

Informational Legal Memo



TO: Indiana Public Libraries
FROM: Indiana State Library
RE: First Amendment "Audits"
DATE: July 22, 2021

This memo addresses some of the recent questions the State Library has received about First Amendment audits, behavior policies, and Poster 7. This memo is intended to provide generally applicable information for local decision-makers. However, open communication with your library attorney is recommended to help with decision-making, especially with respect to considerations that may be unique to your library.

[Q. What is Poster 7?](#)

[A. Poster 7](#) governs conduct on United States Postal Service property and facilities. It does not apply to public libraries.

[Q. What is a First Amendment audit?](#)

[A.](#) In the past few years, certain individuals across the country have taken it upon themselves to test the degree to which their First Amendment rights are recognized in particular settings. They enter public facilities such as libraries, post offices, or courthouses, or follow law enforcement officials in public spaces, while videorecording the settings and people in it. When the auditor's actions are uninterrupted, the place or people being tested are said to have passed the "audit." If a confrontation occurs, the setting or people being filmed "fail" the audit.

In either case, video from the experience is typically posted – either live or after the fact – to social media. Some critics question the motives of First Amendment auditors, suggesting that they are less interested in promoting rights and more interested in getting clicks, followers, and viewers. Auditors counter that they are simply exercising their constitutional rights and educating other about them.

[Q. What should we do if someone comes into the library to do a First Amendment audit?](#)

[A.](#) This depends on the auditor's behavior as well as your videorecording policy and your priorities. If your library's policy allows for the type of videorecording being done by the auditor and he or she is following that and all other library policies, the audit will probably be uneventful and, to the auditor, successful. If the auditor becomes disruptive or threatening or begins to harass or invade the privacy of other patrons, you may call security or the police or choose to ask the patron to stop.

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In all interactions with First Amendment auditors, remember that confrontation is likely to be counterproductive. Auditors tend to approach their work with a desire to test the limits. Any invitation to abide by library policies will probably be perceived as a violation of rights, even if the auditor's behavior is *not* actually protected by the First Amendment (see below). Nevertheless, a "dramatic" confrontation caught on camera will almost certainly get more views – and, possibly media and legal attention – than a peaceful one.

That said, the library does have a right to require patrons to abide by its reasonable policies. And it should certainly do everything it can to keep patrons and employees safe. Libraries must balance the undesirable consequences of engaging with First Amendment auditors against the desirable goals of protecting patrons and employees from disturbances as they peaceably use the library.

[Q. Can't we just prohibit all videorecording in the library?](#)

A. It probably wouldn't be wise – or very enforceable. In general, when people are out in public, they don't have much of an expectation of privacy. No law protects library patrons or employees from appearing on any video ever. And it probably wouldn't be worth the trouble, for example, to keep teenagers from Snapchatting ten-second videos of themselves to their friends while taking a study break at a library table. The problems arise when the filming is disruptive and/or has the potential to compromise patrons' privacy or use of the library.

Libraries certainly *can* prohibit video recording that:

- **Invades the privacy of others.** A library allows patrons to study, meditate, research, access materials, and attend enriching activities. If other patrons might not fully use the library because they fear that their likenesses, browsing choices, or behavior will be publicized, the library has an interest in restricting any videography that would so impact its patrons and its mission. A library may choose to prohibit videographers unwilling to obtain advance permission from the library and/or from those they will record. It may also exclude videographers who are invading patrons' privacy, including by filming computer screens over patrons' shoulders.
- **Constitutes harassment.** Beyond protecting patron privacy, the library can protect patrons' and employees' safety and well-being by prohibiting videorecording aimed to harass, annoy, intimidate, or otherwise harm other individuals.
- **Is disruptive.** If videographers call attention to themselves, shout, interrupt meetings, break other library rules or policies, or otherwise prevent other patrons from using the library or employees from doing their jobs, their conduct is not protected.

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- **Might be unsafe.** If a videographer wants to use equipment beyond a cell phone, such as a tripod, lighting, or speakers, the library may restrict or regulate the video-recording for safety reasons.
- **Is illegal.** Indiana's voyeurism laws make it a misdemeanor or felony to take video or still images in any place where someone could be reasonably expected to disrobe, including a restroom. See IC § 35-45-4-5.

[Q. How do we know whether our videorecording policies are sufficient?](#)

In creating or amending a videorecording policy, all libraries should remember to:

- **Connect the policy to the mission statement.** Videorecording is expressive activity protected by the First Amendment. Libraries can regulate it without violating the First Amendment by enacting reasonable restrictions or requirements designed to further the library's mission.
- **Be specific.** Courts sometimes overturn restrictions on speech for being overly vague, or hard to follow. Someone reading the policy should know exactly what it prohibits and permits. If the policy gives individual library staff members too much discretion to determine what is permissible in any given situation, it could be found invalid. Look at your policy and ask: Would a brand-new staff member with little training read these words and know how to apply them in the same way as our most senior employees?
- **Regulate method, not message.** Libraries have plenty of leeway when it comes to regulating videorecording. They can decide what kinds of videorecording to allow, for how long, during what times, and in what spaces. But what libraries may *not* do is regulate some videographers differently than others because of their motives or message.

