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Auditing the First Amendment at Your Public Library

- 📅 October 2, 2019 (<https://www.oif.ala.org/oif/auditing-the-first-amendment-at-your-public-library/>)
- 👤 Deborah Caldwell-Stone (<https://www.oif.ala.org/oif/author/deborah-caldwell-stone/>)
- 📁 Access (<https://www.oif.ala.org/oif/category/access/>),
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By: Deborah Caldwell-Stone (<mailto:dstone@ala.org>), Director, Office of Intellectual Freedom

A loosely organized social media campaign to “audit” government spaces and agencies for alleged First Amendment violations has begun to target public libraries. The individuals and groups undertaking these self-described “First Amendment audits” claim a right to film in any space accessible to the public, arguing that they’re entitled to do so as taxpayers and citizen journalists. Based on their output, their goal is to create videos of their encounters with police, security officers, and public officials that document a claimed violation of the camera person’s First Amendment rights. The video is then posted to YouTube or other social media, and used as evidence for a legal claim against the targeted agency (<https://firstamendmentwatch.org/first-amendment->)


First Amendment Audits in Libraries

auditors-sue-boulder-police-department-for-violating-their-first-amendment-rights/) or its officers and officials (<https://www.kktv.com/content/news/Colorado-Springs-to-pay-cameraman-41000-after-First-Amendment-audit-of-police-484291511.html>).

Now, a growing number of public libraries are reporting that these individuals are visiting their buildings to film and photograph library staff and library users, on the grounds that libraries are “public spaces.”

What does the law say?

The law distinguishes between a traditional public forum, or public square, and facilities opened to the public for a particular use or purpose, like a library or a courthouse. Facilities like libraries and courthouses are considered to be limited public forums or non-public forums¹ for purposes of the First Amendment. In limited or non-public forums, the government agency administering the space is only obligated to allow those First Amendment activities that are consistent with the nature of the forum, even if the facility is open to the public.

For example, a courthouse is considered a non-public forum  public forum (<http://www.ala.org/advocacy/intfreedom/meetingroomsqa>) (<https://www.freedomforuminstitute.org/about/faq/do-we-have-an-unfettered-right-to-protest-on-government-property/>), and many courthouses forbid photography or filming inside courtrooms or the courthouse itself, even though the public may enter and view activities in the building. (The Supreme Court famously forbids cameras in its chambers, even during public hearings and oral arguments.) So while the First Amendment does protect the right to film or take photos when the person filming is located on a public street, a public sidewalk, a public square, or a public park, it only provides full constitutional protection to expressive activities in a limited or non-public forum when those activities are consistent with the mission or purpose of the facility, or are expressly allowed by the facility.

In *Kreimer v. Board of Police of Morristown, NJ* (<https://law.justia.com/cases/federal/appellate-courts/F2/958/1242/371694/>), an important court opinion addressing a library user’s right to enter and use the library, the court held that because public libraries are a limited public forum, constitutional protection is afforded only to those expressive activities that are consistent with the mission and purpose of the library. A public library is only obligated to permit the public to exercise rights that are consistent with the government’s intent in establishing the library as a limited public forum for the purpose of receiving information and accessing the library’s books, programs, and online resources. According to the *Kreimer* opinion (<https://law.justia.com/cases/federal/appellate-courts/F2/958/1242/371694/>), other activities, including activities such as photography, filming, petition-gathering, assemblies, and public speeches, may be regulated by the library using reasonable, viewpoint neutral, time, place, and manner rules (<https://dictionary.findlaw.com/definition/time-place-or-manner-restriction.html>).

Filming in the library

Given the possible chilling effect on individuals’ library usage, the threat to the library user’s right to privacy, and potential threat of harassment posed by third-party photography or recording, it is reasonable for the library to regulate that behavior in a manner that preserves the individual patron’s right to receive information free from harassment, intimidation, or threats to their safety, well-being, and privacy rights, using policies and procedures developed in accordance with the Intellectual Freedom Committee’s Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage



(<http://www.ala.org/advocacy/intfreedom/guidelinesdevelopment>). Of course, the means of achieving this is determined by each library board, in light of the applicable local, state, and federal law and as appropriate to the library's and the community's needs and circumstances.

