

# Town of Lincoln

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## An Overview of “First Amendment Audits” and the Open Meeting Law

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# Agenda

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- ▶ **Overview of First Amendment audits**
  - ▶ Planning for a First Amendment audit
  - ▶ Experiencing a First Amendment audit
- ▶ **Overview of the Open Meeting Law**
  - ▶ Subcommittees, Emails, Serial Communications, and Social Media
- ▶ **Questions**

# What is a “First Amendment Audit”?

- ▶ A first amendment audit is not an audit
- ▶ There is nothing “official” about these events; they are carried out privately
- ▶ Largely a social movement that involves photographing or recording public employees in public spaces
- ▶ They do not have signs or badges; look like typical people coming into town hall, the police station, and the library, but with recording devices

# What is a “First Amendment Audit”?

- ▶ Recording of interactions with public officials and employees and posting videos to the internet as a form of activism
- ▶ Typically, posted videos are those where employees are “overreacting,” whether out of fear or anger, to the fact of being recorded, etc.
- ▶ Goal appears to be to provoke employees into unlawfully detaining, refusing entry, or otherwise violating First Amendment rights
- ▶ A wrongful detainment can expose a public entity to **serious liability** (e.g., \$41,000 settlement in Colorado Springs for wrongful detainment of auditor filming outside of a police station)

# What is a “First Amendment Audit”?

- ▶ These individuals earn money based on the ad revenue they get on their youtube videos
- ▶ The more provocative the video, or defensive the response, the more views they can get, as well as subscribers, and the more money they can earn
- ▶ Therefore, there can be monetary incentive to try to push you to get a reaction, often making rude, obnoxious, and even offensive comments to get you to try to shut down filming or to call the police

# What is a “First Amendment Audit”?

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# Are the Audits “Legal”?

- ▶ Various Circuit Courts of Appeals have recognized a First Amendment right to record police carrying out their official duties in a public place
- ▶ The First Circuit (Massachusetts) has recognized a broad right to film government officials undertaking their duties in public spaces
  - ▶ Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (first amendment right to film police officers in public spaces, and broadly noting this applies to “public officials”)
  - ▶ Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) (first amendment right to film municipal officials in hallway outside public meeting, such that police officer could not arrest or remove individual)

# Are the Audits “Legal”?



- ▶ First amendment principles vary depending on the “forum” you are in
- ▶ **1) Public Forum** – open to the public, traditional location for self expression, assembly, debate, and speech. Speech receives the greatest level of protection from government interference in a traditional public forum. Examples: public park, street, sidewalk, front steps of town hall.
- ▶ **2) Non-public forum** – place that is not typically opened to the public for self expression; the right to congregate is less compelling such that expression and speech can be restricted more easily, including based on its content. Examples: jails, schools, airport terminals, interior of a polling place.

# Are the Audits “Legal”?



- ▶ **3) Designated or Limited public forum** – open to the public for a designated purpose, or for a limited purpose. There are private interests that generate different levels of tolerance for public expression and congregation.

**Tricky issue** is determining where is the “line” between public and private spaces is drawn, who draws it, and how to evaluate it. For example, town hall lobby may be viewed as public, whereas private office space that says “employees only” may be less so.

# Regulation of Activity

- ▶ **If public or designated forum:** Regulation of speech will be permissible only if necessary to serve “compelling interest” and is “narrowly tailored to achieve that end.”
  - ▶ Government may impose reasonable “time, place, and manner” restrictions that are 1) content-neutral; 2) narrowly tailored; and 3) leave open alternative channels of communication
  - ▶ Examples?
- ▶ **If nonpublic or limited forum:** Government may impose restrictions that are: 1) viewpoint neutral; and 2) reasonable in light of the purpose of the forum.

# Regulation of Activity

- ▶ Once a location is open to the public, it cannot then be “closed” to another group with a different message
  - ▶ Example: high school auditorium is used by a private party after school hours to present information about voting rights. If another private party asks to use the auditorium after school hours to present on a controversial topic, they cannot be prohibited based on content of the messaging.
  - ▶ Example: town hall is opened to allow girl scouts to sell their cookies during business hours, and cannot then be closed to another group asking to sell their products.

