

Guidance on Limiting Access to Publicly Accessible Areas

Public bodies are sometimes faced with significant challenges when members of the general public attempt to access certain areas of their facilities. While public spaces are typically intended to be open and accessible to the general public, such openness can sometimes lead to disruptive behavior and safety concerns. To complicate matters further, as public institutions, units of local government are subject to certain constitutional limitations when restricting access to their facilities. Public bodies must carefully craft their policies so as to maintain the security and safety of their facilities while also avoiding any constitutional violations.

Constitutional Considerations

The limitations on a unit of local government's ability to restrict the public's access to their buildings stems primarily from the First Amendment, which protects freedom of speech and assembly, and requires that any restrictions on these rights be carefully scrutinized. Even though the First Amendment is often thought of in a free speech context, access restrictions to public areas are evaluated under the same analysis.

The First Amendment prohibits laws that abridge the freedom of speech or the right of the people to peacefully assemble. This right, however, is not absolute, and public bodies may impose some regulations on speech and assembly depending on the type of restriction and the specific area where the speech or assembly takes place. Specifically, the level of restriction depends on whether the area is a public or a non-public forum, and if the restriction is content based or content neutral. A content-based restriction regulates speech based on the message being expressed, while a content-neutral restriction regulates the time, place, or manner of speech regardless of its content.

Traditional public forums are spaces that are open for public assembly and expressive activity, such as sidewalks, parks or open spaces. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Designated public forums are government facilities that are not traditionally open to public expression, but have been intentionally opened by the government for public discourse. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985). A public body's ability to restrict access and assembly in these areas is highly limited. Content-based restrictions in these spaces must satisfy strict scrutiny, meaning they must serve a compelling government interest and be narrowly drawn. On the other hand, content-neutral time, place, and manner restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry* at 46.

In a nonpublic forum, the government may restrict speech "as long the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose a speaker's view." *Cornelius* at 800. Nonpublic forums are spaces such as administrative offices and adjoining hallways, meeting rooms not open to the public, mailrooms, IT rooms, employee-only work areas, maintenance rooms, and utility areas. Public bodies have more leeway to restrict access in these areas, as long as the restrictions are reasonable and not based on viewpoint discrimination. Public bodies may limit access to their public facilities to ensure that the property is used for its intended purpose and to minimize disruption. In *Cornelius*, the Court held that "the Government, no less than a private owner of property,



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has power to preserve the property under its control for the use to which it is lawfully dedicated. The First Amendment does not forbid a viewpoint neutral exclusion of individuals who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.” *Id* at 811.

Suggested Policy Language for Board Adoption

If a unit of local government wants to restrict the general public’s access to the public forums within their facilities, they should be able to articulate a significant government interest as to why this restriction is in place. For example, a public body can adopt a policy stating that “access to the public facilities shall be limited to individuals engaging in lawful and authorized purposes consistent with the function of the facility, and the Board may impose reasonable restrictions on individuals whose presence poses a documented risk to safety, disrupts operations, or otherwise conflicts with the intended use of the facility.” As long as the policy applies to all members of the general public and is thus content neutral, the policy is more likely to withstand a legal challenge.

A public body faces less risk by restricting the general public’s access to the public body’s nonpublic forums. All that is required to do so is a reasonable content neutral justification as to why the general public is restricted from accessing these spaces. We feel it is best practice for the public body to identify within its board policy the location of all non-public forums. This way there is no ambiguity where the restriction applies, and an individual cannot claim that the subject area is considered “open to the public.”

In conclusion, we recommend that each public body implement a written policy that distinguishes between public and nonpublic forums across all public facilities and properties. Additionally, we recommend that each public body implement a content neutral policy restricting access to the public facilities to individuals who are engaged in unlawful and disruptive behavior and granting the Board the deference to impose reasonable restrictions on access to the facilities. Finally, we recommend that a public body expressly identify the location of the nonpublic forums within their Board Policy and adopt a policy prohibiting the general public’s access to such areas.

Please contact your Robbins Schwartz attorney if you need assistance in drafting a policy regulating the accessing of your facilities.