

Humber Research Ethics Board (REB) Bulletin No 1 /2019

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Do you know your privacy rights when public research is being conducted? Read more ...

Conducting public research: The impact of privacy rights

Humber researchers often conduct various forms of “public research”. For this discussion, I have chosen to define “public research” as the observation of human subjects in a public setting, the interrogation and/or recording of persons in public spaces or the examination of publicly available human related data and images. Defined in such expansive terms, “public research” would capture research activities such as:

1. Making general observations of persons in public spaces (for example, the focus of the research may be the interaction of customer service personnel with customers of the business or the manner in which smokers interact with each other in a group setting compared to non-smokers who are also in a group setting);
2. Interviewing persons in public places (for example, the focus of or a component of the research may be to interview persons who use the post office or other government agencies);
3. Making video or audio recordings of persons in public spaces (for example, the focus of the research may involve making video recordings of how customers at an airport visually and audibly react to perceived shortcomings in service);
4. Reviewing and analysing videos, photographs and audio recordings from the internet and social media networks.

An issue common to all of these research activities is the consideration of whether people who are in a “public setting” have a reasonable expectation of privacy and what impact this would have on the research ethics review process.

In conducting ethics reviews of research proposals, Research Ethics Boards (REBs) are guided primary by the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*. The latest version, TCPS 2 (2014) provides the following guidance:

1. REB review is not required for research involving the observation of people in public places where:

1. it does not involve any intervention staged by the researcher, or direct interaction with the individuals or groups;
2. individuals or groups targeted for observation have no reasonable expectation of privacy; and
3. any dissemination of research results does not allow identification of specific individuals.

The application of this guideline means that Humber researchers do not need to submit REB applications where the research to be conducted calls for the mere observation of persons in public spaces, provided that these persons would have no reasonable expectation of privacy in such places.

2. Research that relies exclusively on information that is publicly available, or made accessible through legislation or regulation, does not require REB review.

The application of this guideline means that Humber researchers do not need to submit an application for review when the research to be conducted would involve an examination of things such as photographs and recordings which have been legitimately placed in the public domain. For example, research involving a review of political debates to determine the tone of the discourse surrounding Indigenous issues would not require REB review.

3. REB review is not required where research uses exclusively publicly available information that may contain identifiable information and for which there is no reasonable expectation of privacy.

The TCPS guidance notes that “identifiable information may be disseminated in the public domain through print or electronic publications; film, audio or digital recordings; press accounts; official publications of private or public institutions; artistic installations, exhibitions or literary events freely open to the public; or publications accessible in public libraries.” The application of this guideline means that Humber researchers do not need to submit an application for REB review where the proposed research would, for example, involve determining the reaction of different ethnic groups to specific issues, or where the primary research material is archival footage of interviews conducted with named individuals. The caveat is that it must be clear that the persons who gave the interviews had no reasonable expectation of privacy.

It is clear that an assessment of whether members of the public have a reasonable expectation of privacy in specific circumstances, will be an important determinant of whether research ethics clearance is required for proposed research. In a 2019 case, the Supreme Court of Canada (SCC) has provided guidance that will prove invaluable in making an assessment of when a reasonable expectation of privacy may be deemed to exist even in a public setting.

Many of us are aware of the recent case of *R v. Jarvis*^[1] in which the SCC held that a former teacher at a high school in Ontario was guilty of the Criminal Code offence of voyeurism for having secretly made video recordings of female students. As defined in section 162 (1) of the Criminal Code (the “Code”), the offence of voyeurism involves inter alia, surreptitiously, observing or making a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy.

Jarvis made the recordings within the open areas of the school. These were acknowledged to be “public” areas and in light of this, the SCC had to determine whether the students had a reasonable expectation

of privacy when they were present in these areas. The SCC appreciated that a key consideration in the application of section 162 (1) of the Code is whether persons who are observed or recorded, are in circumstances that give rise to a reasonable expectation of privacy. The Court ruled that even when persons are in a public space, the determinative factor will be whether they are in circumstances in which they would reasonably expect not to be the subject of the type of observation or recording that in fact occurred.

This guidance presented by the Court was in the specific context of an analysis of section 162 (1) of the Code. It is nonetheless useful for informing other determinations of those circumstances in which persons who are in public spaces will have a reasonable expectation of privacy. As such, applying the guidance provided by the SCC, an REB would be quite justified in examining an application involving public research to determine whether research subjects in a public setting such a shopping mall, library or school, would nevertheless have a reasonable expectation that their appearances in such a setting would not be subject to image capturing without their consent for the specific purposes proposed by the researcher.

This analysis also impacts on social media research. Whereas Facebook users may have their information “open” on their Facebook page, a researcher interested in harnessing images and recordings of these persons for research purposes should demonstrate an appreciation that although the images and recordings have been made publicly available, the users may nevertheless retain an expectation that their identifiable data will not be utilised for research purposes without their explicit consent.

A determination either by the researcher or the REB that a person in a public setting would still have a reasonable expectation of privacy does not necessarily mean that the research would be inappropriate. Rather, it suggests that the researcher has to comply with informed consent protocols and that the REB will have to ensure that these protocols are respected.

It is appreciated that it may not be easy to secure consent from anonymous members of the public. Imagine the example of research involving a study of the users of fertility clinic. The clinic could be located in a public shopping mall but its clients would still have a reasonable expectation of privacy and hence would expect that they would not be recorded without their consent or that such recordings would not be used for research purposes without their consent. The researcher may not feel comfortable in approaching these anonymous members of the public for their consent or it may be impracticable to secure such consent. However, such considerations do not relieve the researcher of the responsibility to ensure that informed consent protocols are properly complied with.

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