

# First Amendment Audits

## A Resource Guide for Texas County Officials and Employees Highlighting Information About Free Speech Rights and First Amendment Auditing Activities

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***Disclaimer:*** This document and any related training on this topic are intended to provide general educational information regarding First Amendment Auditing activities. This is not to be deemed legal advice. Neither TAC nor the TAC Risk Control consultants, trainers and supervisors are engaged in rendering legal advice. If you need legal advice, TAC recommends that you seek the services of a competent attorney who is familiar with your specific situation or area of concern.

### **First Amendment to the United States Constitution:**

***“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging 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.”***

Congress adopted the First Amendment to the U.S. Constitution in 1789. Since then, a variety of federal case law decisions has interpreted various ways free speech and free press rights apply under the Constitution. Some of those decisions come from the Supreme Court of the United States of America (SCOTA) and are directly applicable throughout our country, while others derive from decisions made by the twelve U.S. Circuit Courts of Appeal, or from among the 94 Federal Judicial District Courts.

Texas joins the states of Louisiana and Mississippi to comprise the 5<sup>th</sup> Circuit Court of Appeals, and our state has four federal judicial districts (Northern, Southern, Eastern and Western). Decisions from those courts are directly applicable to our state. Occasionally, rulings regarding circumstances you may face are unclear or have not been ruled on by the federal courts in Texas, the 5<sup>th</sup> Circuit, or the U.S. Supreme Court. In those instances, we generally look to decisions rendered by courts in other federal circuits as a guide to determine a reasonable course of action.

### **First Amendment Right to Record**

- The recording of public officials is commonly recognized as “**protected speech**” under the 1st Amendment.
- The ability to observe and photograph or record agents of government, including police conducting business in a public place, is guarded by the U.S. Constitution.
- The Supreme Court has also held that the First Amendment protects a person’s right to circulate publicly available information they collect (or record) in any medium they choose. *In other words, once legally obtained, you cannot typically halt or censor their ability to distribute that information however they decide.*

### **What is 1st Amendment Audits**

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- **First Amendment audits** is a social movement conducted by individuals eager to test their free speech rights and any limits you may impose; especially their right to photograph and record from public spaces or public forums.
- Some audits link this practice with 2nd Amendment challenges and simultaneously test their right to carry firearms in public spaces, especially in Texas. These auditors link their right to film or record with the right to possess firearms in public spaces. They especially look for government buildings that improperly display signs referencing the criminal trespass warnings listed in Texas Penal Code (PC) 30.06 & PC 30.07 for handgun carriers. *Those statutes relate only to private businesses, not government properties. The right to ban certain weapons from courts and areas essential to the courts is found in PC Chapter 46, not PC Chapter 30. In that chapter, no warning signs are required, nor language specified, although general warning signs are customary.*
- Amendment auditors and their supporters claim their auditing acts help preserve their Constitutional rights by promoting transparency and open government. Regardless of their motives, every citizen has the same basic rights to occupy and record from open public space.

### Who is 1st Amendment Auditors

- **“Constitutional Amendment auditors”** are self-appointed activists; they may act independently or jointly as citizen journalists. There is no official appointment associated with their title or practice, they are citizens exercising what they believe to be their rights under the U.S. Constitution.
- Some amendment auditors will profess that they “do this for a living” while others merely hold the desire to exercise their constitutional rights by performing auditing activities. Some citizens refer to themselves as “Sovereign Citizens” rather than Auditors, but their methods are similar.
- **First Amendment auditors** desire to test the limits governmental officials and employees may place on “free speech” rights, mostly the right to occupy and film or record from common public spaces or public forums.
- Their goal is to test your knowledge of how they believe the law applies to their actions and gauge your reaction to their presence or methods. Most often, they hope to capture panicked behavior or incorrect acts made by you or co-workers on camera and post that to social media.

