



Free Speech & Public Comment in Illinois

What the government can and cannot do to limit what you say (Revised 07/2008)

The Illinois Open Meetings Act (5 ILCS 120/1 *et. seq.*) requires public bodies to open their meetings to the public, although most public bodies are currently not required to provide an opportunity for public comment. A meeting is defined as any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business. (5 ILCS 120/1.02) Illinois law requires school boards to allow for public comment (105 ILCS 5/10-16), and most municipalities and other public bodies voluntarily set aside a portion of their meetings to allow public comment. If you are unsure if public comment is allowed at a meeting, you can find out by calling the public body or by looking at the agenda to see if a time is provided for public comment. When public comment is allowed, it enjoys the full protection of the First Amendment.

This brochure explains in general what regulations the government can and cannot place on protected speech. **The contents should not be considered as legal advice. If you have a specific legal question, consult an attorney.**

Where is free speech protected?

There are two types of public forums: traditional and dedicated. Traditional public forums are public places where speech has traditionally been allowed without interference from the government, such as parks, sidewalks, and streets. Public land where speech traditionally has not been allowed is usually a non-public forum. This means the government can determine the dedicated use of the land. Police stations, post offices, and city halls are all non-public forums. A non-public forum becomes a dedicated public forum if the government allows public speech to take place there. This means that the government is not required to allow the public to speak there, but once the government opens up the forum for speech, that speech enjoys the full protection of the First Amendment. For example, neither the

238 N. YORK ST.
ELMHURST, IL
60126

PHONE
(630) 833-4080

FAX
(630) 833-4083

E-MAIL
cac@citizenadvocacycenter.org

WEB-SITE
www.citizenadvocacycenter.org

Speech enjoys the most protection when it takes place in a public forum

Federal nor the Illinois Constitution require a city council to allow public comments at its meetings, because the meeting is a non-public forum. However, if the council decides to allow public comment, Constitutional law provides that government officials cannot discriminate among speakers. If the public body allows one person to speak, they cannot prohibit another speaker because of the viewpoint that person wishes to express or because they do not want that particular person to speak.

The government may limit speech in a dedicated public forum to certain issues. If a city council invites public comment on a certain issue, the comment period becomes a public forum with regard to speech on that issue and a non-public forum with regard to speech on other issues.

What speech is protected?

Most speech is protected under the First Amendment. There are certain well-defined and narrow categories of speech that the First Amendment does not protect. This includes obscene language, fighting words, and defamatory statements.

To be obscene by legal standards, expression must:

- Be such that the average person, using the standards of the community in which the expression is made, would find that it appeals to a morbid or shameful interest in sex,
- Depict or describe sexual conduct in a patently offensive manner, and
- Lack serious literary, artistic, political, or scientific value

Legally, if any one of these criteria is not met, the expression is not obscene.

Fighting words are words whose very utterance inflict injury or tend to incite an immediate breach of the peace. Expression only constitutes fighting words if it is done face to face and is directed at an individual or a small group. Fighting words are of such little social value that any value the words might have is overshadowed by the government's interest in prohibiting them. For practical purposes, the fighting words doctrine has been very narrowly defined by the courts.

Defamation is any factually inaccurate statements that injure another person's reputation or good name.

When the subject of a defamatory statement is a private person or entity, that person or entity may prevail in a defamation suit by proving that the communication was made carelessly or negligently. When the subject of defamatory communication is a public official, a speaker will only be liable for defamation if it is shown that the statement was made with malice. This means that a speaker will not be liable for the defamation unless it is proven that the speaker either knew the statement was false or that the speaker made the statement with reckless disregard for whether it was true or not. If a speaker has valid reasons to believe that a statement regarding a public official is true, that statement is not defamation.

Also, the Illinois Appellate Court has held that all comments made at legislative or judicial proceedings are absolutely privileged. This means that anything said by either a government official or a member of the public during the course of a legislative meeting or judicial proceeding can not be considered defamatory. Comments made before or after the meeting may not be privileged.

In all cases, truth is the absolute defense to a charge of defamation.

What regulations can be placed on protected speech?

Even when speech is protected by the First Amendment, the government has some authority to regulate it. Many local city councils have put rules into place to make sure that if they allow public comment, it is purposeful. While some of the policies inappropriately attempt to limit repetitive statements and bar irrelevant and inappropriate material, the most common regulations are time, place, and manner restrictions.

For example, public comment can be limited to a particular portion of the meeting and can be subject to a time limit.

