**IRB Tipsheet: Public vs. Private Behaviors and Spaces in Observational Research**

# **Overview**

A project involving observing public behavior may be considered exempt under certain circumstances ([45 CFR 46.104(d)(2)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.104(d)(2))). In these cases, there is no need for the investigator to obtain informed consent from research participants as long as the behavior being observed is considered public behavior and a few other criteria are met (e.g., data are recorded without identifiers or data are benign).

Therefore, you can use this tipsheet to determine if consent is necessary for your observational human subjects research project.

# **I. Public Behaviors Take Place in Public Spaces**

Generally speaking, behavior which is considered “public behavior” is behavior that takes place in a “public space.” \*Therefore, if your project meets these criteria, you likely do not need to obtain informed consent.

Public behaviors and public spaces meet each of the three criteria below:

1. There is no expectation of privacy by the person being observed. In other words, it would not be reasonable for the person being observed to assume that their behaviors (such as conversations or actions) would be kept secret ([45 CFR 46.102(e)(4)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.102(e)(4))).
	* Examples would include behavior in a public park, grocery store, library.
2. There is no prerequisite (membership, etc.) for entering the space.
	* Examples include a public park, a public sidewalk, or publicly accessible areas of UWL’s campus.
3. If there is any interaction (or intervention) between the researcher and the person(s) being observed, it is considered “benign.” ([45 CFR 46.104(d)(3)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.104(d)(3)))
	* According to [45 CFR 46.104(d)(3)(ii)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.104(d)(3)(ii)), a “benign intervention” (or a “benign interaction”) is brief in duration, harmless, painless, not physically invasive, not likely to have a significant adverse lasting impact on the subjects, and the investigator has no reason to think the subjects will find the interventions are offensive or embarrassing. Some examples of interventions that might be considered “benign” when observing public behavior include standing backwards in an elevator, walking in the opposite direction from the crowd on a sidewalk, wearing clothing inside-out, etc.
	* According to [45 CFR 46.401(b)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.401(b)), if the person(s) being observed are children, there can be **no** interaction between the researcher and the children.

## **\*But Context Matters: Not all behavior in public spaces is considered public behavior.**

It is important to note that not all behavior which takes place in public spaces should be considered public behavior for research purposes.

The expectations of the individual and the context of the behavior matters. One example is in Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings. While anyone could theoretically attend some meetings, those attending the meeting expect that their conversations, stories, and other behaviors are kept private. What happens at these meetings would then not meet the definition of “public behavior.” As another example, behavior which takes place in churches might be considered public behavior if it takes place in the main lobby of the church or during a public church sermon, but may be private behavior if it takes place in an invitation-only Bible study group.

# **II. Special Consideration for Online Behaviors and Spaces**

The guidelines for public behaviors and spaces above also apply to protocols involving observing online behaviors or interactions.

As one example, public figures’ posts to social media can be considered public behavior in nearly every circumstance because public figures should assume that their behaviors, including those posted online, will be observed and noted. If a web site or a social media platform requires logging in to access any of its features (such as Facebook or Twitter/X), but there is otherwise no fee or special affiliation required to join, and there is no interaction or only benign interaction between the researcher and the person(s) being observed, the online space may still be considered public. The research protocol must make it clear that the person(s) being observed should not reasonably expect that their posts on those platforms would be kept private. For instance, even though Facebook requires logging in to view posts, anyone is free to make an account (or possibly even multiple accounts). Thus, if a post is flagged as “public,” virtually anyone could view it provided that they have a Facebook account.

**If a reasonable person would conclude that access to the online space also comes with some expectation of privacy, the protocol requires further review.** For example, if a certain Facebook group is exclusionary, or requires special permission to join, this particular group is considered private, and this protocol would require further review. As another example, if an individual’s Twitter/X posts are only visible to followers, this protocol would require further review because even though the individual might allow their followers to see their posts, it is not reasonable to expect that the individual would allow their followers to collect data about their posts or distribute research findings about their posts.

**Investigators should ensure that, no matter how the online behaviors/spaces are being observed, the identities of the person(s) being observed should be protected as outlined above.** For example, even if a person’s Facebook profile page is public and includes identifying information such as full first and last name and date of birth, the investigator should still anonymize this information when compiling data such that the person’s identity could not reasonably be ascertained by anyone who accessed the data or written results from the data.

# **III. Seeking IRB Approval for Observations of Public Behavior**

If a researcher seeks exemption for their protocol or seeks to observe behavior without obtaining informed consent, the IRB submission must make several points clear in their Narrative Statement or Project Description:

* The researcher must describe how each of the three criteria for public behaviors/public spaces listed above are met.
* The researcher must clearly describe procedures for documenting the behaviors (for instance, typed on a laptop/written on a notebook in real time while watching the behaviors).
* The researcher must clearly describe how the identities of the person(s) being observed are protected (for instance, if field notes are anonymized while being taken and could not be used to somehow identify the person(s) being observed).
	+ Recordings of public behavior are allowed as long as any disclosure of the human subjects’ responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects’ financial standing, employability, educational advancement, or reputation ([45 CFR 46.104(d)(2)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.104(d)(2)(ii))(ii)).
		- If recordings are being made and the above risks are possible, the researcher needs to describe in their IRB submission how those recordings will be made, used, stored, and destroyed securely to protect subjects’ privacy and the confidentiality of the data ([45 CFR 46.104(d)(2)](https://www.ecfr.gov/on/2018-07-19/title-45/part-46#p-46.104(d)(2)(iii))(iii)).

# **IV. Observing Behaviors in Private Spaces**

If a protocol does not meet the requirements above, it is still possible to conduct research that involves observing behaviors in a private setting. However, the IRB protocol would not be considered exemptible, and it would become necessary to obtain informed consent from those being observed or request a waiver of informed consent using Attachment D if your study meets the necessary requirements (see IRB website for access to form).

In online spaces, it is similarly still possible to conduct research observing behaviors in private settings. Because of the nature of online interactions, it may not be possible to obtain informed consent from every participant in an online group, even if that group has some membership requirements. For example, if a Facebook group for LGBTQ+ people and allies is considered “private,” but anyone who requests access to the group who promises to abide by the groups’ rules (such as not “outing” anyone or not making anti-LGBTQ+ comments) is granted access to the group, the researcher may request that a moderator make a pinned post explaining that, for a two-week period, posts will be observed and anonymous data will be collected for research purposes.

# **V. For More Information**

For more information on ethically conducting research in these contexts, see the following CITI trainings:

* IRB Review of Observational Research
* Facial Recognition Considerations for Researchers
* Social Media and Research Recruiting