*Auditors have often researched applicable laws and local policies that apply to their practices. They frequently understand their rights and limitations and hope to exploit situations where errors occur by government actors. They do not solely target law enforcement, but often desire law enforcement intervention. No county, elected official, or public employee is off limits.*

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### The Audit Process

- Amendment auditors show up unannounced and begin to photograph or film in or around government buildings, offices, and commons areas. They often record public officials, governmental employees, and other citizens that are within view.
- Amendment auditors will usually demand that officials and employees within their view be identified by name and position. *Ironically, most refuse to self-identify or state their purpose, and will assert how they respect their privacy, will deflect, or use generic names like I'm Good Citizen or We the People.*
- Auditors commonly seek access to governmental records or request pre-printed copies of complaint or grievance forms. Usually this is merely done to test the process or gauge a response. Occasionally, they will ask for copies of select administrative policies.
- Auditors often record facilities and identify on camera various areas of use. Auditors may stop at clearly defined boundaries, such as counters, closed doors, or fenced areas, but may film anything in sight beyond that control point. Auditors have been known to enter open or unlocked doors/gates of restricted space until told to leave the area.
- Amendment auditors recognize they have the right to visually inspect vehicles (public or privately owned) and other equipment that is assessable from unrestricted public space. They frequently record license plates and check registration certificates for vehicles within their access or view.

### 1st Amendment Audit Experiences

- Amendment auditors' behavior may appear suspicious, odd, or intimidating. Interactions may seem awkward, especially for individuals that are not familiar with their practices.
- Auditors are intentionally vague, and many seem aggressive or confrontational. Some attempt to solicit verbal conflict and use profanities. Others may be polite, but not fully cooperative. Many auditors hope to entice uncertainty about their actions and rights or hope to witness officials and employees behaving emotionally or irresponsibly. Some hope to bait negative/improper responses and hope law enforcement will intervene.

### 1st Amendment Audit Results

- Poorly handled audits often generate return visits or lead to additional auditors selecting your county as a target rich environment.
- Recordings made during audits are commonly circulated on social media platforms, discussed on blogs, or aired on podcasts, especially those that capture wrong employee acts or show unflattering reactions.
- *Remember, you could become a social media sensation overnight by failing to understand their constitutional rights.*

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### Expectation of Privacy from Being Recorded in Public

There is generally no privacy expectation that prohibits you and others from being recorded or photographed when you are within view by someone that is legally occupying a public space. This is equally true for citizens. What can be seen or heard from open public space can be captured by Amendment Auditors without consent.

- Katz v. United States, 389 U.S. 347, 351 (1967): (reasoning that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection”)
- Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 181 (1st Cir. 1997) “persons cannot reasonably maintain an expectation of privacy in that which they display openly.”
- Turner v. Driver, No. 16-10312 (5th Cir. 2017) “First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.”
- Texas v. Johnson, 491 U.S. 397 (1989) US Supreme Court ruled that "symbolic speech" is protected by the First Amendment. *In this case, burning the U.S. flag in protest of governmental policies constituted symbolic speech protected by the First Amendment.* Language used by the Supreme Court is of particular importance:
  - “free speech protects actions that society may find very offensive”
  - “society's outrage alone is not justification for suppressing freedom of speech”.

*Katz was a 4<sup>th</sup> Amendment Claim and Vega-Rodriguez was from another circuit, but the language used by the courts’ summations in each case referenced above helps us logically conclude that a person’s 1st Amendment right to record others from openly accessible public space is not diminished because citizens or employees that are within view may find being recorded offensive.*

### Public Space, Public Forum, and Restricted Space

Not all areas of public buildings or property offer open space or public forum. Amendment auditing activities may be restricted in nonpublic forum space and may be reasonably limited some public forum settings. Generally, public streets, sidewalks, and parks are open to public forum.

- “**Public space**” is an indoor or outdoor area commonly open and accessible to the public by right or invitation. Public space includes all unrestricted areas in and around governmental properties and buildings, including lobbies, hallways, parking lots, sidewalks, streets, and other commons. Public space includes areas of public forum and areas where the right to access may exist but a right to “free speech” may or may not be limited.
- “**Public forum**” (open forum) is a public space or setting where citizens may freely assemble and offer public expression or otherwise exercise their free speech rights. *How a space is used at a particular time can transform that space. For example, a district*

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*courtroom would routinely be recognized as space that is not open to public forum, but if the courtroom is used as a venue for a public meeting such as Commissioners' Court, the space would become open forum during that event.*

- **"Restricted space"** (controlled space) includes areas in and around governmental properties that have controlled access points, such as locked doors, physical barriers, or limiting signage, or other space that would require citizens to be invited or obtain permission to gain authorized access (private offices/workspaces, storage areas, etc.). *Privacy can be created in restricted access areas in and around governmental buildings by closing doors or gates or asking individuals to leave the restricted area.*
- Restricted space includes areas expressly defined by the federal courts or within state statutes as being non-public forums, such as airport terminals, polling places, or jails, as well as areas of public property where citizens and employees expect a greater right to privacy such as public restrooms.