# So, Are the Audits “Legal”?

- ▶ Typically, yes
- ▶ If they are recording in a public area of a public building (lobby, publicly accessible office space, town clerk counter), they are typically permitted to be there
- ▶ There are cases suggesting that a policy could be adopted to prohibit recording in public places; however, the risk of a civil rights lawsuit likely outweighs the municipality’s willingness to take on this risk

# Preparing for an Audit

- ▶ What can you do to prepare for a “first amendment audit?” Have a plan!
- ▶ **Review what is public-facing in Town Hall and the office spaces**
  - ▶ Have employees safeguard private matters, documents subject to attorney-client privilege, or documents exempted from disclosure under the public records law
  - ▶ Do not have confidential matters open on your desk, open to the public, or visible to a telephoto lens



# Preparing for an Audit

- ▶ **Demarcate public and “employee only” areas**
  - ▶ Remember, if you bring a member of the public into an “employees only” area, you may have converted that area into a public space at least for the same purpose
  - ▶ If you do this with a different resident while a First Amendment auditor is present, the employee cannot bar the auditor from entering this previously private space
  - ▶ Could post “no filming” signs in cubicles, offices, and workspaces



# Preparing for an Audit

- ▶ **Determine in advance who will provide service to an auditor**
  - ▶ Some employees may be more comfortable giving their names and appearing on camera than others
  - ▶ These individuals may be best tasked to deal with confrontation
  - ▶ If so, you can state: I have to attend to another matter currently but my colleague, \_\_\_\_ [name], will be more than happy to assist you!
  - ▶ Educate all your employees on first amendment rights

# Preparing for an Audit

*Bottom line: the Town is a customer service agency*

## **#1 Rule: Stay Calm and Pleasant**

- Remember, there is nothing interesting about a video of an employee sitting at their desk, typing on their computer, and politely answering questions
- Most auditors are looking for confrontations, requests to “stop filming,” or evasiveness
- Try to avoid being sarcastic, short, or defensive

## **▶ #2: Then, engage in business as usual**

- Serve the public politely as you typically would
- If they ask for the employee’s name, employee should respond politely
- Try to avoid immediately seeking out the support of the department head or calling for help; this is the type of footage they are looking for

# Preparing for an Audit

## ▶ #3 Ensure that employees know they are not alone

- ▶ While each department should have a plan, those plans should be coordinated with the Town Administrator/Select Board and Police Chief
- ▶ If “de-escalation” is the goal, there should be an understanding of when to involve others
- ▶ All parties should know their role; everyone to remain calm and pleasant

# What About Other Customers?

## ► Be mindful of the needs of other customers

- If other customers express discomfort about being around the First Amendment auditor, offer to speak with them by phone or invite them to come in another day
- Consider posting a similar message in each office:
  - “Be advised that in Massachusetts, persons may record certain public officials in public places as they undertake official business. If such a recording is being made, and you are uncomfortable, please feel free to call the office to address your issue, make an appointment, or come back at a different time. Thank you for your understanding!”

# Public Records Requests

- ▶ Auditors often ask for copies of records or to inspect records on the spot
  - ▶ Oral records requests are valid, but you can offer the opportunity to put the request in writing
  - ▶ If the request is large and will take time to analyze, ask the requestor to leave their contact information or to follow up in five days.
- ▶ Under the public records law, you are not required to answer questions, though customer service is a priority
- ▶ Although you have ten business days to respond to a request by law, the auditors tend to view this as “evasive” or non-transparent
  - ▶ If you have time to make copies or allow them to inspect a non-exempt document on the spot, consider agreeing to do it

# Complaints About Employees

- ▶ Auditors will sometimes make complaints about other employees' reactions to you
- ▶ Follow the typical protocol by referring the individual to the relevant department head or TA
- ▶ Employee should know that they are not expected to resolve the complaint themselves!

# First Amendment Audits

- ▶ Does not have to be a negative experience; if you stay calm and boring, many auditors will give positive reviews too!
- ▶ This official was commended as “very professional” by the auditor



# First Amendment Audits

- ▶ *“Ill give you my card”*
- ▶ *“Are you looking for something in particular?”*
- ▶ *“No problem”*

If there is no confrontation or attempt to shut down the filming, you will likely be deemed to “pass” their audit, and they will move on

# After a First Amendment Audit

1. Report the interaction to the appropriate department head and the TA, or other person responsible for HR matters
2. Provide support to employees who may feel vulnerable and stressed after such an interaction
3. Measure the negative fallout – is there a video?
4. Consider security issues for employees
5. Consider other issues that could arise: harassing telephone calls at work and home, spam, negative press, threats, etc.

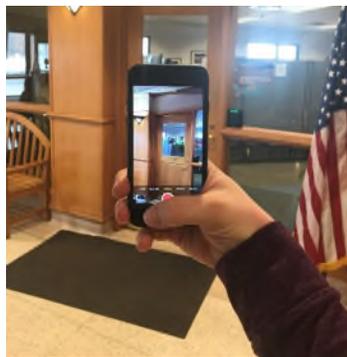
# Additional Resources

- ▶ School of Government at UNC Chapel Hill Blog

- ▶ <https://canons.sog.unc.edu/category/first-amendment/>

- ▶ First Amendment Auditors' Guide

- ▶ <https://www.firstamendmentauditing.com/>



# Overview – What is the Open Meeting Law?

- ▶ The Sunshine Laws: The Open Meeting Law (OML), Public Records Law (PRL), and Conflict of Interest law (COI), which exist in virtually every state
- ▶ Purpose of such laws is to eliminate the secrecy surrounding deliberations and decisions on which public policy is based, and **to ensure government transparency**
- ▶ The OML was substantially revised in 2010
- ▶ Creation of administrative OML complaint process, under the jurisdiction of the Attorney General's Office, has provided an easy pathway to scrutinize and critique how public bodies conduct their business

