



# SOUTH CAROLINA ASSOCIATION OF COUNTIES

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## TECHNICAL BULLETIN

To: County Chief Administrative Officers  
County Attorneys

From: SCAC Staff

**Re: “First Amendment Auditors”: Citizen Recording in County Public Facilities**

There is a growing concern among public officials and employees nationwide concerning citizens entering public buildings for the purpose of recording inside the facility. These citizens have been termed “First Amendment Auditors” for the fact that their stated purpose in many cases is to test government officials and the limits of their First Amendment rights to record government activity.

First Amendment auditing, which has also been called “copwatching” dates from at least the mid-2000s. It began mostly as bystander recording of police activity on public streets and sidewalks but has grown to include recording of government activity inside publicly owned buildings. Recently, the practice has morphed into a YouTube subculture, with self-styled “auditors” in many U.S. cities, suburbs, and small towns to see how government officials and employees react to a camera lens.

In most cases the activity of these “auditors” has been peaceful. A growing subset of these auditors have intentionally become abusive and harassing. County officials should be vigilant to those citizens who appear to have actively set out to provoke confrontations to law enforcement and other officials to coerce them to act in ways that may violate the auditor’s First Amendment rights. Liability for such violations can be both embarrassing to the county, but also can be costly to both the county and the official/employee. Most causes of actions for violation of First Amendment rights are brought as federal claims under 28 USC 1983 which has unlimited damages and personal liability.

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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. *Smith v. City of Cummin*, 212 F.3d 1332 (2000). Like all First Amendment protections, the right to gather information about what public officials do on public property is subject to reasonable time, manner, and place restrictions. *Sheets v. City of Punta Gorda*, 415 F. Supp.3d 1115 (2019)

The federal courts have traditionally distinguished a citizen's right to record government activity based on whether the activity takes place in areas deemed an unlimited public forum such as public roads and sidewalks or whether it is a limited public forum such as government buildings. The courts have consistently held that citizens have broad First Amendment rights to record government activity occurring in areas that are unlimited public forums. However, the courts have allowed greater restrictions on First Amendment activity inside public buildings and other areas deemed limited forums. Any restrictions on recording in these areas must be reasonable and content neutral.

The First Amendment does not guarantee a citizen unlimited access to property just because it is owned by a government entity, and that government employees have the right to withhold consent to be recorded. The district court in *Sheets* specifically held that:

"The Government, like any private landowner, may preserve the property under its control for the use to which it is lawfully dedicated." Likewise, a government "workplace, like any place of employment, exists to accomplish the business of the employer." It follows that the Government has the right to exercise control over access to the [government] workplace in order to avoid interruptions to the performance of the duties of its employees."

The issue of recording government activity has become so common in the area of law enforcement that the Civil Rights Division of the United States Department of Justice has issued guidance to several jurisdictions involved in federal litigation. This guidance is helpful to counties in developing internal policies on recording inside public buildings.

County policies addressing the recording by citizens inside county facilities should:

1. Affirmatively outline a citizen's Fourth Amendment right to record governmental activity inside public buildings.

County facilities are areas of limited public forums and any restrictions on recording inside the buildings must be reasonable in time manner and place. The county can reasonably restrict citizen movement inside their facilities to the times that the buildings are open to the public, to those places in the building that are open to the public, and place reasonable restrictions on the recording of persons within the building. It should be noted that one of the issues before the district court in *Sheets* was complaints by city employees that they had been videoed during work hours and the images had been posted on internet sites. Several city employees cited death threats and harassment as a result. The court held that any recording another person in a public building must be done with the consent of that individual.

Those officials or employees with the authority to initiate contact with any citizen inside a public building should receive training on citizens' rights to record government activity under the First and Fourth Amendment.

2. Policies should address prohibited responses by county officials/employees to citizens observing or recording inside public buildings.

Because observing and recording government activity in public buildings is protected by the First amendment, policies should prohibit officials or employees from interfering with this right except in narrowly described situations where the citizen is in violation of the time, place, or manner restrictions enacted by the county. Officials or employees should be advised not to threaten, intimidate, or otherwise discourage citizens from lawful activity.

Policies should prohibit officials or employees from seizing any device and/or deleting or destroying recordings or photographs except under extremely limited circumstances provided for in the constitution's provisions for lawful search and seizure. The federal courts have consistently held that such activity is both a violation of the First Amendment, but also the procedural due process requirements of the Fourteenth Amendment.

3. Policies should clearly describe when a citizen's actions amount to a violation of county building policies.

Policies should provide clear guidance to citizens to describe the areas within the public building that are open to the public, the times that such spaces are open to the public, and any areas that are considered restricted access. Counties should identify and mark all nonpublic areas within a public building. In many cases, auditors will try to enter private areas, hallways, or offices. The county has a right to mark these areas as nonpublic and to impose reasonable regulations on the right to film in them. Nonpublic forums can include any areas into which, under ordinary circumstances, visitors must be invited before entering. Examples include hallways, cubicles, offices, and workspaces. State and federal rules may also restrict access and recording devices from entire buildings such as courthouses, military facilities, and detention centers.

4. Policies should provide protections for county employees and other citizens from unconsented recording.

County employees and citizens visiting county buildings to conduct business have the right not to be recorded without their consent. Some auditors may engage in conduct that rises to the level of harassment. They may claim they can demand answers or invade the privacy of private residents. There have been prior instances in the state of public employees being filmed at work and followed by those recording them. Counties may adopt appropriate ordinances/regulations to reasonably protect employees or citizens from such harassment and abusive behaviors.

5. Policies should provide information on the officials and or employees that may enforce county policies on recording in public buildings.

Enforcement of any recording policy inside county facilities should be limited to the county official charged with control of the facility, building security, or county law enforcement officers. Line employees should be directed not to approach citizens lawfully acting within their constitutional right. The potential for negative escalation of an otherwise lawful event could result. In cases where law enforcement officers are dealing with specific instances of citizen activity that violates county policies, and body cameras are available and worn, it may be helpful to activate them to document that the officer follows county policy or make a record of the violation of policy by the citizen.

Enforcement policies should provide clear guidance on supervisory review of employee actions. Policies should include guidance on when a supervisor's presence is warranted, and should be required before certain actions are taken such as the search or seizure of any device.

The information in this document is not an exhaustive review of the numerous legal issues concerning First Amendment rights of citizens. County officials should consult with their county attorney before acting on any of the information or policy recommendations contained in this document. For general questions regarding these issues, please contact SCAC legal staff at 1-800-922-6081 or (803) 252-7255.