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April 13, 2009

Alderman Ashanti Hamilton, Chair
City Information Management Committee
City Hall, Room 205

Re: Community Use of www.milwaukee.gov

Dear Alderman Hamilton:

The City Information Management Committee (CIMC) has asked for our legal opinion concerning community use of the City's website. The issue arose at a meeting of the CIMC at which staff from the Department of Administration, ITMD, indicated that there was community interest in using the City's website and the City's "e-notify" application to send notices, agendas, meeting minutes and other information from various community groups and bid organizations.

Various questions relating to this issue arose at the CIMC meeting. For example, would such use create a "record" as defined by the public records law, subjecting it to state record retention requirements as well as disclosure under the public records law? Wis. Stat. §§ 19.21-39. Would the City be able to regulate which individuals and community groups would be allowed to use the City's website, and if it could, who would make those decisions? Would the City be able to regulate the content of these website entries? Finally, who would administer the public's use of the City's website, and who would be responsible for the cost, if any? These questions raise a number of legal and policy concerns.

WISCONSIN'S PUBLIC RECORDS LAW

The Wisconsin Public Records Law interprets the definition of a "record" very broadly, to include ". . . any material on which written, . . . or electromagnetic information is recorded or preserved, regardless of the physical form or characteristics, which has been created or is being kept by an authority." Wis. Stat. § 19.32(2). Thus, electronically stored information is a "record" within the meaning of the public records law, as long as the recorded information is created

or kept in connection with the City's official business. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965). It is the substance of the information stored electronically, not the format that controls whether it is a record or not. Wis. Dep't of Justice, *The Wisconsin Public Records Law: Compliance Outline*: 49 (2008). Section 19.21 of the Wisconsin Statutes establishes record retention requirements for local government units, and applies equally to electronic records. *Id.* at p. 56.

The Attorney General has advised that publication of materials on an agency's website does not qualify for the public record exceptions for published materials found in section 19.32(2) (published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library are not "records" under the public records law) and section 19.35(1)(g) (public records law does not apply to records that have been or will be promptly published with copies offered for sale or distribution). *See*, Letter from James E. Doyle, Wis. Atty. Gen., to John Muench (July 24, 1998).

Accordingly, records created and maintained on the City's website are probably subject to state record retention requirements and disclosure under the public records law. The City should take steps to ensure that information that is removed from the City's website is maintained in some format that would allow reproduction of the information in the event of a public records request. Additionally, the CIMC should establish a record retention schedule for its website records. If the CIMC decides to allow community use of the City's website, the above-referenced mandates would apply to links or information added to the City's website and use of the City's e-notify application by the community groups.

FIRST AMENDMENT ISSUES

The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The United States Supreme Court has ruled that First Amendment protections apply to internet speech. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Opening the City's website for public use could cause it to

become subject to the “public forum doctrine” and associated First Amendment protections. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed. 2d 700 (1995).

The public forum doctrine is the analysis used by the United States Supreme Court to determine the extent of First Amendment protections extended to private citizens on public property.

Once a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972).

As we stated in our opinion dated April 15, 2003:

The United States Supreme Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum. *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed. 2d 794 (1983).

Traditional public fora are those places which “by long tradition or by government fiat have been devoted to assembly and debate.” *Id.*, 460 U.S. at 45, 103 S.Ct. at 954. Public streets, parks, and sidewalks are included in this category. In a traditional public forum, the government may enforce reasonable time, place and manner restrictions, and any content-based prohibition on speech must be narrowly drawn to serve a compelling state interest. *Id.*

In addition to the traditional public forum, a public forum may be created by government designation of a place or channel of communication for use by the public for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry, supra*, 460 U.S. at 45 and 46, n. 7, 103 S.Ct. at 955, n. 7. We have previously determined the City Hall rotunda to be a designated

public forum. In contrast, we deemed the outer reception area to the Mayor's Office a non-public forum. In a significant First Amendment decision in the case of *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed. 2d 567 (1985), the U.S. Supreme Court stated:

“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. . . . Accordingly, the Court had looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. . . . The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

Id., 473 U.S. at 802, 105 S.Ct. at 3449. The government is not required to indefinitely maintain the open character of a designated public forum, but as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Perry, supra*, 460 U.S. at 46, 103 S.Ct. at 955.

Finally, public property that is not by tradition or designation a forum for public communication is governed by different standards. The non-public forum exists when publicly owned facilities have been dedicated to use for either communicative or non-communicative purposes but have never been designated for indiscriminate expressive activity by the general public. In a non-public forum, the government can control access to the forum based on subject matter and speaker identity, “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views.” *Perry, supra*, 460 U.S. at 46, 103 S.Ct. at 955. Thus, any regulation of protected speech in a non-public forum must be reasonable and viewpoint-neutral.