***Note: It is your responsibility to shield sensitive records and information from individuals that occupy public space, not their responsibility to avoid. Discuss ways to identify nonpublic forum areas (below) with your County Attorney before placing restrictions on public space.***

➤ Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983)

In this case the Supreme Court defined three categories of forums:

- Traditional public forums
- Limited or designated public forums, and
- Nonpublic forums
- "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

➤ United States v. Grace, 461 U.S. 171 (1983)

- "Public places," such as streets, sidewalks, and parks, historically associated with the free exercise of expressive activities, are considered, without more, to be "public forums."
- "The Court grounds are not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and is admitted to the building during specified hours. But where the sidewalks forming the perimeter of the grounds are indistinguishable from any other sidewalks..."

➤ **ADDERLEY V FLORIDA, 385 U.S. 39 (1966)**

- The Supreme Court ruled a jail facility is not a public forum,
- A state may regulate the use of its property and withhold its use from demonstrators for nondiscriminatory reasons such as protection from damage.

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➤ ***WILSON v. STATE | 504 S.W.3d 337 (2016) (State Court of Appeals Ruling)***

The 9th Circuit Court of Appeals in Beaumont, TX upheld a Criminal Trespass Conviction of Wilson after he was warned to leave a city of Dayton Community Center and returned. *His expulsion stemmed from disruptive behavior, and he was in non-public forum space at the time.*

- Texas statute also provides clarity for citizens' right to record during public meetings:

**"RECORDING OF MEETING BY PERSON IN ATTENDANCE. TEXAS GOVERNMENT CODE, Sec. 551.023**

(a) A person in attendance may record all or any part of an open meeting of a governmental body."

(b) A governmental body may adopt reasonable rules to maintain order at a meeting, including designating the location of recording equipment; and regulating the manner in which the recording is conducted, but may not prevent or unreasonably impair a person from exercising a right" listed in (a) above.

*This would include Commissioners' Court meetings, bail bond board meetings, and other public meetings of elected or appointed boards where the Texas Open Meetings Act would apply.*

### **Hindering Free Speech May Equal a Constitutional Violation**

➤ ***Justice v. Hosemann, 771 F.3d 285, 291 (5th Cir. 2014)*** was decided by the 5<sup>th</sup> Circuit Court of Appeals in 2014 and is directly binding on Texas. Language used by the Court stated:

- "Chilling a plaintiffs' speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *In other words, a constitutional violation would exist.*
- "[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution . . . a credible threat of enforcement is sufficient." *Id.*

### **Stop Recording and Leave the Property**

- A person should not be told to stop recording or ordered to leave open public forum simply for taking photographs or making recordings from that area. Amendment auditors that are within open public space may continue to occupy that space so long as it remains open and accessible to other citizens unless they create a disturbance, disruption or interfere with the work or meeting.
- Amendment auditors have no greater right than other citizens to occupy public space and may be instructed to leave areas that are being closed to the public such as at the end of the business day.
- Persons that become violent, interfere with governmental duties, disrupt public meetings, or commit other criminal acts may be detained, arrested by law enforcement, or warned of Criminal Trespass depending upon the circumstances.

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- Remember: stating “You’re free to go” to auditors and other individuals also signifies “you’re free to stay”.

### Avoid False Arrest Threats or Acts

- Failure to ID, alone, is not an arrestable offense. Enforcement action must not be based merely on someone refusing to identify!
- Amendment Auditors that refuse to identify should only be arrested if probable cause first exists to support their arrest for a different criminal offense.

*FAILURE TO IDENTIFY. Texas Penal Code Sec. 38.02.*

*“A person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information.”*

- **Davidson v. City of Stafford, Texas, No. 16-20217 (5th Cir. 2017)**
  - 5<sup>th</sup> Circuit determined Mr. Davidson had a First Amendment violation claim after he was arrested for Failure to ID (PC38.02) without sufficient probable cause to arrest him for another offense.
  - Mr. Davidson had been exercising his First Amendment right by distributing pamphlets in protest of a Planned Parenthood clinic from the sidewalk in front of the clinic (*see the associated case below to reaffirm the First Amendment protections that apply*).
- **Flower v. United States, 407 U.S. 197 (1972),**
  - The U.S. Supreme Court upheld the 5<sup>th</sup> Circuit’s decision that Fort Sam Houston, TX military base had violated Mr. Flower’s 1<sup>st</sup> Amendment rights by stopping him from quietly distributing leaflets along open, publicly accessible streets of the military post.

