August 19, 2002

Alderman Robert G. Donovan
8th Aldermanic District
Room 205 – City Hall

Re: Johns TV

Dear Alderman Donovan:

In your July 29, 2002 communication, you requested our opinion on "whether or not there would be any legal impediments to creating a Milwaukee version of 'Johns TV.'" You explain that "Johns TV" is a cable television program currently telecast in both Kansas City, Missouri and Denver, Colorado on the city's cable TV channel. Those programs broadcast the name, photograph and arrest information on individuals arrested and convicted of solicitation of prostitution.

Our analysis of your question requires us to examine by analogy whether the information in question is a public record and, as such, whether it is open to public inspection. If third parties would have the ability to gain access to the information under the Open Records Law, Subchapter II of Chapter 19, Stats., then the City decision to make such information publicly available on its own initiative would be justified. Our conclusion is bolstered by the recent 7th Circuit Court case of *Willan v. Columbia County*, 280 F.3d 1160 (7th Cir. 2002). In that case the 7th Circuit stated:

> "The Supreme Court held in *Cox* that the First Amendment creates a privilege to publish matters contained in public records even if publication would offend the sensibilities of a reasonable person."

In the recent case of *Linzmeyer v. D.J. Forcey*, 646 NW2d 811 (2002), the Wisconsin Supreme Court determined whether a teacher could obtain injunctive relief to prevent a city attorney from publicly releasing a police investigation report of the teacher's possible inappropriate interactions with students. The court outlined its analysis of the issue as follows:

> "We address the issues presented here in two steps. First, we determine whether the open records law applies to the record in question here-—the report of a police investigation where the investigation has been closed, and where no enforcement action has been taken or is contemplated. In determining whether the open records law applies, we look at the statutory language of that law, along with its statutory and common law exceptions. If the basic open records law applies, there are no blanket exceptions from release, other than those provided by the common law or statute. *Woznicki v. Erickson*, 202 Wis. 2d 178, 183, 549 N.W.2d 699 (1996). Here, we hold that the open records law applies, and that no statutory or common law exceptions exempt the Report from release.
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> "Because we hold that the open records law applies to the Report, our second issue is whether the presumption of openness under the open records law is overcome by any other public policy. We have recognized that the policy toward openness, although strong, is not absolute. *Milwaukee Teachers' Educ. Ass'n v. Bd. Of Sch. Dirs.*, 227 Wis. 2d 779, 787, 596 N.W.2d 403 (1999). In the absence of a statutory or common law exception, the presumption favoring release can only be overcome when there is a public policy interest in keeping the records confidential. *Wis. Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996) (citing *Hathaway v. Green Bay Sch. Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984)). Thus, our second step is to determine if there is a public policy that overrides the presumption of openness.
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> "To determine whether the presumption of openness is overcome by another public policy concern, we apply the balancing test articulated by this court in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699, and *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979). That is, we must weigh the public policies not in favor of release against the strong public policy that public records should be open for review. In weighing the public policies for and against release in this case, we also take the opportunity to provide some guidance on dealing with the open records law as it relates to police records, and we attempt to identify factors that should be taken into consideration by records custodians before law enforcement records are publicly released. In this case, however, we ultimately conclude that the presumption for openness is not overcome by any other public policy, and we thus affirm the order of the circuit court."

The court then explained the nature of the public interest that may in certain instances weigh in favor of nondisclosure of information implicating reputational or privacy interest of individuals. Specifically, the court reasoned:

> "As we have found in other cases, the public interest in protecting the reputation and privacy of citizens may also be a factor that favors nonrelease. *Woznicki*, 202 Wis. 2d at 187, 549 N.W.2d 699; *Breier*, 89 Wis. 2d at 430, 279 N.W.2d 179; *Youmans*, 28 Wis. 2d at 685, 137 N.W.2d 470. This public interest is *not* equivalent to an individual's personal interest in protecting his or her own character and reputation. For instance, we have recognized that the disclosure of certain public records might result in fewer qualified applicants for public positions where their privacy would be regularly intruded upon. *Vill. Of Butler v. Cohen*, 163 Wis. 2d 819, 831, 472 N.W.2d 579 (Ct. App. 1991). Similarly, some personnel files might not be releaseable because the persons whose records are released might be less willing to testify in court when faced with the potential that they would be cross-examined on the contents of their personnel file. *Id*. Thus, the public interest in protecting individuals' privacy and reputation arises from the public effects of the failure to honor the individual's privacy interests, and not the individual's concern about embarrassment."

The court then determined whether the plaintiff had demonstrated the requisite countervailing public interest to justify nondisclosure of the information:

> "Having reviewed the Report, we admit that release of the Report could cause some embarrassment to Linzmeyer and that it could possibly cause some damage to his reputation. However, as we have mentioned, it is not Linzmeyer's personal embarrassment that we are concerned about in applying this test. Rather, we must ask whether releasing the Report under the present circumstances would affect any *public* interest.
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> "Linzmeyer fails to show us how this embarrassment would give rise to a public interest in protecting his reputation. This is a police report, which details information surrounding allegations of misconduct by Linzmeyer that occurred at school and in the classroom. Its release will not dissuade qualified persons from applying to be teachers, as the release of their personnel files might. *See Village of Butler*, 163 Wis. 2d at 831, 472 N.W.2d 579. Similarly, it will not impede the ability of the vast majority of teachers to perform their jobs. If there is any negative effect from the release of the Report, it will be on Linzmeyer as an individual, and not on the public interest.

