



SAN JOSE POLICE DEPARTMENT

TRAINING BULLETIN

TO: ALL DEPARTMENT PERSONNEL

FROM: Anthony Mata
Chief of Police

SUBJECT: FIRST AMENDMENT AUDITORS

DATE: October 23, 2022

Bulletin #2022-035

The [First Amendment of the U.S. Constitution \(link\)](#) protects freedom of religion, speech, and the press, and the right to peaceful assembly and petition the government for redress of grievances. [Article I of the California Constitution \(link\)](#) has similar protections. Activities protected by the U.S. and California Constitutions include, but are not limited to, auditing, protests, demonstrations, rallies, assemblies, and marches on City streets, sidewalks, plazas, parks, and other similar areas open to the public. Additionally, the Department's philosophy regarding First Amendment activity is noted within [Training Bulletin #2022-023 First Amendment Activity and Civil Disturbance Performance Reminders \(link\)](#).

First Amendment Auditors (FAAs) are members of a social movement who test the constitutional knowledge of government employees. Typically, these individuals video record the encounter and post the video on social media platforms. These videos may serve as a basis for a complaint with oversight bodies (e.g., Internal Affairs) or for a legal suit against the individual and/or the government entity (e.g., the Department or City of San Jose).

It is important for Department members to understand what FAAs legally can and cannot do. The following information is intended to assist Department members who encounter FAAs.

Who are FAAs?

FAAs are individuals who exercise their right to record government employees and law enforcement officers engaged in the exercise of their official duties in public places. First Amendment auditing is a form of activism where an individual seeks to test the constitutional knowledge of government employees.

When an FAA is at the Police Department, where can they legally be?

FAAs may freely occupy any area accessible and open to the public (e.g., sidewalks, streets, parking lots, parks, or City, State, or Federal buildings). FAAs may be inside the Information Center, in the parking lot open to the public (i.e., the "Info Center Lot"), and in any public area surrounding the Police Department. They are not allowed in any secured area on any SJPD campus, including parking lots.

Are FAAs allowed to video or audio record while they are at the San Jose Police Department?

Yes, FAAs may record from any area accessible and open to the public (e.g., sidewalks, streets, parking lots, parks, or City, State, or Federal buildings).

Can FAAs heckle, provoke, curse, or yell at Department members?

Yes. The First Amendment allows for heckling, provocation, profanity, and raised voices. However, in rare circumstances, speech may cross into incitement^{1 2} or threats^{3 4 5}. Before any action is taken for incitement or threats, Department members should have a supervisor respond to the scene for consultation.

Are FAAs members of the press?

FAAs may or may not be members of the press. As a reminder, Duty Manual sections L 2306.1 and 2306.2 address who is a duly authorized representative of the media. A press pass or media identification is not a requirement of being a duly authorized member of the media. "Freelance" media personnel, including reporters, photographers, videographers, bloggers, or vloggers without valid media credentials, but possessing other identification establishing affiliation and employment with a third-party news service, should be considered duly authorized representatives of the media. A personal blogger with no credentials and no supporting third-party news service identification does not meet the criteria of duly authorized. Department members should use reasonableness and sound decision-making when considering a person to be a duly authorized representative of the media. In the event of uncertainty, officers should contact a supervisor for direction.

Do Department members need to provide an FAA with their name and badge number, if asked?

Yes, if they are on duty or they are acting in a professional capacity (e.g., they are contacting an FAA in the field), *Department Members, will supply their name, rank and position, and similar identifying information in a professional manner to any person who may inquire.*⁶

No, if they are off duty and not acting in a professional capacity (e.g., an FAA confronts a Department member while walking into work), Department members do not need to identify themselves as government employees.

Note that this applies to both sworn and professional staff.

¹ <https://supreme.justia.com/cases/federal/us/395/444/>

² https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=415.&lawCode=PEN

³ <https://supreme.justia.com/cases/federal/us/538/343/>

⁴ https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=71.&lawCode=PEN

⁵ https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=422.&lawCode=PEN

⁶ Duty Manual section C 1409

Can a law enforcement officer take away a recording device from an FAA, tell them to stop recording, or demand to see the recording?

