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## LEGAL UPDATE

September 13, 2023

**To:** Superintendents, Member School Districts (K-12), County  
Offices of Education and Community College Districts

**From:** Frank Zotter Jr., Senior Associate General Counsel *FZ*

**Subject:** Responding to a “First Amendment Audit”  
Memo No. 07-2023

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“First Amendment Audits” have increasingly become an issue of concern for public entities around the State of California. This Legal Update is intended to provide some factual and legal background about this phenomenon, and also to suggest some practical approaches to dealing with someone who shows up at a District, County Office or Community College District to conduct an audit.

### 1. What is a “First Amendment Audit”?

The term describes a visit to a public agency from one or more individuals who describe themselves as “auditors.”<sup>1</sup> Auditors enter the public spaces of a public office while recording the entire encounter and have, in extreme cases, been known to shout epithets, insults, or to challenge public employees to take action to stop them. The recordings of the audits (typically shot from the auditor’s point of view) are then posted online.

When entering public buildings, they will sometimes ask for a form so that they can file a complaint against the agency or an employee. They often do not intend to file such a complaint; instead, part of the audit is to determine whether the agency keeps a ready supply of such forms available and provides one upon request.

The auditors sometimes make oral comments about their treatment or the agency’s readiness with any forms that are solicited. In other cases, before posting the video on YouTube they will add written commentary over the

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<sup>1</sup>Auditors also approach law enforcement officers in the field.



video (“Watch what this guy does next!” or “See where she moves as I move to the right!” etc.)<sup>2</sup>

## 2. Why do they engage in this behavior?

The auditors claim that they are “checking” or “testing” the behavior of public employees, allegedly to determine whether the employees appropriately respond to requests from citizens coming into public offices. In many cases, the auditor is simply attempting to determine if they are allowed to make the recordings unimpeded by the agency’s employees. Depending on the auditor, some of the behavior exhibited toward public employees may seem aggressive and an attempt to entice the employees to react angrily or in kind toward them. On the other hand, some of the auditors simply walk around the public areas, asking for forms or asking questions.

Despite these justifications, in the words of humorist Kin Hubbard, “When a fellow says, ‘It ain’t the money but the principle of the thing,’—it’s the money.” It is important to understand that the videos from these encounters generate content for YouTube Channels, such as “Bay Area Transparency” (the person likeliest to visit public offices in this area), “Audit the Audit,” or “First Amendment Rights.” Having just a few thousand subscribers and “Likes” on their videos can generate substantial income, and many of the “auditors” solicit donations to “continue the work.”

YouTube channels are fiercely competitive for subscribers and “Likes.” Angry or aggressive confrontations with public employees are more likely to generate page views—and income for those who post them.

## 3. Are these “audits” legal?

With certain exceptions, recording what is happening in your immediate presence while in a public area is not illegal. Although Penal Code section 632 prohibits recording a “confidential conversation” between two people unless both people consent, this prohibition primarily applies to audio-recording of a conversation.<sup>3</sup> For example, section 632 clearly prohibits one party from audio-recording another with a hidden device or over the telephone without the other party’s consent. It could also apply to a video recording if the recordings were made in a place like a bathroom or a bedroom.

This statute, however, would likely not apply to a location like the counter at a public entity, or the reception desk at a County Office, even if the parties to the conversation state that they are not consenting to the recording. For the most part, courts have concluded that audio and video recording of others, even without their consent, is permissible if the recording occurs in a public area.<sup>4</sup>

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<sup>2</sup> For further description of a First Amendment Audit, see [https://en.wikipedia.org/wiki/First\\_Amendment\\_audits](https://en.wikipedia.org/wiki/First_Amendment_audits).

<sup>3</sup> *People v. Drennan* (2000) 84 Cal.App.4th 1349.

<sup>4</sup> The case most often cited for this proposition is *Fields v. City of Philadelphia* which involved two members of a self-described “police watchdog” organization. (*Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir.2017).) In response to attempts to observe and record police activity, the police prevented them from making recordings. The federal appeals court ultimately held that the First Amendment’s right of access to information also grants the public the “right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.” (*Id.* at 360). The California legislature has similarly recognized the right to peacefully record in public



#### 4. What should I do if confronted by a “First Amendment auditor”?

Ignore that the person is making a video recording. Treat the person the same way that you would anyone else who was not holding a recording device. To the extent that you behave in any way differently from how you would if someone approached you at the counter without a camera, you are in essence feeding the market for this kind of material.

DO:

- Ignore the camera (this cannot be emphasized enough).
- Ask the person, in a neutral tone of voice, how you can help them.
- If the person requests a document, such as a complaint form, explain whether you have any, or if there is a different process to obtain one (e.g., downloading it from the District’s website).

