

Responding to First Amendment “Audits”

Health Directors’ Legal Conference, 2023

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What are First Amendment “audits”?

Individuals asserting a First Amendment right to enter and remain on government-owned property and to film public officials and employees.



Responding to First Amendment “Audits” in the Local Government Context

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Questions Raised

- Is the act of filming protected by the First Amendment?
- If so, can the government place limitations on filming?



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Is filming protected under the First Amendment?

“If the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the ‘speech process,’ and thus qualifies itself as speech protected by the First Amendment.”

- *Ness v. City of Bloomington*,
11 F.4th 914, 923 (8th Cir. 2021)



Is there a right to film public officials?

The First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuit have all recognized a First Amendment “right to record” public officials carrying out their duties in public places, *at least in the context of police activity in traditional public forums.*

Sharpe v. Winterville Police Department

(4th Cir. Feb. 7, 2023)

Recognized First Amendment right to livestream police during a traffic stop

How broad is the right?

- “[T]he 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 Cumming*, 212 F.3d 1332 (11th Cir. 2000)
- “[T]he videotaping of public officials is an exercise of First Amendment liberties.”
 - *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)



What is NEVER protected by the First Amendment?

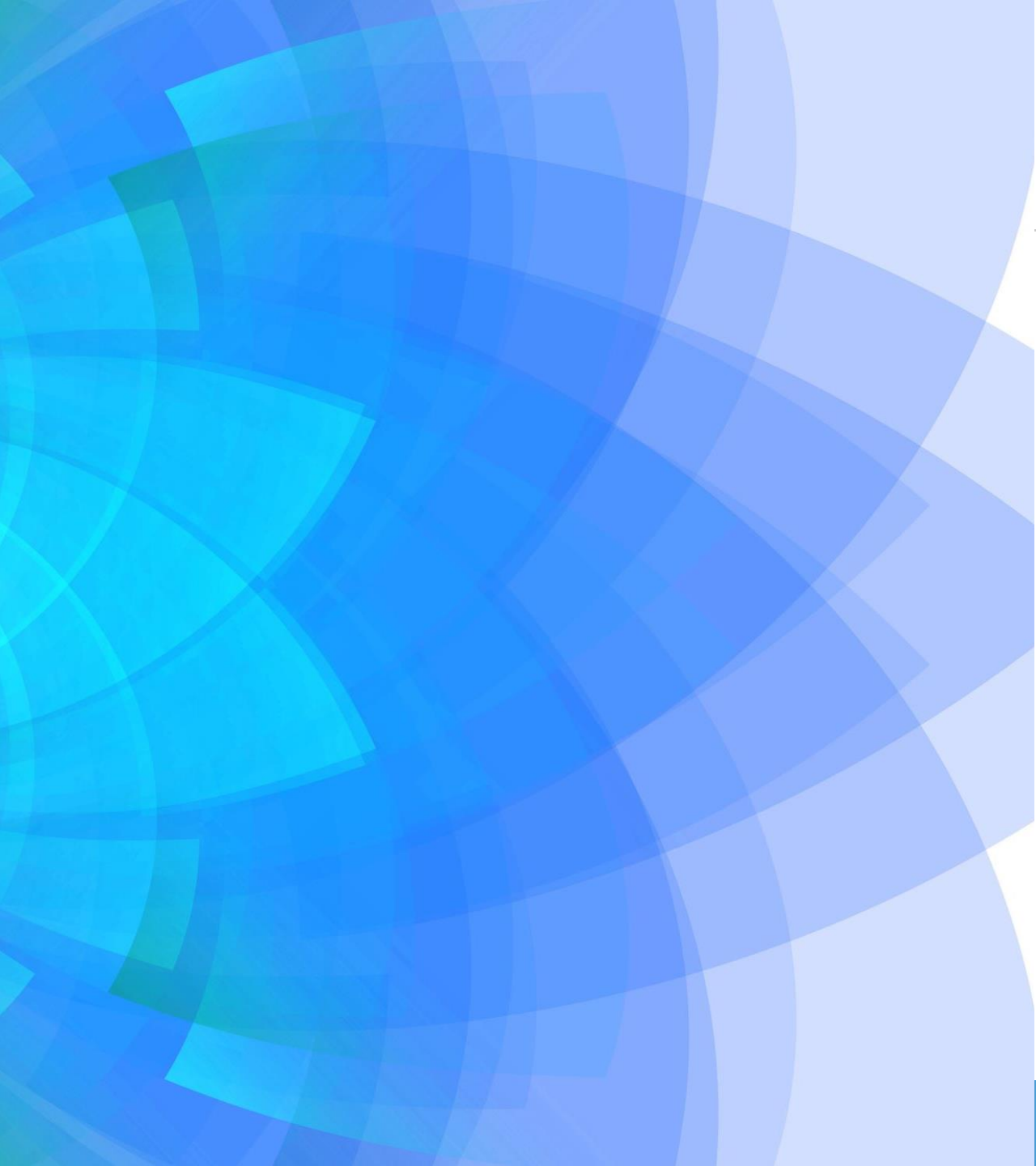
True
threats of
violence



“An *objectively* threatening statement communicated by a party which possesses the *subjective* intent to threaten a listener or identifiable group.”

State v. Taylor, 379 N.C. 589 (2021)

Restrictions on First Amendment Rights



If an activity is protected by the First Amendment, can an individual engage in it anytime, anywhere, without any constraints?

Forum Analysis

- Used when courts assess the constitutionality of restrictions on speech on government property.
- Standard of judicial review depends on the category of “forum” at issue.