No, a law enforcement officer may not take away a recording device, tell someone to stop recording, or demand to see a recording, even if the recording may be of evidentiary value.

Can an FAA record or photograph a Department member's personal vehicle and license plate?

An FAA who is located within a legally authorized area, accessible and open to the public (e.g., sidewalks, streets, parking lots, parks, or City, State, or Federal buildings), may photograph or record personal vehicles and license plates of government employees.

Do Department members need to call for a supervisor if an FAA requests one?

While it is not a requirement, Department members should request a supervisor to respond to the scene if one is requested.

Does an FAA need to provide law enforcement officers with their identification when asked?

Generally, no, FAAs are not required to state their name or explain their reason for recording. If the contact is a consensual encounter or if there is a detention based on reasonable suspicion, there is no statutory requirement for an FAA to provide identification to a law enforcement officer. An officer may ask for identification, but failure to produce identification is not a violation of [Penal Code section 148\(a\) \(link\)](#).

If there is a detention based on probable cause of a law violation, there is a statutory requirement for an FAA to provide identification to a law enforcement officer. An officer may ask for or request identification; failure to produce identification may, under certain circumstances, constitute a violation of Penal Code section 148(a).

Can an officer direct an FAA to leave an area?

An FAA can be directed to leave an area that is not open to the public (e.g., secured parking lots, secured areas of buildings, crime scenes).

An FAA cannot be directed to leave if the area is accessible and open to the public.

If a Department member is on a call for service and an FAA begins to yell at them as they are trying to investigate the call, can the FAA be asked to leave?

The Department member may ask the FAA to move a reasonable distance away from where the officer is trying to conduct the investigation.

What is the distance that a Department member can direct the FAA to move?

The distance a Department member can direct an FAA to move is based on the totality of the circumstances. The FAA may be moved only that distance which is reasonably necessary to conduct the investigation. The reasonableness is based on a reasonable person standard.

Example #1: An officer is on a car stop with three occupants and an FAA arrives on scene and stands at the passenger side door of the vehicle. The FAA records the officer and yells obscenities and derogatory statements at the officer. It is reasonable for the officer to tell the FAA to move back a reasonable distance for officer safety.

Example #2: An officer is investigating an assault and battery, and an FAA arrives on scene. The FAA is recording while standing approximately 30 feet from the officer and is asking the officer questions. It is not reasonable for the officer to direct the FAA to move if the questions are regarded as a distraction.

Can an officer arrest an FAA for Penal Code section 148(a)?

Yes, an officer can arrest an FAA for violating Penal Code section 148(a). However, before an officer decides to arrest an FAA for violating Penal Code section 148(a), the officer should:

- Ensure that all the elements of Penal Code section 148(a) have been met and that the FAA's conduct does not come under the exception under Penal Code section 148(g).
- Ensure that reasonable efforts have been made to de-escalate the situation with the FAA.
- Notify a supervisor and request they respond to the scene.

Per [Penal Code section 148\(g\) \(link\)](#), making a recording of a peace officer, while the officer is in a public place or the person making the recording is in a place they have the right to be, does not constitute, in and of itself, a violation of Penal Code section 148(a), nor does it constitute reasonable suspicion to detain the person or probable cause to arrest the person.

What do FAAs do with the videos they take?

When government employees abide by legal requirements and do not violate the Constitutionally afforded rights of an FAA, the videos are rarely posted on the Internet. Conversely, if the encounter results in a First Amendment violation, the FAA may post the video on a social media platform. These videos may also serve as a basis for a complaint with Internal Affairs and for a legal suit against the Department member, Department, and/or the City.

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As a reminder, per Duty Manual section C 1308, Department members will be courteous and professional to the public. Department members will be tactful in the performance of their duties, control their tempers and exercise the utmost patience and discretion even in the face of extreme provocation.

A handwritten signature in black ink, appearing to read 'A. Mata', is positioned above the printed name and title.

Anthony Mata
Chief of Police

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