

# First Amendment Audit Preparedness

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# Disclaimer

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Jason Brokaw of the firm of Giffin, Winning, Cohen & Bodewes, P.C. prepared this presentation on behalf of UCCI.

<http://www.giffinwinning.com/>

# What is a 1<sup>st</sup> Amendment Audit?

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“First Amendment Auditors”—individuals who specifically film on public property and police stations to test the rights to film in a public space—has forced some police departments to review how to respond to First Amendment audits. The audits, often posted to YouTube, have become a form of activism: individuals stake out a public facility and record the location and any interactions with staff and the public. An uneventful audit is akin to “passing a test,” while a confrontational audit, usually an attempt by an employee to interfere with the filming, gets a failing grade. Many audits are non-violent and uneventful. But some encounters have escalated dramatically, resulting in arrest and litigation.

“Controversial ‘First Amendment Auditors’ Test the Right to Film in Public Spaces”

<https://firstamendmentwatch.org/deep-dive/controversial-first-amendment-auditors-test-the-right-to-film-in-public-spaces/>

# What is a 1<sup>st</sup> Amendment Audit?

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The “First Amendment Audit” phenomenon doesn’t appear to be led by any particular organization, but rather, seems to be made up of individuals (“auditors”) who are interested in making videos of their encounters with law enforcement officers or other public officials.

If the encounter results in an actual or perceived violation of the auditor’s First Amendment or other protected rights, then the video likely will be posted on social media and/or serve as the basis for a claim or suit.

A violation may come about if the auditor is denied the right to take photos or videos in a public place, or is detained for “suspicious” activity or other reasons.

Other “audit” scenarios could take place during public comment periods at governing body meetings. If the auditor is denied the right to speak on a particular topic during public comment, or to speak in a particular fashion, a First Amendment or other claim might result.

# First Amendment to U.S. Constitution

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

# Illinois Constitution – Bill of Rights (Art. I)

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## SECTION 4. FREEDOM OF SPEECH

All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

## SECTION 5. RIGHT TO ASSEMBLE AND PETITION

The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances.

# First Amendment? News Gathering?

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After broadcasting company had been refused permission to inspect and take photographs at a portion of a county jail where a prisoner's suicide reportedly had occurred and where conditions were assertedly responsible for prisoners' problems, they sued the county sheriff, who supervised the jail, claiming deprivation of their First Amendment rights.

“There is an undoubted right to gather news ‘from any source by means within the law,’ \*\*\* but that affords no basis for the claim that the First Amendment compels others-private persons or governments-to supply information.” Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (citing Branzburg v. Hayes, 408 U.S. 665 (1972))

Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control

# First Amendment? News Gathering?

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It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.' \* \* \* Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. Pell v. Procunier, 417 U.S. 817, 833–34, (1974)

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected. Am. Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012)



# First Amendment? News Gathering?

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The First Amendment protects the public's right of access to information about their officials' public activities. It “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”

Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) citing First Nat'l. Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

# Illinois Eavesdropping Law

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A person commits eavesdropping when he or she knowingly and intentionally uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is (or is not) a party unless he or she does so with the consent of all of the parties to the private conversation;

“private conversation” means any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation. A reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution.

"surreptitious" means obtained or made by stealth or deception, or executed through secrecy or concealment.

# Illinois Eavesdropping Law Exceptions

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Nothing prohibits any individual, not a law enforcement officer, from recording a law enforcement officer in the performance of his or her duties in a public place or in circumstances in which the officer has no reasonable expectation of privacy. However, an officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order.

Recording the proceedings of any meeting required to be open by the Open Meetings Act. Section 2.05 of the Open Meetings Act expressly provides that “any person may record the proceedings at meetings required to be open by this Act by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings.”

# First Amendment Audit Examples

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Mchenry IL: <https://www.youtube.com/watch?v=6ojXkJFUVPM>

Richmond IL: <https://www.youtube.com/watch?v=3Fio7cleRsg>

Nashville TN: <https://www.youtube.com/watch?v=pJYudMI4IHs>

Nashville public library: <https://www.youtube.com/watch?v=YvxNyr1K6DY>

Effingham IL: <https://www.youtube.com/watch?v=Xhv1EVbcus>

Joliet IL : <https://www.youtube.com/watch?v=UwRgHocuFOc>

# Parting Advice

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Identify & Provide Notice of Restricted Areas (Signage, etc.)

Develop & adopt reasonable content-neutral rules on recordings (Think time, place, and/or manner)

Use common sense

Consider whether there is any actual harm from the recording/audit

Discuss how these audits are to be handled before one takes place