DON’T:

- Raise your voice.
- Call the police or campus security (*unless* the person attempts to do something such as enter a private area, as discussed below).
- Refuse to allow the person to continue to make a recording of the public counter area. There is no time limit by which the person must conclude their recording provided they are not otherwise disruptive or impeding service to members of the public. Allow them to record, but be aware of the person’s movements in case they attempt to go behind the counter or into private offices.

#### 5. What can my agency do to prepare for such a visit?

- Signage:** Check the signage in the public areas of your site. If certain doors lead to private offices or similar areas where the public normally is not allowed, either ensure that they are accessible only to staff or are clearly marked, e.g., “Staff Only. No Public Admittance” or the like. The “auditors” are generally willing to abide by such signs.
- Limit Accessibility:** If the private areas of your office are easily accessible, such as through a lower-level swinging door, then check that it cannot easily be opened from the outside. Consider installing less “friendly” catches on such doors to ensure that only employees or invited members of the public are able to access private areas from the public service counter.

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spaces. (See Penal Code § 148: “The fact that a person takes a photograph or makes an audio or video recording of a public officer or peace officer, while the officer is in a public place or the person taking the photograph or making the recording is in a place he or she has the right to be, does not constitute, in and of itself, a violation of [this statute] nor does it constitute reasonable suspicion to detain the person or probable cause to arrest the person.”)

**School Sites Should Require Registration:** Any person who is an “outsider,” as defined by section 627.1 of the Penal Code, is required to register with the school upon entering a school site.<sup>5</sup> Confirm that signage notifying visitors that they must register and sign in is in place at your school site.<sup>6</sup> Require all visitors to state their business and gain permission to enter the school before allowing them to proceed. (*Note: this would not apply to stand-alone district, county or community college offices unless there are classrooms on the premises.*)

**Secure Confidential Information:** All public agencies, and especially LEAs with confidential student records, should take steps to ensure that confidential material is not accessible or visible in public spaces. For example, agencies should ensure that content on computer screens are not visible to members of the public from public areas of the office. Similarly, confidential documents containing student or employee information should not be visible or legible from public areas.

## 6. Are there any things that “auditors” do that would be illegal?

Yes. While an auditor likely has the right to film public employees in public areas, and should be treated no differently than any other member of the public, an auditor may not:

Enter Private Spaced Uninvited. As noted above, areas behind a counter, private offices, workers’ cubicles and the like are all areas to which no member of the public except someone who has legitimate business in the building would be admitted. Areas not normally open to the public often have confidential files or records that only employees should have access to, such as pupil records or personnel files.

Enter a Public School Without Permission. Members of the public (also referred to as “outsiders” in the Penal Code) do not have the right to enter student areas without registration and permission to enter. For pupil safety, visitors cannot just wander down school corridors looking for “interesting” things to film; safeguarding children is still paramount.

Recording In a Classroom Without Permission. Education Code section 51512 requires permission of the classroom teacher and principal before recording in a classroom.

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<sup>5</sup> Penal Code § 627.1 defines an “outsider” as any person other than:

- (1) A student of the school; except that a student who is currently suspended from the school shall be deemed an outsider for purposes of this chapter.
- (2) A parent or guardian of a student of the school.
- (3) An officer or employee of the school district that maintains the school.
- (4) A public employee whose employment requires him or her to be on school grounds, or any person who is on school grounds at the request of the school.
- (5) A representative of a school employee organization who is engaged in activities related to the representation of school employees.
- (6) An elected public official.
- (7) A person who comes within the provisions of Section 1070 of the Evidence Code by virtue of his or her current employment or occupation.

<sup>6</sup> Auditors may claim that they are members of the press in order to gain greater access to a school site. If this occurs, we recommend that you contact legal counsel for support. Even if an auditor meets the narrow definition of press, a school site may still require them to register and provide their name, age, purpose of the visit, and identity.



## 7. What should I do if an auditor becomes aggressive?

Whenever possible, try to keep confrontations to a minimum. However, if an auditor becomes aggressive and tries to enter private non-public areas of a building:

- Calmly remind them that they are not permitted to enter areas clearly marked “Private” or “Staff Only.” Most auditors will not attempt to enter these areas when asked not to do so.
- Ask them again what their business is, and how agency personnel can assist them in achieving it.

**Do Not** attempt to physically restrain an auditor; these are the kinds of confrontations that they hope to provoke and can cause you or others to become injured.

Finally, if all of these efforts fail, and an auditor attempts to do something that is clearly improper (entering a private office, entering school grounds without registering or without lawful business, or using any force on a staff member) then and only then should agency personnel contact the police.

Again, use of law enforcement should be judicious and only when it is absolutely necessary to do so.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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