Forum Analysis

Greater leeway to regulate public expression

Less leeway to regulate public expression

Nonpublic
Forums

Designated
Public Forums

Limited Public
Forums

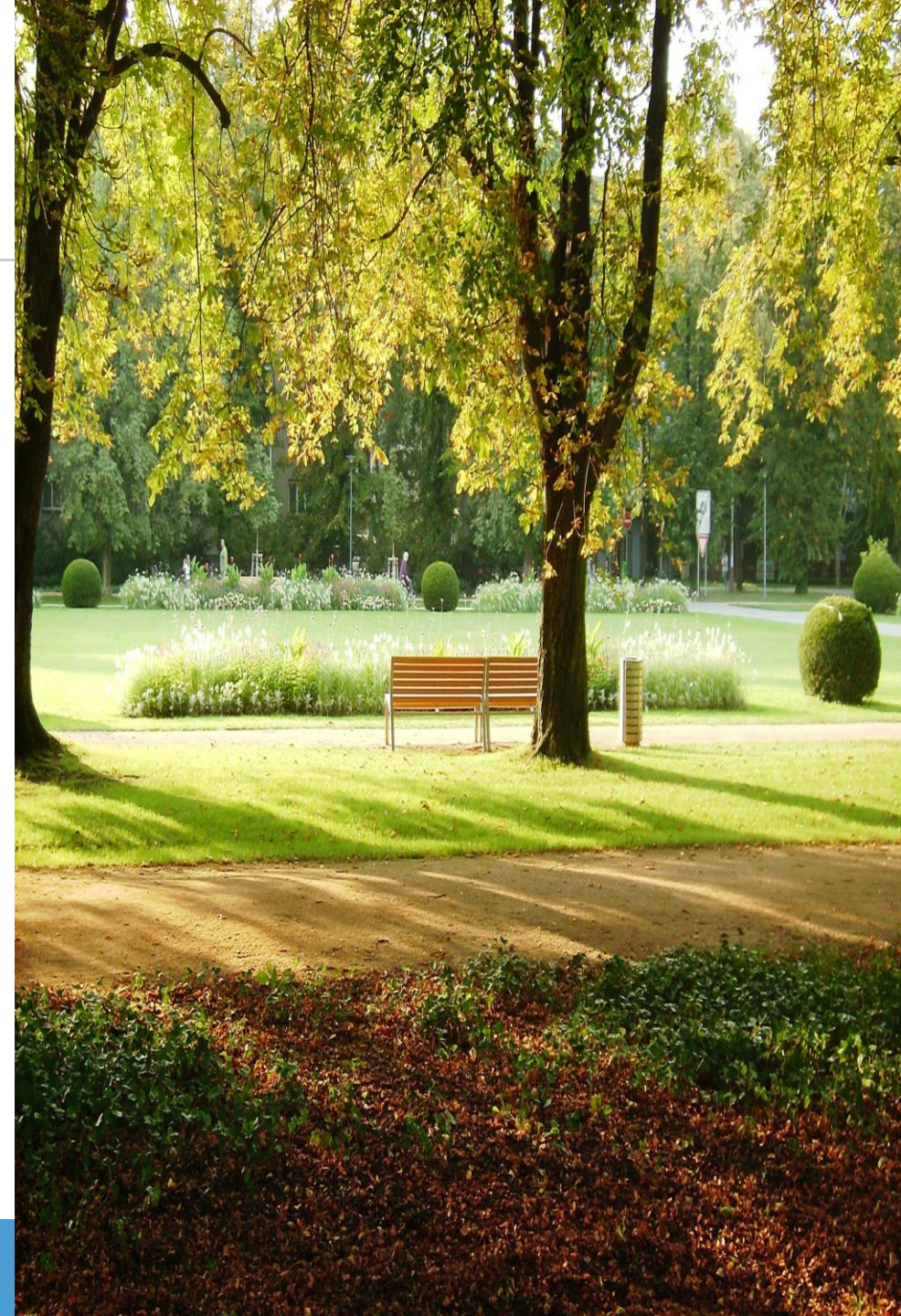
Traditional
Public Forums

Traditional Public Forums

An area of public property traditionally open for public assembly, expression, protest, solicitation, and debate, or “which has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Examples:

- Streets.
- Sidewalks.
- Parks.
- Public squares.
- Highways.



Nonpublic Forums

Public property that has not been traditionally used or designated for use as a forum for expressive activity.

Examples:

- Government employees' offices (usually)
- Lobbies of government buildings (depending on policy/practice)
- The interior of polling places
- Courthouses
- Military bases



Designated or Limited Public Forums

Areas the government has *intentionally* opened for expressive activity, even if the area was not traditionally used for such purposes.

Wide open → **Designated**

- Same standard as Traditional

Limited subjects/speakers → **Limited**

- Same standard as Nonpublic



Publicly Accessible ≠ Public Forum for First Amendment Purposes

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

- “Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”
- “There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”

State v. Barber, 281 N.C. App. 99 (2021)

- Interior of the North Carolina General Assembly is not “an unlimited public forum” for purposes of First Amendment activity.
- “The government may prohibit...conduct on a content-neutral basis that would affect the ability of members and staff to carry on legislative functions.”

Publicly Accessible ≠ Public Forum for First Amendment Purposes

United States v. Kokinda, 497 U.S. 720 (1990)

The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.

Postal entryways...may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment.



How do we know what type of forum is at issue?

- Look to history and tradition
- Analyze the government's **intent** for the forum (policy, practice, nature of the property)



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What type of forum is a local health department?



- Public hospitals have generally been recognized by courts as nonpublic forums, as have VA facilities.
- “Few places have more nonpublic characteristics than medical centers, whose work is private by its very nature.”

Low Income People Together, Inc. v. Manning, 615 F. Supp. 501 (N.D. Ohio 1985)

- Lobby and outpatient clinic waiting areas of a county-owned hospital were nonpublic forums.
- A key purpose was “to serve patients, friends and families of patients, and... staff who provide medical care,” not to provide a space for expressive activity by the general public.

What type of forum is a local health department?



Families Achieving Independence & Respect v. Nebraska Department of Social Services,
111 F.3d 1408 (8th Cir. 1997)

