

CITY OF MILWAUKEE

Form CA-43

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June 6, 2005

Public Improvements Committee
City Hall, Room 205

Re: Common Council File No. 050197: An Ordinance Relating to the
Procedure for the Renaming of Streets

Dear Committee Members:

You have asked us to approve as to legality and enforceability Common Council File No. 050197, an ordinance relating to the procedure for the renaming of streets. The proposed ordinance establishes a procedure for assigning honorary names to streets. The honorary street naming procedure is an alternative to the existing procedure under which official street names can be changed. The proposed ordinance lists various procedures to be followed in order to add an honorary street name together with the existing official street name. The proposed ordinance eliminates the requirement that a proposal to rename a street be accompanied by a petition signed by more than 50% of the owners of the property along the street. That requirement is replaced with a directive that the appropriate City department or agency must conduct a confidential postcard survey of the property owners, residents and businesses along the street to determine the level of support for a street renaming proposal.

Because we have concerns with the clause requiring that "individual survey responses shall remain confidential" (113-3-3), it is our opinion that this portion of the ordinance is not legal and enforceable.

We issued an opinion to former Alderman Donald Richards relating to aldermanic ability to keep constituent survey cards confidential. In that opinion, dated September 30, 2003, we informed former Alderman Richards that constituent survey cards are public records subject to the public records law, unless they fit within one of the narrow exceptions recognized in Wisconsin. In its declaration of policy, the state legislature states that it is "the public policy of this state that all

persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31. Therefore, any exceptions to the public records law are to be construed narrowly. *Hathaway v. Joint School District No. 1*, 116 Wis. 2d 388, 396 (1984).

As we stated in our earlier opinion, which we have attached, constituent survey cards can only be kept confidential and withheld under the public records law if a clear pledge of confidentiality has been made to the constituent, if the pledge has been made in order to obtain information necessary for aldermen and alderwomen to do the job that they have been elected to do, and the pledge must have been necessary in order to obtain the information. 60 Op. Atty. Gen. 284, 289 (1971). Additionally, even if a pledge of confidentiality has been promised, if the subject constituent survey cards were requested, a denial must be accompanied by an explanation that the information was obtained under a pledge of confidentiality and must additionally include sufficient public-policy reasons for a non-disclosure decision. In our earlier legal opinion we suggested public-policy reasons that may be applicable. Generally, however, a non-disclosure decision based upon public-policy reasons must be fact-specific, and made on a case-by-case basis.

In our earlier opinion, we stated that it may be possible to maintain the confidentiality of constituent names, addresses, and personally identifying information if a pledge of confidentiality is provided. This may be especially true where safety issues are a concern, as when aldermen and alderwomen are conducting constituent surveys in relation to liquor or tavern-licensing issues. *Morke v. Record Custodian*, 159 Wis. 2d 722, 726 (Ct. App. 1990).

It is our opinion that a general inclusion in an ordinance that a constituent postcard survey will be kept confidential, however, will not pass scrutiny under the public records law. On a case-by-case basis, there might be a safety concern relating to a constituent position on an honorary street name, but that would be rare. Accordingly, it is our opinion that the word “confidential” should be removed from proposed ordinance number 050197.

Public Improvements Committee

June 6, 2005

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If you have any additional questions or concerns regarding this matter, you may feel free to contact us.

Very truly yours,



GRANT E. LANGLEY
City Attorney



MELANIE R. SWANK
Assistant City Attorney

MRS:wt:93797

Attachment:

Ronald D. Leonhardt, City Clerk

CITY OF MILWAUKEE

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Assistant City Attorneys

September 30, 2003

Alderman Donald F. Richards
Room 205 – City Hal

Re: Public Records Request for Constituent Survey Cards

Dear Alderman Richards:

This letter responds to your request of September 5, 2003 for our opinion regarding a request you have received, under the Wisconsin Public Records Law, for access to, or copies of, constituent survey cards. You state that you mail the survey cards to your constituents for various types of information relating to your representation of them as alderman. Specifically, you have received a public-records request for a copy of the survey cards that you presented to the Utilities and Licenses Committee on Tuesday, July 1, 2003. You ask whether you can deny the request. For the reasons discussed below we do not find an exception under the Public Records Law that would allow nondisclosure of the requested survey cards. You may, however, amend you survey cards for future use in a manner that would allow you to keep the survey cards, or personally identifying information, confidential.

