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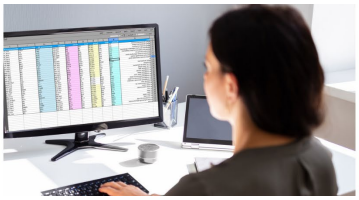


HEALTH INFORMATION AND DATA SHARING

Guidance

Balancing Client Privacy with First Amendment Rights in Local Health Department Clinics

A county health department contacted the Network for guidance on whether the department could prohibit the recording of video and/or photography in their facilities. The question arose after an individual entered their WIC facility and began filming and harassing clients and staff. Police who responded to a call from the staff informed the staff that they could not lock their doors or refuse entry to a person since it was considered a public building.

This question raises complex and contestable legal claims that lack clear precedent. Nonetheless, as explained in detail below, the Network did not identify any legal barriers to limiting access to WIC activities, as long as the restrictions are content neutral (i.e., apply equally to all). Therefore, the department can post signs prohibiting filming of areas serving clients, and limit access to clients obtaining services and those who need to accompany them.

To answer the request, the Network focused on the key legal and policy questions. Those involve competing privacy and First Amendment claims.

Privacy/Confidentiality

WIC Clinics. Under federal law, 7 CFR 246.26, WIC clinics are responsible for protecting their clients' right to confidentiality. Although the law does not fit perfectly because it refers to applicant and client information and records, the following subsection is broad enough to support restricting access to filming clients:

> (d) *Confidentiality of applicant and participant information*—(1) *WIC purposes.*
>
> (i) Confidential applicant and participant information is *any* information about an applicant or participant, whether it is obtained from the applicant or participant, another source, or generated as a result of WIC application, certification, or participation, that individually identifies an applicant or participant and/or family member(s). Applicant or participant information is confidential, regardless of the original source and

exclusive of previously applicable confidentiality provided in accordance with other Federal, State or local law (emphasis added)….

(ii) Except as otherwise permitted by this section, the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the WIC Program whom the State agency determine have a need to know the information for WIC Program purposes. These persons may include, but are not limited to: personnel from its local agencies and other WIC State or local agencies; persons under contract with the State agency to perform research regarding the WIC Program, and persons investigating or prosecuting WIC Program violations under Federal, State or local law.

Clearly, a photographic image constitutes "any information about an applicant or participant." Consequently, federal law requires the agency to restrict access to participants or officials with a need to know. The individual filming the clinic does not fall within the allowed categories.

Michigan policy supports this interpretation. In a policy memo titled MI-WIC Policy, 1.03, Confidentiality (April 15, 2011), the Michigan Department of Health and Human Services (MDHHS) states that:

1. WIC staff shall not disclose confidential information [as defined above] to anyone other than WIC staff and others listed in this policy who have a need to know the information for the benefit of the WIC client.

2. WIC agencies shall assure privacy when performing the following:

   a) Income determination
   b) Anthropometric and laboratory procedures
   c) Obtaining medical history
   d) Client counseling….

5. The use and disclosure of confidential applicant and client information shall be restricted to persons directly connected with the administration or enforcement of the WIC Program at the local, state or federal level who have a need to know the information for WIC Program purposes.

The individual at the heart of this question has no right to film any WIC clients.

HIPAA. According to a US Department of Agriculture policy memo, WIC programs are not covered entities for HIPPA purposes (USDA Policy Memo, 2001). Nonetheless, to the extent that WIC locations share space with a hybrid or HIPAA-covered entity, such as a waiting room, the Office for Civil Rights (OCR) in the US Department of Health and Human Services has stated that:

> **[H]ealth care providers cannot invite or allow media personnel, including film crews, into …areas of their facilities where patients' PHI will be accessible in…visual or audio form…without prior written authorization from each individual who is or will be in the area or whose PHI otherwise will be accessible to the media…(**OCR HIPAA FAQs, 2016).

Note that the HIPAA Privacy Rule covers many health department clinics. If HIPAA applies, a full face photographic or comparable image constitutes personal health information (PHI) that must be protected from disclosure (45 CFR 164.514(b)(2)(Q)). According to OCR Guidance, HIPAA "does not permit a covered entity to give the media access to such patient PHI unless it obtains a valid HIPAA authorization from the patient

before giving such access" (https://www.hhs.gov/sites/default/files/guidance-on-media-and-film-crews-access-to-phi.pdf).

