

MMA Legal Services Advice RE: First Amendment Audits

We have received numerous inquiries regarding “First Amendment Audits” at municipal buildings as this activity has increased in frequency in recent months. Since many of the inquiries are similar, MMA Legal Services has developed the following guidance for municipal members.

What is a First Amendment Audit?

A first amendment audit occurs when a private citizen audits, or “tests,” municipal officials on their response to the citizen’s exercise of their First Amendment rights. Usually this occurs by the citizen entering a town or city hall and records municipal officials while they conduct municipal business. If a municipal official asks the citizens to stop recording or otherwise interferes, the response is often posted on a website and the municipality is given a “failing” grade. Moreover, it is possible that an improper response, such as denying a person the right to record in a public space, could be found by a court as a violation of the citizen’s First Amendment rights. Some citizens generally see First Amendment Audits as a form of activism to promote government transparency.

Therefore, the key to responding to a First Amendment Audit is to stay calm and know your rights and the rights of the public.

Are First Amendment Audits legal?

First Amendment Audits can be stressful and can feel confrontational for municipal officials and employees. However, they are not necessarily illegal. The public generally has a First Amendment right to record municipal officials and members of the public in public places, including certain areas in municipal buildings. Think of it this way: if a municipal official is conducting town business in a public place, any person that comes into that public place and can see or hear what the official is doing, can generally record it.

What are public places where recording can occur?

To determine whether the audio or video recording is permissible, you first need to identify the area where the recording is occurring.

Audio or video recording in a “public place” is generally permissible as these are areas where individuals do not have any expectation of privacy. Specifically, the First Amendment to the U.S. Constitution protects an individual’s right to speech under the First Amendment. Courts have extended this right to include recording public officials “performing their duties in public,” *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) citing *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). This is further supported by Maine’s Freedom of Access Act, which make public proceedings and public records open to the public (note specifically 1 M.R.S. § 404, which authorizes the public to record public proceedings in order to promote government transparency). Also see 17-A M.R.S. § 511, which makes “violation of privacy” a crime and prohibits recording or photographing of a person in a “private place” and 15 M.R.S. ch. 102, which only requires one party’s consent to record or intercept communications.

The portions of municipal buildings that are open to the public to conduct municipal business, such as the lobby and counter area where residents pay taxes or register their vehicles, are generally public

MMA Legal Services

places, meaning that it is generally permissible to make video and audio recordings of people in those areas without their consent. However, it would probably not be permissible to make recordings of private places, like bathrooms or restricted areas.

Usually, when analyzing free speech issues, courts will distinguish between different a “public forum” (or area where the public traditionally has expressed views), a “non-public forum” (or area where the public traditionally has not expressed views), and a “limited public forum” (or non-public forum that has been opened for public expression of views). A municipal building is usually a non-public or limited public forum for this purpose. While there is generally some authority for municipalities to regulate the conduct and “speech” that occurs in public areas, including lobby areas or other places that are open to the public to transact government business, it is unlikely that there is sufficient authority to entirely prohibit recording in these areas, as it would not likely meet the constitutional tests required to restrict speech. A municipality probably can only restrict recording in municipal buildings to the extent required to protect confidential information or transactions or to prevent interference with government business being conducted with other residents.

What can we do to protect confidential information and General Assistance (GA) applicants?

If there is any confidential information being stored or processed in public areas in the municipal office building, the municipality should try and relocate that business to a private area or keep the documents otherwise concealed from view (i.e., by turning computer screens away from the counter area and storing documents with confidential information in folders or out of view). We understand that sometimes an individual will need to convey otherwise protected information to municipal officials in a public area, such as making a request for information on GA. When anyone asks for information on GA, they should be brought to a non-public area to discuss GA further. Arguably, obtaining information on GA is not protected under the confidentiality provisions in state law, as any person may request information on GA for any purpose (not just to apply for GA). Moreover, this activity could be overheard by anyone in the proximity of the potential applicant, regardless of whether they were being recorded.

Non-public areas should be clearly identified and closed off to the public.

Places that are non-public areas include private offices, confidential storage rooms, or vaults in a municipal building. Municipalities should clearly mark where the public is authorized to enter to conduct business and post signs or other notifications stating that other areas may only be entered if conducting official business or that these areas are restricted to “employees only.” It may also be helpful to make a clear barrier between municipal officials and their records and the public lobby area where residents are authorized to conduct business.

What should we do when confronted with a First Amendment Audit? What can we ask?

Arguably, one of the most difficult aspects of a First Amendment Audit is the confrontational or stressful feeling municipal officials have when faced with video cameras in their workplace. Our best advice is for municipal officials to stay calm and continue with the normal course of business. Municipal officials should not ask a person to stop recording, interfere with their recordings, or ask them to leave. Municipal officials should simply ask whether the person needs any assistance or wishes to conduct

MMA Legal Services

business with the municipality. If not, they should generally be left alone, unless they are acting illegally, interfering with municipal business, or improperly recording a private place.

What should we do if a person tries to record a private place or is disrupting municipal business?

If a municipality clearly marks private areas, then any person trying to enter a private area should be advised that those areas are not open to the public and that recording is not permissible in those areas. If a person refuses to comply with a verbal warning or instruction, law enforcement should be contacted. Municipal officials should not take any action to forcibly remove someone from the office. Municipal officials should also consider taking notes or otherwise documenting of the improper actions taken by First Amendment Auditors to preserve a record of the actions should they continue in a manner that justifies seeking a court protection from harassment order or other form of relief.

Maine Municipal Association Legal Services

1-800-452-8786

legal@memun.org

www.memun.org