# Basic Requirements

## 1) Notice

- ▶ Timing
- ▶ Location (including ADA accessibility) and/or remote access information
- ▶ Level of detail

## 2) Purpose

- ▶ Presumption of open session
- ▶ Limited authority to meet in closed (executive session)



## 3) Minutes

- ▶ Content
- ▶ Timing for approval (within three meetings or 30 days, whichever is later)

# What is a Meeting?

*Meetings covered by the OML encompass any **deliberation** amongst a **quorum** of a public body to discuss matters within the jurisdiction of the body.*

- ▶ **“Meeting”** does not include attendance by a quorum at an on-site inspection, provided that members do not deliberate (interpreted very strictly)
  - ▶ Best practice – post notice for a follow-up meeting of board if members anticipate that they might want to discuss or respond to matters raised at site visit
- ▶ **“Meeting”** does not include attendance by a quorum at a public or private gathering, educational program, or social event, provided that, members do not deliberate
  - ▶ Best practice – avoid creating the appearance that a public body is discussing municipal business outside of a posted meeting

# Deliberation

**“Deliberation”** is “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction.”

## Includes:

- ▶ E-mail communications
- ▶ Text messages
- ▶ Social Media
- ▶ Serial conversations

## Excludes:

- ▶ Distribution of meeting agenda
- ▶ Scheduling or procedural information
- ▶ Distribution of meeting materials, reports, or documents, so long as no member expresses an opinion, belief, or idea about those materials

# E-mail

- ▶ **E-mail** – A quorum may not use e-mail (or social media) to share their ideas, feelings, opinions, or beliefs on board business, whether serially or in a single e-mail, and may not use a staff member to avoid OML or communicate to a quorum.
- ▶ AG has acknowledged that “it can be difficult to determine when a communication serves an administrative function and when it contains substantive discussion in violation of the law. **Our best advice continues to be that public bodies not communicate over e-mail at all except for distributing meeting agendas, scheduling meetings, and distributing documents created by non-members to be discussed at meetings.**”



# E-mail

- ▶ **Do E-mail:**
  - ▶ Availability for meetings
  - ▶ Distribution of documents and meeting packet, but do not comment on materials
- ▶ **Do Not E-mail:**
  - ▶ Any opinion or thoughts on pending topic or application
  - ▶ Open questions, such as “how do you intend to handle...?”
  - ▶ “If you ask me, I think the area is too densely developed...”
  - ▶ “There is no way I will vote for ...”



***Beware of “reply all” on emails***

# Social Media

- ▶ **Social Media** use is also covered by OML
  - ▶ If member posts opinion on social media, group, blog, chat room, or listserv that other members of the board could see, it may violate the OML.
  - ▶ The Attorney General “cautions public bodies on the use of Facebook and other social media.”
- ▶ **Best practices**
  - ✓ Do not direct comments to other members of body
  - ✓ Do not use “closed” or private facebook groups with other public body members
  - ✓ If matter directly involves issue pending before body, do not engage
  - ✓ Be thoughtful about manner in which social media comments are made
  - ✓ Consider using separate accounts for campaign and election purposes, if applicable



# Social Media

*Public officials should be cautious when conducting public business on social media*

- ▶ **OML Declination, May 7, 2020, Select Board:** complaint alleged that Vice Chair excluded individuals from seeing and responding to comments posted to several town-related social media pages. AG said it was not an OML violation, however, likely implicates the First Amendment.

*The AG strongly cautions against quorum of public bodies using social media groups*

- ▶ **OML 2018-145, Select Board :** three select board members were simultaneously members of a closed Facebook group, with over 950 members. One SB member offered an opinion on Board business in a post to the group. AG found no violation because there was no evidence the other members saw or interacted with the post.

# Subcommittees

- *Subcommittee* – any multiple-member body created to advise or make recommendations to a public body:
  - Intent to create a subcommittee is *not required* or determinative;
  - Attorney General looks to three factors to determine if group is subcommittee: is it “within government,” “empowered to act collectively,” and serving a “public purpose”
- Practical way to avoid violations:
  - One person does not constitute a subcommittee
  - Conservative approach - when two or more members are tasked to accomplish something together, post meetings and comply with OML
- Committees created by sole officer who has authority to act independently are excluded from application of OML. Connelly v. School Committee of Hanover, 409 Mass 232 (1991).

# Questions?

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