> "To the contrary, a number of the characteristics of this specific case actually undercut the notion that a public interest would be damaged by the release of the Report. First, the allegations against Linzmeyer involved possible inappropriate interactions with his students. The statements in question were made publicly, and many were corroborated by other students, or even admitted by Linzmeyer himself. As the court of appeals has previously recognized, information that is already known to the public is germane to the balancing test. *Kaitlin v. Rainwater*, 226 Wis. 2d 134, 148, 593 N.W.2d 865 (Ct. App. 1999). The fact that much of the activity was already public, and could be corroborated, mitigates, to some extent, any embarrassment that might be caused by the release of the Report, and tends to even weigh in favor of release."

However, the court cautioned:

> "We caution, however, that this is not an attribute of many police reports. Police reports regularly contain raw investigative data, which is gathered from witnesses of varying degrees of reliability. It would not be unusual to find statements in a police report involving rumor, multiple levels of hearsay, or other characteristics that make the veracity of the statements questionable. Likewise, witnesses who have a bias against the subject of the investigation may have been interviewed. The release of this type of information—unlike here, where the actions in question were public and well-corroborated—would weigh more greatly in favor of the public policy of protecting a person's reputation interests, and would likely support nondisclosure of the record."

The court then concluded:

> "In sum, we hold that there is no public policy which, in this case, would overcome the presumption of openness. We caution, however, that this does not mean that all police records are immediately open to complete public disclosure, simply because there is a decision not to charge. We emphasize again that the balancing test must be done on a case-by-case basis, to ensure that the public policies for and against release are assessed."

The *Linzmeyer* case may actually have presented a more compelling reason for nondisclosure than the Johns TV situation in that *Linzmeyer* involved a police report concerning an incident that did not result in criminal charges. The Johns TV scenario involves not only an arrest, but an actual conviction. Therefore, the ability of a named "John" to assert a compelling public interest outweighing the strong public policy favoring disclosure would seem far less likely than was the case in *Linzmeyer*. The inability to assert such a public interest means the record custodian is not required to

provide the named individual with a *Woznicki*-type prerelease notice informing the individual of his right to seek judicial relief to prevent the release.

Our conclusion is bolstered by the Supreme Court's pronouncements on the ability to inspect arrest records. In the case of *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417 at 440, the court stated:

> "We hold as a matter of law that the harm to the public interest in the form of possible damage to arrested persons' reputations does not outweigh the public interest in allowing inspection of the police records which show the charges upon which arrests were made. The police 'blotter' shall be open for inspection by the public at any time when the custodian's office is open for business and the 'arrest list' or the police 'blotter' is not actually being used for the making of entries therein."

The *Breier* case also addressed the issue of whether the release of such information would constitute an actionable invasion of the right of privacy. The court concluded that it would not, reasoning as follows:

> "Nor does it appear that any right of privacy is afforded by state law. Under the recently enacted right of privacy law, sec. 895.50, Stats., ch. 176, Laws of 1977, 'One whose privacy is unreasonably invaded is entitled to . . . relief.' Publicity given to a matter of private life may constitute an invasion of the right of privacy. However, the right to relief depends on whether there is 'a legitimate public interest in the matter involved.' Sec. 895.50(2)(c). The statute is to be construed 'in accordance with the developing common law of privacy.' Sec. 895.50(3). The basic common law approach is that, where a matter of legitimate public interest is concerned, no cause of action for invasion of privacy will lie. *Williams v. KCMO Broadcasting Division – Meredith Corp.*, 472 S.W.2d 1, 4 (Mo. Ct. of App. 1971). That case is relevant to the matter before us, because it held that an arrest is a matter of legitimate public interest and, therefore, that a news report concerning an arrest could not be the basis for a cause of action for invasion of privacy. Moreover, the Wisconsin right of privacy statute, sec. 895.50(2)(c), specifically states, 'It is not an invasion of privacy to communicate any information available to the public as a matter of public record.' Accordingly, the legislature has determined that individuals have no right of privacy in materials contained in public records that are open to the public generally."

The *Willan* case reaches a similar conclusion regarding the right of privacy. Specifically, the 7th Circuit stated:

> "Information about oneself, such as one's criminal history, would have to be deemed a form of liberty or property, and the unjustified disclosure of such information a violation of (substantive) due process. *Paul v. Davis*, 424 U.S. 693, 711-13, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976), holds that the interest in reputation is not a form of liberty or property within the meaning of the due process clauses and therefore is not protected by those clauses, and it is reputation that Willan seeks to protect by concealment of his criminal record. Even if reputation were a form of constitutional property, it would not be infringed in any invidious sense by the disclosure of legitimately discreditable information about a person, such as his criminal record. No one should have a right to induce other people to deal with him on the basis of false pretenses, a contrived and misleading reputation. It would be a considerable paradox, quite apart from the First Amendment, to allow a person to obtain damages for the disclosure of his criminal record when if he had sued for defamation his suit would be barred by the defense of truth."

Therefore, in our opinion, based upon the Wisconsin Supreme Court's guidance in both *Linzmeyer* and *Breier* and the 7th Circuit's pronouncements in *Willan*, the cable casting of information concerning arrests and convictions for solicitation would be permissible and would not constitute an actionable invasion of the named individual's right of privacy.

Very truly yours,

GRANT F. LANGLEY
City Attorney

PATRICK B. McDONNELL
Special Deputy City Attorney

PBM:dms

c: Ronald Leonhardt

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