Time, place and manner restrictions will be subject to “heightened scrutiny” if examined by a court. This means that a time, place, or manner regulation on speech will be valid as long as it furthers an important governmental interest that is unrelated to the suppression of free speech and as long as it does not burden speech more than is necessary to further the governmental interest. The regulation does not have to be the least restrictive alternative as long as it is not unreasonably burdensome. The mere fact that a different regulation would have the same result with less restriction on expression is not enough to invalidate a time, place, or manner restriction.

Time, place and manner restrictions must be content neutral. To be content neutral means that the phrasing of the restriction must purport to regulate all expression equally, without regard to its content.

A time, place, and manner restriction must also be applied in a content neutral manner. This means that all speakers must be subjected to the restriction equally and without regard to the content of their speech or the viewpoint they wish to express. For example, a school board president cannot enforce a time limit against one speaker who opposes a school board action and then decide not to enforce it against another who supports the school board action.

Time, place, and manner restrictions must be content neutral both on their face and in application

The government can place reasonable restrictions on the time, place, and manner in which speech is made.

Even a facially neutral regulation will be struck down if a court determines that it may result in discrimination because some government authority can arbitrarily decide who is governed by the regulation. For example, a town may require a permit for groups that want to have a parade or hang a temporary banner from public property. However, the town is not allowed to arbitrarily discriminate among permit applications. They cannot say that only “charities and civic groups” may be granted a permit, if the ordinance does not define “charities” or “civic groups” and the decision is left to the unfettered discretion of an administrator to decide which groups qualify.

When can the government regulate the content of protected speech?

When speech is protected by the First Amendment, the government generally has no power to restrict it because of its message. There are exceptions that occasionally allow the government to prohibit even protected expression.

Government actions to prohibit speech will only be valid if they meet each of two criteria:

1. The action must have been taken to further a compelling state interest that is unrelated to the suppression of expression, and
2. The action must be narrowly tailored to the furtherance of that interest.

What is “Compelling State Interest?”

The government only has a compelling state interest in prohibiting speech if there would be a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. This means that speech that does not have a substantial capacity to propel action cannot be censored. The government can only prohibit speech if it is very likely that it will lead to the evil the government is seeking to prohibit. Also, the evil must be substantial to justify the prohibition of protected speech.

Another important limitation on the government’s ability to censor expression is the requirement that the speaker intend to cause the evil that the government is preventing. For example, a speaker who makes a speech clearly meant to entice the audience to violence and is likely to do so, could be subject to speech regulations. On the other hand, a speaker who makes a controversial speech that is not meant to lead to violence cannot be censored. If violence resulted because of the speech, the government must deal with the situation by curtailing the audience rather than by stopping the speaker’s speech.

The following chart compares the strict scrutiny test with the heightened scrutiny test

Heightened Scrutiny (Time, place, and manner restrictions)	Strict Scrutiny (Content Restrictions)
<ul style="list-style-type: none">• Must further an <i>important</i> state interest – Anything a court finds is important (e.g., making sure a public meeting runs smoothly)• Must not burden expression unreasonably more than is necessary to further the government interest. Need not to be the least restrictive means.	<ul style="list-style-type: none">• Must further a <i>compelling</i> state interest – something the government is forced or obliged to protect (e.g., interest in life and the public order)• Must be <i>narrowly tailored</i> to the compelling state interest. Must be the least restrictive alternative. If another regulation could protect the state interest with less burden on expression, the restriction is invalid.

For more information:

This brochure is meant to provide a general guide to freedom of speech at public body meetings and should not be taken as legal advice. If you have any questions regarding your protection under the First Amendment, contact your attorney, the Citizen Advocacy Center, or the American Civil Liberties Union in Illinois at (312) 201-9740. The following sources also provide useful information on freedom of speech:

- The right to protest: The Basic ACLU Guide to Free Expression, ISBN 0-8093-1699-4.
- Constitutional Law in a Nutshell by Jerome A. Barron and C. Thomas Dienes. Published by West Publishing, ISBN 0-314-80710-1.
- Free Speech in an Open Society by Rodney A. Smolla, ISBN 0-679-40727-8.

The Citizen Advocacy Center, a nonpartisan, 501(c)(3), non-profit organization is dedicated to building democracy for the 21st Century by strengthening the public’s capacities, resources and institutions for better self-governance. If you are interested in more information about the Center, becoming a volunteer, or making a tax deductible contribution to the Center, please feel free to contact us at:

Citizen Advocacy Center
182 N. York Rd.
Elmhurst, Illinois 60126
(630) 833-4080
E-mail: cac@citizenadvocacycenter.org
Website: www.citizenadvocacycenter.org