We have already provided you with an opinion of this office dated May 29, 1996 that answers your question. In that opinion, we conclude that the survey cards are public records subject to the Public Records Law, unless they fit within one of the narrow exceptions recognized in Wisconsin. Of relevance to your request is whether the survey cards were solicited from your constituents with an expectation or promise of confidentiality. You have informed us that currently there is no expectation or promise of confidentiality relating to the survey cards. You have stated that you do not want to disclose the cards because it would discourage constituents from expressing their opinions and make post card surveys less useful, even unhelpful. You have also informed us that if you disclose the survey cards, with the constituent identity, you will not be able to get important citizen input necessary for you to do the job that those same citizens elected you to do.

We take this opportunity to briefly review the Wisconsin Public Records law. The public policy of this State is to give the public the greatest amount of access to public records as possible.

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§19.32, Wis. Stats. Upon receipt of a request for public records, the custodian may consider three possible bases for denying access to the records: (1) express statutory exceptions; (2) exemptions under the Open Meetings law if the required demonstration is met; and (3) common law principles. When common law is the basis for denial of a public-records request, the "balancing test" is key. That provision provides that a custodian must "balance the harm to the public interest from public examination of the records against the benefits of the interest from opening these records to examination, giving much weight to the beneficial public interest in open public records." *State ex rel. Bilder v. Delevan T.P.*, 112 Wis.2d 539, 533 (1983), OAG 285 (January 10, 1985).

It is the custodian who must supply the balancing test on determining whether a record should be made available to the public. As custodian of this record, you must decide whether or not there exist strong public-policy reasons that outweigh the presumption of openness. If you decide not to allow inspection of the record or any portion of the record, you must state specific public-policy reasons for the refusal. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 427 (1979). In Wisconsin, there is a presumption that the public has the right to inspect public records. *Id.* at 426. Any denial of public access is contrary to the public interest and is allowed only in an exceptional case. *Hathaway v. Joint School District No. 1*, 116 Wis.2d 388, 396 (1984). Exceptions to the general rule of disclosure must be narrowly construed. *Id.* at 397.

In Wisconsin, the Wisconsin Attorney General is charged with interpreting Wisconsin's Public Records law. § 19.39, Wis. Stats. The Attorney General has interpreted the Public Records law to conclude that one exception to the presumption of full access to public records is when information has been obtained "by a public agency on the promise that it should be kept confidential and not be disclosed." 60 Op. Atty. Gen. 284, 289 (1971). The Attorney General clarified this exception as follows:

There must have been a clear pledge made. Second the pledge should have been made in order to obtain the information. Third the pledge must have been necessary to obtain the information.

Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in each instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records.

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Because no pledge of confidentiality has been made with regard to the current request we find no exception to the Public Records law that would apply allowing nondisclosure of the survey cards in this instance.

You may want to consider amending your survey cards in the future giving your constituents the opportunity to request confidentiality. For example, you could include a notation at the bottom of the card with a checkbox and the following statement: "Please keep the information I have given you on this card confidential. I would not respond to this survey but for your promise that this information will be kept confidential" or " Please keep my name, address, and any other personally identifying information in my response confidential. I would not respond to this survey but for your promise that this information will be kept confidential."

With such a pledge of confidentiality, you would be able to deny a similar public-records request in the future if you also include sufficient public-policy reasons for nondisclosure. Public-policy reasons may include that you have been elected by your constituents to represent their interests in the City. The best way for you to effectively represent their interests is by learning their preferences on specific matters as they arise. The most efficient way for you to obtain this input is with the survey cards. As you have stated, citizens may be discouraged from expressing their opinions, and the survey cards may become less useful, or even unhelpful without the pledge of confidentiality. The public's interest in effective representation of citizens by their elected officials outweighs the public interest in disclosure of the survey cards.

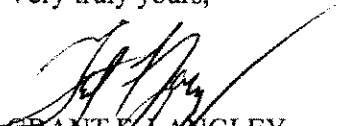
You may also include as a public policy your constituents' right to keep their home address as associated with their preferences on various City matters confidential for privacy and safety reasons. Often times, as is the case with the current request, the survey is conducted in relation to liquor or tavern-licensing issues. As you have told us, it may become difficult or impossible to obtain citizen input if citizens know their name and address, and their preference on an issue such as a tavern license renewal, will be made public. Additionally, you may point out as a public-policy reason the state legislators' recognition of an employee's right to privacy in their home address as evidenced in a recent amendment to the Public Records law, which prohibits public employers from disclosing the home address of public or private sector employees. §19.36(10), Wis. Stats.

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If you decide to add the above-referenced amendment to your survey cards, please feel free to contact us if you wish assistance in the proper wording. If you have any further questions regarding this matter, please do not hesitate to contact us.

Very truly yours,



GRANT E. LANGLEY
City Attorney



MELANIE R. SWANK
Assistant City Attorney

MRS:lmb
enclosure
c: Ronald Leonhardt, City Clerk
1033-2003-2862:72959

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