HIPAA permits disclosure of PHI if necessary to avert a serious threat to health or safety of the person or to the public. The disclosure must involve someone the covered entity believes can prevent or lessen the threat, and may include the target of the threat. See, 45 CFR 164.512(j). None of the permitted disclosures applies to filming a HIPAA-covered location.

In support of this analysis, a recent Alabama Attorney General Opinion, (Ala Op Att'y Gen No 2021-020 at *2 (Feb. 9, 2021)), discusses HIPAA implications. The Opinion notes that because the health department "has a duty to safeguard protected health information and to minimize incidental disclosure of such information [under] 45 C.F.R § 164.530(c)(2)(i-ii)" and because [the group at issue that is seeking to film] routinely posts their videos on the internet[,]…allowing video recording of the lobby and secure areas of [health department] facilities could run afoul of HIPAA privacy mandate."

Michigan's Public Health Code. The Public Health Code does not specify general privacy and confidentiality protections. Instead, the Code provides broad power for local health departments to obtain information, including private information, to conduct investigations or provide services to protect the public's health. See, e.g. MCL 333.2221. In turn, the Health Officer is responsible for operating the local health department to protect the public's health, and is empowered to take actions necessary or appropriate to ensure that the health department carries out its public health functions. MCL 333.2428.

The health officer has the authority and responsibility for establishing operational standards to encourage and support individuals in their access to and use of public health programs and services, including the WIC Program. MCL 333.2433. It is reasonable to assume that these responsibilities would include protecting clients' privacy and confidentiality.

In this regard, a health department must provide programs and services that prevent disease and injuries, promote wellness, address health problems of particularly vulnerable population groups, and support nutritional services. MCL 333.2433; MCL 333.2473.

Addressing the First Amendment Claims

The individual at issue in this technical assistance request appears to be part of the "First Amendment Auditor" movement, based on his social media channels. Members of the group "'test' the strength of their First Amendment speech rights," often by "filming government employees at government worksites." Such auditors have also been described as "individuals who film government employees in the course of their duties in the hopes of catching them violating someone's constitutional rights." Elizabeth M. Jaffe, *Caution Social Media Cyberbullies: Identifying New Harms and Liabilities*, 66 Wayne L Rev 381, 395 (2021). Some locales have even created "ordinances protecting police from aggressive First Amendment Auditors." *Id.* at 396.

As such, the individual will raise First Amendment issues on any attempts to restrict the filming activity. For the following reasons, we do not expect this claim to be successful.

The U.S. Supreme Court "[has] recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 US 37, 46 (1983). "Governmental actions are subject to a lower level of First Amendment scrutiny when the governmental function operating is not the power to regulate or license, as lawmaker, but, rather, as

proprietor, to manage its internal operations," *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Accordingly, the government is permitted to regulate the conduct of individuals on public property, even if those regulations infringe on First Amendment rights. The type of regulation permitted in a given context is based on a determination of "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes," which depends on the type of public property at issue. *Id.* at 726.

When a forum is considered to be nonpublic, "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." *Perry*, 460 US at 46. Similarly, the Court has permitted the reasonable prohibition of solicitation on postal service property because "the intrusion [of solicitation] create[ed] significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails." *Kokinda*, 497 U.S. at 721.

A waiting area in a health department is almost certainly a nonpublic forum, even if the service is provided in an otherwise public building. For instance, in *Make the Road by Walking (MRBW), Inc. v. Turner*, 378 F3d 133, 140 (2nd Cir. 2004), a job center run by New York City's Human Resources Administration where people apply for welfare benefits can exclude from its waiting room, pursuant to job-center policy, a welfare-benefits advocacy organization seeking to observe welfare agency staff. MRBW "claimed that [the Human Resources Administration's] access policy violated the First and Fourteenth Amendments of the U.S. Constitution because it…abridged MRBW's speech, press, petition, and associational rights." In rejecting these arguments, the court noted that the waiting rooms in the job centers belong to the "nonpublic forum" class because "governmental intent and access policy, as well as the purpose of a forum, are the touchstones for differentiating between designated public fora and nonpublic fora."