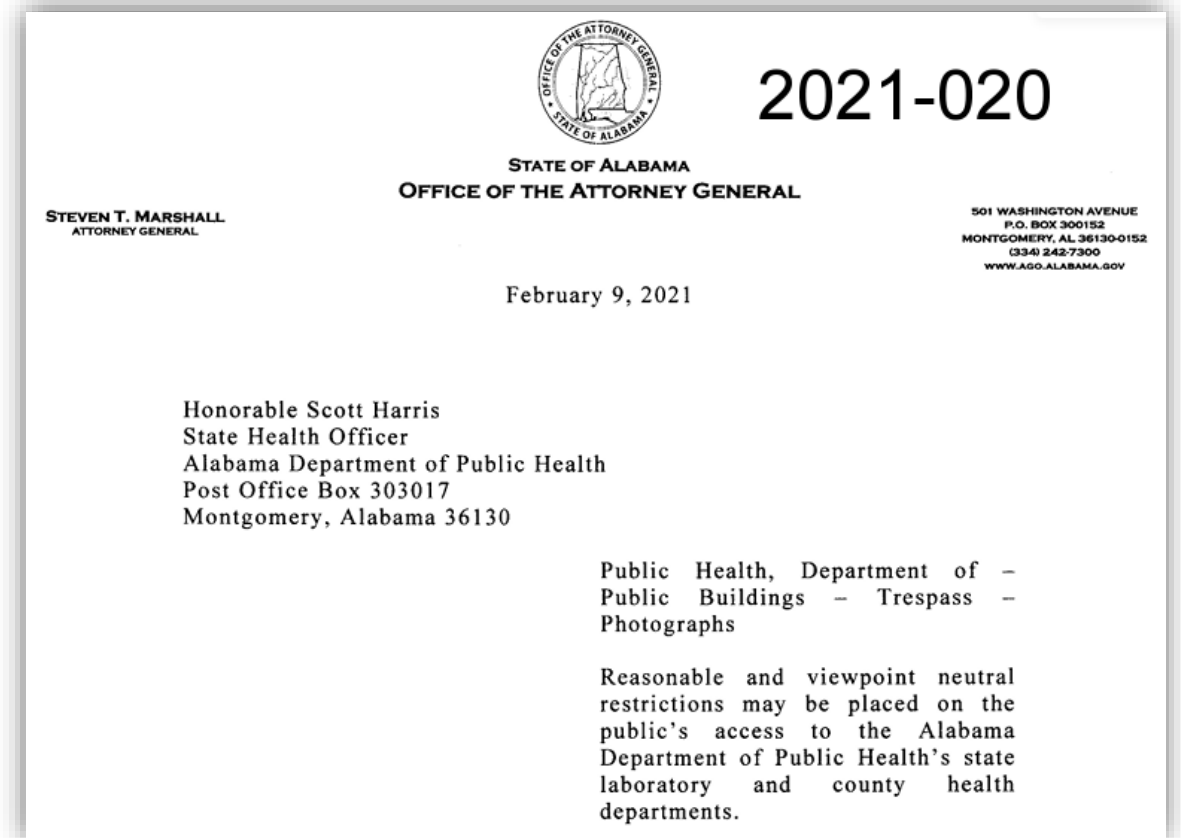
- Court held that DSS lobby was a nonpublic forum, finding that the lobby's principal purpose was to provide services to the public.
- The lobby was a high-traffic "workplace where government employees provide financial assistance and social services to thousands of clients"
- "Keeping the lobby generally closed to outside groups helps prevent additional congestion and the resultant disruption."

Make the Road by Walking, Inc. v. Turner,
378 F.3d 133 (2d Cir. 2004)

- Court found that welfare center waiting rooms were nonpublic forums because the New York City Human Resources Association enforced a policy reserving those rooms for the transaction of official business, including for welfare claimants and those accompanying them.

What type of forum is a local health department?

- In a 2021 opinion letter (No. 2021-020), Alabama's Office of the Attorney General concluded that county health departments are nonpublic forums.
- Alabama Department of Public Health could place "reasonable and viewpoint neutral restrictions" on the public's ability to film and take photographs inside of county health departments.



Forum Analysis – Lobbies

- ***Claudio v. U.S.***, 836 F. Supp. 1219 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994)
 - Main entrance lobby of a federal building was a nonpublic forum.
- ***United States v. Gilbert***, 920 F.2d 878 (11th Cir. 1991)
 - Interior of a federal government building was a nonpublic forum.
- ***Freedom Found. v. Washington Dep't of Ecology***, 426 F. Supp. 3d 793 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020)
 - Department of Ecology lobby was a nonpublic forum.
- ***Fams. Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.***, 111 F.3d 1408 (8th Cir. 1997)
 - Lobby of state-operated DSS was a nonpublic forum.

Nonpublic Forums

Restrictions must be:

- 1. viewpoint-neutral** and
- 2. reasonable** in light of the purpose served by the forum.



Sheets v. City of Punta Gorda, Florida,

415 F.Supp.3d 1115 (M.D. Fla. 2019).

- City ordinance prohibited filming in City Hall without the consent of the individuals being filmed.
- Ordinance did not target any specific opinion, belief, view, or ideology in its plain language.
- Parties agreed this was a limited public forum.
- How did the court rule?

“Reasonable in light of the purpose of the forum”

“The Government’s decision to restrict access to a nonpublic forum need only be reasonable; it need not be *the most* reasonable or *the only* reasonable limitation.”

Restrictions must be:

- Capable of clear interpretation and application
- Support a *legitimate* government objective



“Reasonable in light of the purpose of the forum”

What is a legitimate government objective?

