

First Amendment Audits in Florida's Cities

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➤ What Are “First Amendment Audits”?

First Amendment audits are situations when individuals attempt to enter and remain on city-owned property to record employees, officials, and operations, or to engage in other expressive conduct. Sometimes, these individuals appear on the street, follow, directly confront and record law enforcement officers on duty. Sometimes, they enter city hall using cell phones to record government employees while simultaneously making verbal demands for public records.¹ Often, they engage in these and other tactics to “rattle” or “surprise” the government employee or official while on duty. These individuals are referred to as “First Amendment auditors.”

First Amendment auditors seek to test their rights (as they understand them) under the First Amendment to the U.S. Constitution. In reality, they often test the patience and temperament of government workers in hopes of capturing an unflattering response to post to the First Amendment auditor’s social media platforms. First Amendment auditors may even intend to use footage as evidence in a suit alleging deprivation of First Amendment rights against the government. **Given the dynamics typically at play during a First Amendment audit, this phenomenon deserves due consideration by cities to avoid or minimize socio/political conflicts, workplace safety issues, public relations blunders or legal liability.**

This memo will provide city government staff and officials a high-level explanation of First Amendment law concepts relevant to First Amendment audits. It will also offer a practical framework to consider when formulating policies that may impact First Amendment rights within city facilities. It will also provide a link to one Southwest Florida city’s recently adopted ordinance addressing this issue. **All material provided in this memorandum is for general informational purposes. It is neither legal advice nor a substitute for advice from your hired legal counsel familiar with your particular facts and circumstances.**

➤ Where Do First Amendment Audits Most Frequently Occur?

First Amendment Audits typically occur on government-owned property. **Location matters** because courts have explained the degree of protected First Amendment rights (*meaning the rights to engage in expressive conduct, such as speech communication, viewpoint expression and, in certain cases, the act of recording government officials while performing official duties*) will vary depending upon where the alleged First Amendment rights are being exercised and the city’s ordinary intended use of that location.

¹ Florida’s public record laws and cases construing them entitle governments to a reasonable time frame in which to respond to any public record request. Therefore, front-line staff should be trained to advise in-person requesting parties the city will comply with all public record requests in a reasonable time frame, but a “drop everything” response is simply not required under current law.

Under the First Amendment, courts analyze free speech rights on government-owned property by first identifying which of four possible location-based categories apply: (1) traditional public forum, (2) designated public forum, (3) limited public forum and (4) nonpublic forum.² The type of “forum” involved generally dictates which city-imposed restrictions on First Amendment rights may lawfully stand.

The two extremes of forum type: public forum and nonpublic forum³:

- **Traditional public forum. The highest degree of protected First Amendment rights exists in a traditional public forum.** Traditional Public Forums may include sidewalks, streets, public parking lots and parks. These areas are regarded as locations held in the public trust for public use and have been historically used for assembly, communicating thoughts among citizens and discussing public questions. **Generally, no individual, including a First Amendment auditor, should be restricted from exercising speech in these areas.** In a traditional public forum, “the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”⁴ Attempts to restrict the content/subject matter of speech in a traditional public forum stand a good chance of being stricken as unconstitutional under the very high level of judicial review known as “strict scrutiny.”⁵
- **Nonpublic forum. The lowest degree of protected First Amendment rights exists in a nonpublic forum.** Nonpublic forums are places where the government acts as a proprietor, managing its internal operations. These are not places traditionally used for expressive assembly or designated as such by the government. Access can be restricted in nonpublic forums if the restrictions are reasonable and are not an effort to suppress expression because public officials oppose the speaker's view. These areas may include employee-only, “interior” and employee workspace areas of government buildings, storage facilities, utility facilities, etc. Courts repeatedly hold certain public property is a nonpublic forum where the evidence shows the property’s purpose is to conduct or facilitate government business and not to provide a forum for public expression.

² *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017).