For example, imagine that a first amendment auditor and a resident with a local tourism blog want to do the same thing: enter the library and silently record the library's interior while respecting patrons' privacy and the library's policies. If the library would allow the tourism blogger to record in this way, it couldn't prevent the first amendment auditor from doing the same thing, and vice versa. Drawing that distinction would be an act of viewpoint-based discrimination, which violates the First Amendment. Whatever a library's videorecording policies, the library should apply them uniformly and without regard for a videographer's agenda.

[Q. What First Amendment protections do patrons have in our libraries?](#)

Short A. Inside the library, patrons can exercise their First Amendment expression rights *to any extent that does not interfere with the library's mission.*

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While each library's specific mission statement differs, Indiana's library laws state that public libraries are to be "part of the provision for public education" by "meet[ing] the educational, informational, and recreational interests and needs of the public" through "collecting and organizing books and other library materials[]" and providing reference, loan, and related services to library patrons." IC § 36-12-1-8.

If a patron behaves in a way that impedes the library from accomplishing these goals, that behavior is not protected by the First Amendment even if it is a form of expression or communication. While the library may place reasonable restrictions on patrons' expressive activity inside the building, the library should not prohibit speech because of its *message*. Regulations should govern instead the *manner* and *method* of communication.

Long A. First Amendment protections differ depending on the government setting in which people seek to exercise their rights.

In *public fora*, such as a public parks and sidewalks, people have the most rights. The government can impose only content-neutral restrictions on speech, such as regulating noise levels during certain hours of the day or requiring protestors to get a permit in advance. While outside the library on public property, people can generally communicate how they wish – as long as they follow all the relevant laws and ordinances and don't interfere with the library's mission by making it more difficult for patrons to enter the library.

In *nonpublic fora*, such as government offices, mailrooms, or polling places, people have the least rights. The government can determine who and what kinds of communication are permitted in these spaces, though it can't, without good reason, quash speech just because it disagrees with speakers' viewpoints. In offices, staff-only areas, and restrooms, the library can exclude patrons and prohibit expressive activity. If a patron couldn't enter the space normally, the patron certainly can't enter it to engage in expressive activity.

In *limited, or designated, public fora*, such as courthouses or state university meeting rooms, people have some rights. The government can restrict who speaks and how, but it still can't discriminate based on viewpoints. For example, a court ruled that a university could prohibit non-students from using its campus meeting rooms, but it couldn't prevent student religious groups from using the space while it allows student political and social groups to use the space.

It's usually hard to guess into which of the three categories a court will place a space. The Court of Appeal for the Third Circuit, which covers Pennsylvania, New Jersey, Delaware, and the Virgin Islands, decided a case in 1992 in which it determined that a local public library was a limited purpose public forum. Indiana is in the Seventh Circuit, which hasn't decided the issue. However, the district court for the Southern District of Indiana decided a case in 2013 in which it agreed with the Third Circuit's decision finding the library to be a limited public forum.

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The court placed the library in the limited public forum category because it was a space into which the local government invited patrons for a specific purpose: reading, study, learning, and quiet contemplation. The court recognized the library's right to exclude people whose interest in being in the library did not align with the library's purpose, as long as the library's rules were reasonable and did not discriminate against speakers because of their viewpoints.

Additional Resources:

- Article on First Amendment audits from the *American Libraries* magazine:
<https://americanlibrariesmagazine.org/2020/01/02/free-speech-free-for-all-first-amendment-audits/>
- Blog about First Amendment audits posted by the American Library Association's Office for Intellectual Freedom, including links to some example library videorecording policies:
<https://www.oif.ala.org/oif/?p=18859#easy-footnote-1-18859>
- Resources, including a collection of news articles, on First Amendment audits from New York University's First Amendment Watch: <https://firstamendmentwatch.org/deep-dive/controversial-first-amendment-auditors-test-the-right-to-film-in-public-spaces/>
- Definition of First Amendment auditing, plus links to the profiles/channels of auditors:
<https://www.firstamendmentauditing.com/home>.
- IN State Library 2013 Summer Webinar on the First Amendment PowerPoint Slides:
https://www.in.gov/library/files/Social_Media_Presentation.ppt
- IN State Library 2013 Webinar on Behavior Policies:
https://www.in.gov/library/files/Patron_Behavior_Policies.pptx
- American Libraries Association Video Surveillance in the Library Guidelines:
<https://www.ala.org/advocacy/privacy/guidelines/videosurveillance>