

Preparing for a 1st Amendment Audit

Cheri Harris
Certification Program Director/Legal Consultant
Indiana State Library

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Disclaimer

- ▶ This is legal information provided for educational purposes.
- ▶ See your attorney for legal advice (applying the law to your specific situation).

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Overview

Getting back to normal? As libraries have opened back up some find patrons aren't the only ones eager to enter the building.

- ▶ Define 1st Amendment Audit
- ▶ Review 1st Amendment
- ▶ Analyze relevant case law
- ▶ Consider your policies re. speech and behavior
- ▶ Discuss training and preparation

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What is a First Amendment Audit?

The practice of exercising one's constitutional right to record video for the purpose of educating anyone who attempts to infringe that right and commending those who respect it.

—[FirstAmendmentAuditing.com](https://www.firstamendmentauditing.com)

A loosely organized social media campaign to "audit" government spaces and agencies for alleged First Amendment violations.

—ALA Intellectual Freedom Blog

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Why are they doing it?

- ▶ Belief that it promotes transparency and open government.
- ▶ To post on social media:
 - ▶ To increase social media metrics of likes, follows, shares, and subscribers
 - ▶ To make money (some sell merchandise)
- ▶ Recordings have been used, sometimes successfully, as the basis of a claim or lawsuit
- ▶ To proclaim whether officials “pass” or “fail” the audit based on actual or perceived violations of the auditor’s constitutional rights.
- ▶ One television news interview with citizen activist refers to “entertainment value.”

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The First Amendment

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

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The 14th Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Indiana Constitution

ARTICLE 1.

Bill of Rights.

Section 9. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.

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Indiana Constitution

ARTICLE 1.

Bill of Rights.

Section 31. No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

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How Courts Have Connected Public Libraries to 1st Amend.

- ▶ *Kreimer v. Bureau of Police* (3rd Cir. 1992) (Upheld library rule prohibiting disruptive behavior.) Library is a limited public forum, may refuse service to someone who willfully violates a library policy.
- ▶ *Armstrong v. Dist. Of Columbia Pub. Library* (D.D.C. 2001) noted “long-standing precedent supporting plaintiff’s First Amendment right to receive information and ideas, and [its] nexus with access to public libraries . . .”
- ▶ *Doe v. City of Albuquerque* (10th Cir. 2012) included the right to receive info & access to public library

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Access to Library Included In Right to Free Speech

- ▶ Courts decisions have recognized in the First Amendment a constitutional right to receive information, which includes some access to a public library.
- ▶ Government must justify actions infringing on this right. Regulations impacting speech must be:
 - ▶ Narrowly tailored to serve a significant governmental interest; and
 - ▶ Leave open alternate channels for communication of ideas.

U.S. Constitution, Amend. I

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3 Types of Fora

1. Traditional Public Forum
 - ▶ Examples: Streets and Parks
 - ▶ Purpose: Free Exchange of Ideas
 - ▶ Test: Strict scrutiny
2. Designated or Limited Public Forum
 - ▶ Examples: Public Library or College Campus
 - ▶ Purpose: Place of learning
 - ▶ Test: Strict scrutiny
3. Nonpublic Forum
 - ▶ Examples: Military Installation or Prison
 - ▶ Purpose: Focus on Security
 - ▶ Test: No test required

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Where do libraries fit in this scheme?

The 3rd Circuit in *Kreimer v. Bureau of Police*:

“It is clear to us that a public library, albeit the ‘quintessential’ locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonable be deemed to constitute a traditional public forum. *Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment.*”

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Can this behavior be regulated via policy?

- ▶ Activities of users filming in the library should be addressed by policies concerning behavior or media relations.
- ▶ Such policies need to balance public's right to film in a public space with desire to protect privacy of library users.
- ▶ Tie the policy directly to library's mission statement, be as specific as possible and be consistently enforced.
- ▶ Craft behavior policies to protect patrons and staff from intimidation and harassment and to keep information about individuals' library use and circulation record confidential.
- ▶ Develop or update your policy with input or assistance from library's attorney.

See ALA Intellectual Freedom Committee's Video Surveillance in the Library Guidelines from 2020

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What are you regulating?

Behavior

- ▶ Legal Standard:
 1. Must be reasonable
 2. Must be related to library's mission

Speech

- ▶ Legal Standard:
 1. Significant government interest
 2. Narrowly-tailored
 3. Ample alternative channels to receive information

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Characteristics of Well Written Policies & Procedures

Make sure patrons know what is allowed and what is prohibited:

- ▶ Equal Enforcement
 - ▶ Be consistent - Treat teenagers same as board members
- ▶ Patron Notice
 - ▶ Policies/instructions clearly worded - not subject to wide variety of interpretations by differently employees

Have a fair process take place when you issue the infraction:

- ▶ Reasonable Penalties
- ▶ An Appeals Process

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What steps might make you feel more prepared?

Become familiar with:

- ▶ What to expect in the event of an “audit”
- ▶ Policies and responses recommended by the ALA
- ▶ What do your own library policies allow or require

Meet with department heads to collaborate on a strategy to prepare staff. Train staff how you would like for them to respond.

- ▶ Have public-facing departments: go over policies with staff.
- ▶ Ask staff not to intervene or engage unless an auditor violates behavior policies or harasses library staff or patrons.

Consider your relationship with your security and local law enforcement ahead of time.

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More examples

- ▶ Can a person record in the following places:
 - ▶ the library
 - ▶ the lobby
 - ▶ on the sidewalk in front of the library
 - ▶ in the parking lot
 - ▶ At a board meeting

U.S. Constitution, Amend. I

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Resources

- ▶ I will send a resource page with slides

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Questions

Cheri Harris

Certification Program Director/Legal Consultant

- ▶ Direct: 317-234-6217
- ▶ Toll free: 800-451-6028
- ▶ charris@library.in.gov

For questions about specific regulations at your library,
contact your library's attorney.

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