³ We cover the two extreme forum types for simplicity and to aid understanding in context. However, other “hybrid” forum types exist and can be more nuanced. Do not rely solely upon this memo’s illustrative explanations that focus on traditional public forums and nonpublic forums.

⁴ *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1876, 1885 (2018).

⁵ Content-based restrictions on speech are reviewed for constitutionality under a strict scrutiny analysis, meaning the restriction must be narrowly tailored to serve a compelling governmental interest. See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The “Middle Ground” of Forum Types: Designated Public Forum and Limited Public Forum:

- **Designated Public Forum. A designated public forum is a subset of traditional public forums.** These may be thought of as places that are not typical traditional public forums but are created through purposeful governmental action that opens a nontraditional public forum to all potential speakers or a group of potential speakers.⁶ An example might be a city-owned theatre facility intended for use by all citizens or for use only by local K-12 school groups. Another example might be a public university that creates and designates a space for on-campus meetings and social gatherings among university student groups only (or the university could choose to grant access to the public at large). First Amendment rights in a designated public forum are protected to the same high degree as in a traditional public forum. Here, time, place and manner restrictions on speech are permitted where reasonable and viewpoint-neutral and any content-based restrictions on speech must be shown to be narrowly crafted to achieve a compelling governmental interest.⁷
- **Limited Public Forum. A limited public forum is a step closer to a nonpublic forum and permits a higher level of speech restriction.** A limited public forum is characterized as a place in which the government has opened what might otherwise be a nonpublic forum but only for a LIMITED group or audience of speakers who are allowed there only to discuss or transact business related to one or more LIMITED topics.⁸ In other words, the government has opened a location for expressive activity, but it has established restrictions on access to that forum based on subject matter, the speaker, or both. Unlike a designated public forum, a limited public forum cannot, by definition, be open to the public at large for discussion of any and all topics.⁹ Examples of spaces found by courts to be limited public forums include public school facilities during after-school hours or the interior of a city hall. Within the meeting spaces used by public bodies, such as school boards, the “public-comment portions of [Board meetings] fall into the category of limited public forums because the Board limits discussion to certain topics and employs a system of selective access ... Public comment is limited to ‘issues of concern,’ and speakers may not raise complaints against Board employees or engage in ‘abusive or disruptive’ speech. This is content-based discrimination, which is permitted in a limited public forum if it is viewpoint neutral and reasonable in light of the forum's purpose.”¹⁰

Courts have wrestled with the question of what type of forum analysis and speech protections apply to speakers during the public comment portion of city council meetings. The analysis is fact-specific, and different facts have yielded different results.

⁶ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

⁸ See *Barrett*, 872 F.3d at 1224.

⁹ *Id.*

¹⁰ *Id.* at 1225.

In one recent case, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit rendered an opinion partially adverse to the **City of Homestead**, holding city council meetings should be treated under the more “speaker-friendly” *designated public forum* analysis.¹¹ This ruling meant city policy limiting citizen speech during council meetings could be more easily stricken for First Amendment violations. However, less than two months after appeals were filed, the Eleventh Circuit Court vacated the panel’s ruling. On rehearing, with all members of the court participating (en banc), the court addressed the confusion surrounding the proper forum type for city council meetings. **It held that when city council meetings are limited to a specific class of speakers (i.e. only city residents), limited to speech on specified topics (i.e. matters pertinent to the city or topics from the meeting agenda, etc.), or both, such are treated as “limited public forums, and any restriction on speech ... must be reasonable in light of the purposes served by the meetings and may not discriminate on the basis of viewpoint.”**¹²

The court noted that this was not a blanket rule, and the facts of each case must still be considered. Therefore, while the Eleventh Circuit’s en banc opinion provides greater clarity as to the applicable limited public forum standard for city council meetings, cities should continue to rely on their city attorney’s advice and proceed cautiously if enacting any new policies that tend to restrict public speech rights during council meetings.

