 (2015) (“As our history makes clear, conduct is prerequisite of an obstruction charge.”).

⁵ *Deputy State v. Vanvoorst*, 2019 Wash. Super. LEXIS 4727, *10.

⁶ See *E.J.J.*, 183 Wn.2d at 500 (holding that an individual could not be convicted of obstructing law enforcement for calling officers abusive names, yelling, and using profanity towards them because he engaged in protected speech).

⁷ Fighting words are words which “by their very utterance, inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. N.H.*, 315 U.S. 568 (1942). See, e.g., *State v. York*, 732 A.2d 859 (1999) (holding that loudly cursing at a police officer while attempting to spit on him constituted unprotected fighting words).

⁸ See e.g., *State v. Sidell*, 2022 Wash. App. LEXIS 1371, *5 (finding that shouting profanities and threatening to shoot someone in the head was not protected speech).

⁹ See *State v. Blair*, 65 Wn. App. 64 (1992) (holding that an individual can be excluded from a publicly owned apartment complex for possessing cocaine on the premises in violation of its prohibition against illegal activities)

example, if your administrative offices are located behind locked doors that are only accessible by certain district employees, an auditor cannot demand access beyond those doors to film.

- Auditors cannot freely go into schools and film students.

PRACTICAL TIPS

Training: Understanding the rights of First Amendment auditors is essential for districts and their officials to navigate auditing situations effectively without infringing on those rights. Districts should train their staff on how to handle First Amendment auditors. These trainings should cover the following material:

- **What First Amendment auditors are:** Staff should be trained on what First Amendment auditors are. This ensures that staff know what to expect if an auditor approaches them. Staff should also be provided with visual examples of what auditors may look like, as auditors will sometimes be dressed in intimidating or provocative attire. For reference, examples of what an auditor might look like are featured in the “cheat sheet” for office employees, which is part of the provided materials.
- **The Rights of First Amendment auditors:** Staff should learn the rights of First Amendment auditors. This ensures that those rights are respected and that the consequences of unintentional violations are avoided. The training should cover not only the right to film in public spaces but also the rights conferred by the Public Records Act, as auditors often request access to certain records. In addition to understanding auditors' rights, staff must be aware of the limits to those rights so they know when it is appropriate to take action.
- **Training for staff on how to interact with First Amendment auditors:** Staff should be trained on how to interact with First Amendment auditors. This is critical—auditors aim to provoke public officials, so district staff must remain calm and polite during these encounters. Thinking of audits as a “test” can be useful; if an auditor is within their rights to record in a particular setting and the employee does not infringe on that right, they pass the test.

Staff should also be trained in de-escalation techniques to manage auditor interactions peacefully and prevent escalating conflict. Staff should also aim to help the auditor rather than deter them. For instance, if an auditor appears to be making a public record request, staff should engage and assist them in making that request. A key aspect of this training should be equipping staff with phrases they can use to facilitate auditor interactions. Importantly, staff must know what to do when the auditor’s behavior is so disruptive that they must take action to remove the auditor.

Understanding the Public Records Act: It is important to understand the Public Records Act.¹⁰ The rights afforded by this Act are broad and often asserted by First Amendment auditors.

Identifying and Posting Placards for Non-Public Spaces: Identify and clearly label areas of the district office and other district buildings that are closed to the public, such as “employee only” spaces, to ensure that both staff and auditors understand the boundaries.

Identifying a “Point Person”: Consider identifying a “point person” within each district building who can take the lead during auditor encounters. This individual should be well versed in the rights of First Amendment auditors and competent in using de-escalation techniques.

Protecting Employees: Districts must protect their staff from discrimination based on a protected class (i.e., age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship status, military status, or disability).¹¹ If such discrimination is the basis for auditor harassment, districts have an obligation to protect their staff. Failing to protect them may expose districts to liability for allowing a hostile work environment.¹²

¹⁰ See RCW 42.56.

¹¹ RCW 49.60.180

¹² RCW 49.60