### First Amendment Limitations

- Free Speech is a qualified right, not an absolute right; it is governed by **reasonable time, place, and manner restrictions**. Individuals, including activists, journalists or the media cannot:
  - Place themselves or others in danger
  - Trespass on private property
  - Enter a marked crime scene; or “materially interfere” with law enforcement activities.

### Establishing Law Enforcement Perimeters

Officers can require a reasonable distance be maintained from police related duties and enforcement activities.

- Perimeters should be reasonably placed and should apply to all members of the general public, not just those with cameras.

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- Perimeters may be expanded to protect individuals or for investigative purposes, so long as the expansion is reasonable and applies equally to all citizens.
- Hostage/barricade incidents may necessitate larger perimeters than altercations on public sidewalks.

### Material Interference

- Interference must be based on conduct that materially inhibits, obstructs, delays, or in other ways negatively affects operations.
  - The act of recording, by itself, does not constitute interference.
  - Officers must have objective, articulable reasons for claiming material interference.
- **Buehler v. City of Austin, No. A-13-CV-1100-ML, 2015** (U.S. W.D. Tex. Feb. 20, 2015) makes caselaw reference for material interference related arrests.

*If minor interference occurs by someone filming you, consider attempting to direct the recording party to another location within a reasonable distance before taking enforcement action.*

*A best practice for directing someone that has gotten too close to officers taking enforcement action to back up is to identify a fixed point, when practical, and verbally instruct the individual to remain at or behind that point. Not only does the fixed location give officers and citizens on scene a clear understanding of the space limitations that apply, but the direction also clearly identifies a recognizable boundary that prosecutors, judges, and jurors can identify if enforcement action becomes necessary.*

- **Turner v. Driver, 848 F.3d 678, 689 (5th Cir. 2017)**
- The right to record police is clearly established
- **HOUSTON v. HILL, 482 U.S. 451 (1987)**
- Supreme Court ruled that shouting at police in an attempt to divert their attention is protected under the First Amendment when the verbal interruptions of police deals with speech rather than with core criminal conduct, unless the speech consists of "fighting words" that by their very utterance inflict injury or tend to incite an immediate breach of the peace.

### Texas Penal Code (PC) Statutes that Address Interference Related Offenses

Depending on the circumstances of each encounter, the following is a listing of some criminal offenses that may be relevant for enforcement:

- **PC Sec. 38.13. HINDERING PROCEEDINGS BY DISORDERLY CONDUCT.** (a) A person commits an offense if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.



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(b) A person commits an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance and continues after explicit official request to desist. (Class A Misd).

- **PC Sec. 38.15. INTERFERENCE WITH PUBLIC DUTIES.** (a) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law; (Class B-Misd.)
- **PC Sec. 42.03. OBSTRUCTING HIGHWAY OR OTHER PASSAGEWAY.** (a) A person commits an offense if without legal privilege or authority, he intentionally, knowingly, or recklessly: (1) obstructs a highway, street, sidewalk, railway, waterway, **elevator, aisle, hallway, entrance, or exit** to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others; or ...  
*(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.*
- **Sec. 42.05. DISRUPTING MEETING OR PROCESSION.** (a) A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, he obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance. (Class B Misd.).

### UAV/UAS (Drone) Photojournalism Is Covered by the First Amendment

- **Turner v. Driver, 848 F.3d 678, 689 (5th Cir. 2017)**
  - The Fifth Circuit has noted that "the First Amendment protects the act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself.'" *Turner v. Lieutenant Driver, 848 F.3d 678, 689 (5th Cir. 2017)*
  - "Furthermore, courts have never recognized a "distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded."  
*gov.uscourts.txwd.1060128.74.0.pdf*
- **National Press, et al v Steven McCraw, et al 1:19-CV-946-RP**
  - "This reasoning holds just as true for photographs and videos captured by drone: the process of creating the images finds just as much protection in the First Amendment as the images themselves do." *Note: appeal decision pending as of 08/11/2023!*
- In the case of **National Press, et al v Steven McCraw, et al 1:19-CV-946-RP Western District of Texas; March 28, 2022**, the lawsuit challenged the constitutionality of Texas