➤ **Do Individuals Have a Right to Film City Employees or Officials?**

- ***Probably not, IF the place is a nonpublic forum, and/or has been designated as such by the city because the nature of the work, workers or operations are traditionally not intended for public expression/expressive conduct. Any right to film diminishes, disappears entirely or may be robustly regulated by the city.***
- ***Probably yes, IF the place is a public forum or has been designated as such. Courts have found a right to record police employees and matters of public interest, but reasonable restrictions on the time, place and manner of such recording still apply. But, in a nonpublic forum, the right to record begins to diminish.***

The Eleventh Court has said: “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest,” including the right to photograph or videotape police conduct.¹³ However, this right is not absolute and in certain contexts is subject to reasonable time, manner, and place restrictions. Further, the right to record within a government building or record non-police employees working in a government building can be fact-specific and, therefore, is not considered a clearly established right.¹⁴ While under some circumstances Florida law requires consent of the subject of a video or audio

¹¹ *McDonough v. Garcia*, 90 F.4th 1080, 1094 (11th Cir. 2024), *abrogated en banc*, 2024 WL 4195557.

¹² *McDonough*, 2024 WL 4195557, at *1.

¹³ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)

¹⁴ *Metz v. Hines*, 219CV424FTM38MRM, 2019 WL 6716180, at *3 (M.D. Fla. Dec. 10, 2019)

recording, generally when the individual does not have an expectation of privacy, such consent is not required.¹⁵

➤ **Can Cities Designate Certain Buildings or Facilities as “Off Limits” and/or Prohibit “Non-Consensual or Unauthorized Recording?”**

- **Yes, BUT IT DEPENDS** upon the forum type that reasonably attaches to, or is designated for, the place and requires that such designation is not motivated by viewpoint discrimination.

City governments are expected to deliver a range of essential governmental services to citizens each day and employ tens or even hundreds of employees in that effort. Therefore, **city governments, as owners of property and business facilities, have the right to designate certain city buildings as nonpublic forums for the purpose of ensuring that the use of the space is conducive to orderly and efficient government operations.** Courts recognize government discretion to craft reasonably tailored policies intended to ensure productivity and preserve safe environments for employees, officials and the public. Therefore, cities may lawfully designate an entire building, building wing, floor or set of offices as “off limits to the public” or subject to other reasonable restrictions **as needed**. And while no court has specifically determined government building lobbies or waiting areas to be nonpublic forums in a case involving First Amendment audits, “courts across the United States have generally treated these areas in government-owned buildings as nonpublic forums.”¹⁶

If your city hall or principal government operations center is unreasonably disrupted or left in disarray by random groups or recognizable First Amendment auditors, begin framing your rules or policymaking in this arena around the need for thoughtful and proactive property management guidelines to ensure safe and productive government activities inside any building or facility occur as intended. **Avoid the mistake of focusing on “banning the First Amendment auditors.”** A city may not prohibit recording or designate a space off limits based upon an express or evidence-backed intent to shut down or shut out First Amendment auditors. Such a designation could amount to an impermissible viewpoint-based restriction of speech or expressive conduct under the First Amendment. But once properly designated as a nonpublic forum or other limited forum type, **the city may then outline the types of prohibited uses and activities it finds reasonably inconsistent with the forum designation.**

¹⁵ See §§ 934.03, 810.145, Fla. Stat., see also *Silversmith v. State Farm Ins. Co.*, 324 So. 3d 517, 518 (Fla. 4th DCA 2021) (for an oral conversation to be protected under Section 934.03, the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable).

¹⁶ Kristi A. Nickodem and Kristina Wilson, “*Responding to First Amendment ‘Audits’ in the Local Government Context*,” UNC School of Gov., Local Gov. Law Bulletin No. 141, Nov. 2022, at 26.

➤ Tips for Policy Development

Cities should begin by asking:

- Would uncontrolled entries by third parties jeopardize, disrupt or derail the ordinary governmental functions intended for the building, building wing, floor or set of offices? If the facts and circumstances reveal traditionally nonpublic facing spaces and/or records or material affecting building or data security measures, sensitive health or social security numbers of city staff, criminal investigative or other sensitive law enforcement activities, or material generally exempt from disclosure under Florida's Public Record Law,¹⁷ it is reasonable to conclude the space is a nonpublic forum.