A policy that prohibits First Amendment Auditors in such a nonpublic forum must therefore be "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985). As long as the health department does not single out First Amendment Auditors or other specific groups/individuals because of their viewpoint and has a valid reason to exclude filming, prohibiting filming in waiting areas should be permissible. Examples of valid reasons to prohibit an activity in a nonpublic forum include: (1) the activity is disruptive, *see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992); (2) the activity distracts employees from their work by demanding "considerable time and energy" to manage it, *Kokinda*, 497 U.S. at 735; (3) the activity takes up space needed to efficiently accomplish government business, *id.*; or the agency wishes to "restrict use to those who participate in the . . . official business," *Perry*, 460 US at 53. *See also People v. Bedwell*, No 344820, 2019 WL 2439333 at *3 (Mich Ct App June 11, 2019); *Make the Road by Walking*, 378 F3d 133.

Michigan case law supports this analysis. In *People v. Bedwell*, No 344820, 2019 WL 2439333 at *3, the Michigan Court of Appeals stated of a courthouse lobby that, "although [it] is a public place, its principal purpose is not the free exchange of ideas," so it is not a public forum. "Rather, a courthouse is a government-owned property established for the purpose of administering justice, and the government has an interest in preserving a decorous environment there in order to achieve that interest." Thus, because the "state had a valid, viewpoint-neutral interest in restricting noise levels and maintaining a calm atmosphere inside the courthouse, the conduct that led to defendant's arrest ["being loud and using swear words"] was not protected by the First Amendment." *Id.*

Likewise, the recent Alabama Attorney General's Opinion cited above supports the analysis, though it is certainly not binding in Michigan. The Opinion specifically addressed three First Amendment Audit activities: can county public health departments limit photographs or video recording in their lobbies; can a person causing a disturbance be removed; and can a state laboratory limit its accessibility to only those people with a business purpose? Ala Op Att'y Gen No 2021-020 at *2 (Feb. 9, 2021). The Opinion answered yes to each question.

> [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." . . .
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> The state laboratory and county health departments are nonpublic fora….Thus, any restriction on public access to these buildings need only be "viewpoint neutral and reasonable in light of the purpose served by the forum." "It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its] internal operation[s]....'" In this context, neither the state laboratory nor the county health departments act in a lawmaking capacity.
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> Like any private landowner, the government may "preserve the property under its control for the use to which it is lawfully dedicated." Further, like any place of employment, a government workplace exists to accomplish the business of the employer. The government may, therefore, exercise its right to control access to its workplace to avoid interruptions to the performance of the duties of its employees.

Id. [Citations omitted.] The Opinion further concludes that "[i]n addition to reasonable and viewpoint neutral restrictions on visitors, [the Alabama Department of Public Health (ADHP)] may direct those who refuse to abide by the restrictions to leave the property. Failure to leave the property after being directed to do so may constitute a trespass" under Alabama law. *Id.* at *4.

Discussion

While this request for guidance indicates that the site of the filming is a public building, one's access to the building does not include harassing individuals, invading their privacy, and interfering with their right to obtain services, including health and nutrition services. For instance, one cannot walk into a public hospital or emergency room and start filming patients. Many governmental entities restrict movement within a public building and may limit access in certain portions of the building to those who have a legitimate reason to be there.

As long as the restrictions on filming and signage are content neutral (that is, they apply equally to everyone), and are based on reasonable considerations (such as protecting clients' privacy), it appears the health department can limit access to those with a need to be on the premises, and can restrict activities (i.e., filming others) once entry to the premises is granted. Thus, the health department can post signs prohibiting filming of areas serving clients.

The Network for Public Health Law cannot provide you with legal advice for handling a particular matter. We encourage you to share this memo with your legal counsel to ensure that he or she concurs with our analysis. If the activity continues, we recommend asking your attorney (or the county prosecuting attorney's office) about sending or delivering a cease and desist letter to this individual. If he continues to harass members of the public who seek health department assistance, the health department can request an injunction in court. That way, the court might issue a show cause order against the individual as to why he should not be held in contempt and then arrested for violating the court order. In short, this shifts the burden to the individual to

demonstrate why his First Amendment rights should outweigh individuals' privacy protections. Our analysis suggests that the health department's privacy arguments are strong and should prevail.

SUPPORTERS

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This document was developed by Peter D. Jacobson, Co-Director, and Abigail Lynch, Legal Researcher, for the Network for Public Health Law – Mid-States Region Office. **The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.**

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