Here are additional guidance and resources for libraries developing or amending their policies to address filming or photography in the library:

- Even though libraries are public places, libraries, and those who work for libraries, should strive to protect users' privacy when they are using library resources in the library, in accordance with the *Library Bill of Rights* (<http://www.ala.org/advocacy/intfreedom/librarybill>), the *ALA Code of Ethics* (<http://www.ala.org/tools/ethics>), and state laws protecting the privacy and confidentiality of library users' records and information (<http://www.ala.org/advocacy/privacy/statelaws>).
- The act of photographing or filming the activities of library users by a third party has generally been addressed as a behavior issue or a media relations issue by libraries. Here are some examples of how libraries have addressed these issues:
 - Chicago Public Library specifically bars the photography or recording of library users in its "Library Use Guidelines" (<https://www.chipublib.org/library-use-guidelines/>).
 - St. Louis Public Library's more detailed "Photography, Filming and Videography Policy" (<https://www.slpl.org/service-policies/filming-and-photography-policy/>) bars photographers from taking identifiable images of other library users and establishes rules for media.
 - The Shaker Heights Public Library maintains a Media Relations Policy (<https://shakerlibrary.org/policies/administrative-policies/media-relations-policy/>) that addresses both photography and newsgathering in the library.
 - Saint Paul Public Library's "Photography and Videography Policy" (<https://sppl.org/policies/photography-and-videography/>) requires those who wish to use cameras and/or recording equipment to obtain advance approval from a supervisor, in order to "protect library users who may be endangered or inconvenienced by having their photo or video image taken in the library."
- Consider policies that allow for photography and filming of the library building and collections that does not invade the privacy of library users. Many people visit libraries to view the architecture, evaluate the collection, or see historic documents or artifacts, and wish to have a photographic souvenir or record of their visit.
- All libraries should take care to clearly identify non-public spaces in the library that are not open to the public or where users have an expectation of privacy, such as washrooms, reservable private study spaces, offices, break rooms, and work areas.
- Carrels, stacks, and computer stations should be arranged in a manner that discourages or prevents someone reading over a user's shoulder without the user being aware of the activity.
- Avoid practices and procedures that place library users' personally identifiable information on public view.
- Best practice: Do not engage with First Amendment auditors who are filming in accordance with policy and are not violating library policies that protect library users' privacy or that prohibit behaviors that constitute harassment of users and staff. Allowing them to film without incident means that they will not obtain the videos that support their social media accounts.
- Different rules may apply to the filming and photography of public library employees. The Digital Media Law Project discusses the right of the public and the press to film public officials carrying out their duties in a public space in this online blog post (<http://www.dmlp.org/legal-guide/recording-police-officers-and->

public-officials), “Recording Police Officers and Public Officials (<http://www.dmlp.org/legal-guide/recording-police-officers-and-public-officials>).”

- While some “audits” are unobtrusive and do not interfere with the activities of staff or patrons, many library workers are describing a pattern of behavior on the part of some First Amendment auditors that often rises to the level of harassment of staff and library users. This can include a claimed right to interrogate and demand answers from any individual inside the library or invading the privacy of library users by filming and recording their reading or browsing activity in the library. Harassment and abusive behaviors should be addressed as provided in the library’s behavior or use policy.

The Office for Intellectual Freedom encourages libraries to report such incidents using this online reporting form



www.ala.org/challengereporting

(<http://www.ala.org/tools/challengesupport/report>)

(<http://www.ala.org/tools/challengesupport/report>) so that we can track their location and their frequency, and offer support.

(Please note that this post provides legal information but does not constitute a legal opinion. It should not be treated as legal advice. Please consult with your own legal counsel for legal advice regarding your particular situation.)

 Deborah Caldwell-Stone

Deborah Caldwell-Stone is Director of the American Library Association’s Office for Intellectual Freedom and Executive Director of the Freedom to Read Foundation.

She is a recovering attorney and former appellate litigator who now works closely with librarians, library trustees and educators on a wide range of intellectual freedom and privacy issues, including book challenges, Internet filtering, meeting room policies, government surveillance, and the impact of new technologies on library patrons’ privacy and confidentiality. She has served on the faculty of the ALA-sponsored Lawyers for Libraries and Law for Librarians workshops and speaks frequently to librarians and library organizations around the country about intellectual freedom and privacy in libraries.

1. A designated or limited public forum is a place purposefully opened by the government for designated expressive activity by part or all of the public. A nonpublic forum is a place that is neither traditionally used for expressive activities nor set aside or opened up in a substantial way for expressive activities. See the Intellectual Freedom Committee’s Meeting Room Q & A (<http://www.ala.org/advocacy/intfreedom/meetingroomsqa>).

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