- Safety and efficacy of employees
- “Captive audience” issues
- Duty to protect confidential information

Duty to Protect Confidential Information

HIPAA Privacy Rule
(45 CFR Parts 160
and 164)

Public health
patient
confidentiality law
(G.S. 130A-12)

Communicable
disease
confidentiality
(G.S. 130A-143)

Title X family
planning client
confidentiality
(42 CFR 59.11)

WIC confidentiality
(7 CFR 246.26)

SUD treatment
confidentiality
(42 CFR Part 2)

Filming and HIPAA

HHS Guidance:

HIPAA does not permit covered entities to give the media, including film crews, access to *any areas* of their facilities where patients' PHI will be accessible *in any form* without first obtaining a written HIPAA authorization from each patient whose PHI would be accessible.

- *“A patient’s presence in an area of a health care facility that is dedicated to the treatment of a specific disease or condition...reveals the patient’s diagnosis.”*



HHS Filming Guidance

May HIPAA-covered health care providers allow media or film crews to film patients in their facilities where patients' protected health information will be accessible without the patients' authorization if the patients' faces are blurred or their identities are otherwise masked in the video?

No. It is not sufficient for a covered health care provider to require the media to mask patients' identities when airing recorded video (such as by blurring, pixelation, or voice alteration), after the fact. Prior, express authorization from the patient is always required.

Filming and HIPAA

Issued by: Office for Civil Rights (OCR)

Unauthorized Filming for “NY Med” Results in \$2.2 Million Settlement with New York Presbyterian Hospital

New York Presbyterian has agreed to settle potential violations of the HIPAA Rules, specifically the impermissible disclosure of two patients protected health information to news media and the lack of appropriate safeguards for protected health information. The settlement includes not only a monetary payment of \$2.2 million, but also a comprehensive corrective action plan that includes two years of monitoring.

Filming and HIPAA

Unauthorized Disclosure of Patients' Protected Health Information During ABC Television Filming Results in Multiple HIPAA Settlements Totaling \$999,000 – September 20, 2018

The Department of Health and Human Services, Office for Civil Rights (OCR) announced that it has reached separate settlements with Boston Medical Center (BMC), Brigham and Women's Hospital (BWH), and Massachusetts General Hospital (MGH) for compromising the privacy of patients' protected health information (PHI) by inviting film crews on premises to film an ABC television network documentary series, without first obtaining authorization from patients.

Practical Considerations

- Policies addressing filming and photography.
 - What is the governmental interest being served?
 - Does the policy target specific opinions or perspectives?
 - Is it clear and understandable?



Practical Considerations

- De-escalation
- Training
- Consistency in implementation
- Communicate limitations to the public (signage, etc.)



Other Issues

When Auditors Refuse to Leave

Second-Degree Trespass - G.S. 14-159.13

Individual enters or remains on the premises of another without authorization and after being asked to leave by a person in charge of the premises, a lawful occupant, or another authorized person.

WARNING

NO

TRESPASSING

Trespass in a Building Open to the Public?

Myth:

Government buildings cannot be the premises “of another”

Reality:

Government buildings belong to the *government*, but if held open to the public, the law implies the government’s consent for the public to enter.

Implied Consent Can Be Revoked

Explicit Revocation:

- *State v. Nickens*, 262 N.C. App. 353 (2018) – order to leave revokes any implied consent to remain



Implicit Revocation:

1. Individual's **conduct** is sufficient to render the implied consent void
2. Individual **exceeds the scope** of the implied consent

Public Records Requests and First Amendment Audits

1. The request does not need to be fulfilled immediately.
2. Requestors do not need to fill out a form or identify themselves in any way.
3. Requestors can legally film the documents provided by a local government in response to a public records request.
 - Be careful to redact/withhold confidential information



Final Takeaways

Filming public officials engaging in public duties is likely protected activity under the First Amendment

- BUT case law largely focuses on filming police in traditional public forums

A county can likely impose reasonable, viewpoint-neutral restrictions on filming in nonpublic forums

- Policy, practice, and signage are all important

Bulletin Highlights for Health Directors

- **p. 48 - Other Government Objectives to Consider in the “Reasonableness” Analysis**
 - Safety and efficacy of government employees
 - Protection of confidential information
 - Vulnerability of “captive audiences”
- **p. 33-34- Examples of Forum Determinations**
 - Departments of Social Services and Local Health Departments
- **p. 55 - Practical Considerations for Local Governments**