If a building, building wing, floor or set of offices can be fairly identified as a nonpublic forum,¹⁸ cities should:

- Make reasonable, fact, circumstance and traditional use-based determinations of the nature of the space's "First Amendment speech" profile (forum-type)
- Devise a set of reasonable time, place and manner restrictions consistent with the type of forum identified
- Codify any rules and limitations needed to preserve the intended use characteristics of the space by ordinance, resolution or policy adoption
- Use internally posted signage (i.e., "Private," "Employees Only," "No Entry Without Permission") and
- Post newly adopted policies publicly, at entryways and reception areas and on city websites.

Regardless of forum type, cities should educate:

Remind city staff, officials and citizens alike that while the First Amendment conveys a powerful bundle of speech and expression rights to citizens, **it does not guarantee unrestricted public access to all city-owned property at all times.**¹⁹

➤ Tips for Front-Line City Staff Responding to First Amendment Audits

- Stay calm.
- Be patient and polite.
- Attempt to ignore, deflect or defuse inflammatory statements.

¹⁷ See Section 119.071, Florida Statutes, for a wide-ranging list of records and material that should be shielded from disclosure based on public record exemptions.

¹⁸ If a nonpublic forum designation doesn't apply to a space that routinely hosts public visitors, such as city hall, consider the applicability of a limited public forum designation, as illustrated in the City of Punta Gorda example covered below.

¹⁹ The Supreme Court has stated, "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. 788, 800-01.

- If the city has adopted regulations that apply to specific behavior observed and prohibited in a location, staff should clearly announce or provide a copy of the rules and direct the person to abide as a warning.
- Try to resume regular duties or functions.
- Never touch the auditor or their camera, cell phone or equipment.
- Never threaten the auditor or make any discriminatory or offensive remarks.
- Contact law enforcement if the auditor becomes disruptive, attempts to access designated nonpublic areas, refuses to follow any rules after fair warning or poses a safety or security risk.

➤ **Always Rely on Your City Attorney for Guidance on Responding to First Amendment Audits**

The First Amendment is a complicated area of law. Any legal analysis surrounding the First Amendment is extremely fact-specific and may hinge on the unique policies and procedures adopted by each city. The information provided in this document does not, and is not intended to, constitute legal advice. Information in this document may not reflect the most up-to-date legal or other information.

A violation of an auditor’s First Amendment rights can subject your city to legal liability. Readers of this document should contact their city attorney to obtain legal advice for responding to First Amendment audits. Only your city attorney can provide assurances that the information in this document and any interpretation of it is applicable or appropriate to your situation.

➤ **Recent Florida Ordinance to Regulate City-Owned and Leased Facilities**

The City of Punta Gorda recently adopted an ordinance titled “Control of Access to City Owned, Controlled and Leased Property.” The ordinance identifies the various forum types, designates certain city facilities by forum type and characterizes permissible and impermissible public conduct therein, according to the facility designation and use types.²⁰ The ordinance also empowers the City Manager to take certain activities, from additional site-specific rules to referral of uncooperative individuals, to law enforcement. Interestingly, this ordinance and its First Amendment implications have been analyzed by a federal court following a lawsuit filed by a First Amendment auditor. The City prevailed on the issues raised against the ordinance in that litigation.

The full text of the Control of Access to City Owned, Controlled and Leased Property [Ordinance](#) and the ensuing [Sheets v. City of Punta Gorda lawsuit](#) may be obtained by clicking the links shown.

²⁰ See *Punta Gorda Code of Ordinances*, § 15-48; see also *Sheets v. City of Punta Gorda*, 415 F. Supp. 3d 1115 (M.D. Fla. 2019) (finding that a citizen did not demonstrate an ordinance that limited recording in city hall was unreasonable).