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Government Code (GC) Chapter 423 regulating unmanned aerial vehicles (UAV-drones). The Court found that:

- use of drones to document the news by journalists is protected expression, and, by regulating this activity, Chapter 423 implicates the First Amendment. (pg 18)
- GC Chapter 423 violates the First Amendment because the Surveillance and No-Fly Provisions are not actually necessary nor narrowly tailored, and they cannot withstand strict scrutiny. (pg 24)
- Chapter 423 is unconstitutionally vague... and noted that a more stringent vagueness test applies where a law “interferes with the right of free speech.”

### **FAA Part 107 Airspace Authorizations** *(Updated drone rules took effect April 21, 2021)*

FAA part 107 would not typically regulate citizens recreational use of drones however, because many amendment auditors assert monetary intent or profess to “do this for a living” the commercial regulations listed in part 107 may be applicable.

The FAA’s Part 107 provides a listing of regulations for the issuance of a remote pilot certificate as well as operating rules for drone operators. The list below highlights only a few of the long list of rules: PART 107 - SMALL UNMANNED AIRCRAFT SYSTEMS (UAS)

- Less than 55 lbs;
- Operated in line of sight (unaided); may need an observer;
- Can’t fly over people not participating in the operation;
- Dawn to dusk; unless equipped with night anti-collision lighting & training
- Max. height of 400 feet and max. speed of 100 mph.
- Drone registration and pilot licensing required for commercial use.

Additionally, some cities may have ordinances requiring permits or further limiting drone activity.

## **Suggestions to Help During Encounters with Auditors**

### **Deflection and Disengagement**

Auditors may try to intimidate you, engage you in debate or argument, or challenge you over their rights to exercise what they believe is a constitutional right or your legal requirements regarding the first amendment, public verses restricted space, and access to public information.

- Educate yourself and train your co-workers. Gain confidence in your ability to interact with auditors by understanding their rights and their limitations.
- Remain professional and courteous
- Deflect any inflammatory comments
- Develop disengagement techniques (create privacy or separation, pass them off to a supervisor, etc.)
- Prepare programmed responses to common requests or demands made by Constitutional Auditors.

### **Develop Programmed Responses**

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- “I know that you have a right to record in this area.”
- “Public access stops here”: \_\_\_\_\_ (*identify the boundaries*).
- “Complete this form to obtain a copy of public records” (*or explain the process if no form is available*).
- “My name and title (or rank) is \_\_\_\_\_”; *or*,
- “Our office policy does not require me to identify to you and I prefer to withhold my identity”.
- “Would you like to speak to my supervisor?”

### Prepare for Audits in Advance

- Hold training or discussions about how audits should be handled in your office or workspace.
- Identify and mark any publicly restricted areas. Add doors, locks, fencing or signage, etcetera, limiting access to restricted space.
- Consider moving control points, if necessary, to protect the confidentiality of certain individuals’ information.
- Ensure that work areas are restricted and areas containing sensitive information (computer monitors/screens, documents) is shielded from view in public spaces.
- Consider whether counters need to be equipped with glass/plexiglass and blinds or tint that limits visibility beyond public control points.
- Adopt reasonable policies or procedures for employees to follow when engaging auditors:
  - *identity policy requirements for your office;*
  - *rules for addressing policy and public records requests;*
  - *filing grievances and complaints, etc.*

### THINGS TO AVOID,

- Do not demand they stop recording from open public space unless they interfere, become violent, or create a disruption
- Do not demand that they identify, state a purpose, or provide an explanation for their actions, activities or requests
- Do not insist that they leave open public space or stop recording unless they interfere, become violent, or create a disruption
- Do not inform them you are about to call law enforcement (*even if you do*)
- Do not touch them, threaten them, try to detain them, or exchange insults with them.

*TAC recommends that you confer with your local County or Criminal District Attorney for legal opinions about case law interpretations, or the enforcement of limitations to public forum and permissible use of open public space in and around your county buildings.*

**For additional information or to schedule training on this matter you may contact your regional law enforcement consultant or me, as follows:**

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