2003 O.C.A. 271. A government website, like other “places” owned and regulated by local government, can become a “public forum” if the forum is opened for

public use, and is not regulated and controlled pursuant to an appropriate policy of the local government agency. *See, Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834 (6th Cir. 2000). If the City's website is opened for public use, it will not be able to exercise complete control over who participates and the content of the participation, for the reasons outlined above. In the alternative, if the City prohibits use of the website by private individuals or groups, it can protect its website from being declared a "public forum" and thus losing control of the information and content of messages included on its website. *See, Allen R. Kesner, Websites, E-mail and Other Technology Issues for Local Government: A Hodge-podge of Legal Issues Resulting from the Use of New High-Tech Tools Created to Help Us All Do Our Jobs More Efficiently, (6/26/08)* (paper presented at the League of Wisconsin Municipalities, Municipal Attorney's Institute.)

In *Putnam Pit*, Geoffrey Davidian, editor of a community newspaper described as "a self-appointed eye on government corruption for the City of Cookeville," wanted to place a hyperlink to his newspaper on the city's website. *Putnam Pit*, 221 F.3d at 838. Davidian argued that the city's website was a designated public forum because the city permitted nongovernmental links on its website. He also argued that the city's denial of his request to place a web link on the city's website was impermissible viewpoint discrimination. The city's website included several links to for-profit and non-profit entities, including a local technical college, two internet service providers, a law firm, a local computer club, a truck product distributor and a site with information on the City of Cookeville. *Id.* at 841-842.

After the City denied Davidian's request to list Putnam Pit's link on the City's website the City changed its policy to limit access to its website to non-profit organizations that promoted economic welfare, tourism and industry. *Id.* The court ruled that the city's policy to limit the pool of persons who might be linked to the city's web page created a non-public forum under the First Amendment. The court also ruled, however, that as a non-public forum, the city's website policies must be reasonable, and must be viewpoint neutral. *Id.*, 844. The court further ruled that the City's policy was reasonable, but its denial of Davidian's request suggested impermissible viewpoint discrimination, *Id.*, 845-846, because prior to Davidian's request, no link request had been denied. The court of appeals remanded the action for trial because Davidian raised a genuine issue of material fact regarding whether the refusal to allow Putnam Pit's link was based on viewpoint discrimination. *Id.*, 846.

In a non-public forum the government may impose reasonable restrictions on speech, as long as the restrictions do not discriminate based upon viewpoint. *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983).

If the CIMC decides to limit use of the City's website for City use and input only, it will not have to be concerned with these issues. If the CIMC agrees to open the City's website to public use for hyperlinks and other information, or for the e-notify application, it must carefully consider whether it intends to limit the purposes or reasons for access to the City's website prior to opening the forum. If the CIMC decides to allow certain links and information to be added to the City's web page, we cannot guarantee that the City would be able to choose which links and information it would accept for inclusion on the City's website.

There are certain steps that the CIMC can take that may help create some reasonable limitations without violating the law. Other cities have included policy statements on their websites that specifically state the purpose and reasons for the city's website and include limitations on the type of information to be included on the website, such as the following:

The purpose of the City's website is to provide citizens, businesses and visitors with a wide range of information about the City of Milwaukee. As part of this public purpose, this website includes links to outside websites compatible with this goal.

If the CIMC decides to allow links to non-City websites and information, it may wish to include a disclaimer regarding the website links such as:

The City has no control over the format, content or accuracy of any of the information found on any website not a part of the City's website (specifically, any site not part of the domains of the City of Milwaukee). The City is not responsible for, does not endorse, and cannot assure the accuracy of information on outside websites.

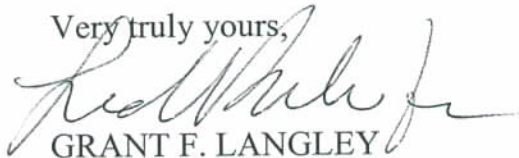
Kesner, *supra*, pg. 7. (See also, attached City of Wauwatosa policy.) If the CIMC decides to allow links to non-City websites and e-notify use, we recommend that you develop a clear policy that describes the types of links that will be allowed on the City's website, such as governmental and educational institutions, organizations funded or created by the City, non-profit neighborhood associations, etc. The policy should be clear that only those individuals or entities

whose website links or information is compatible with the intended purpose of the City's website will be allowed.

The CIMC should also develop a policy with a well-defined decision-making process for approving and denying link requests, identify who would make those decisions, and for assessing costs to administer, if any. The policy should be implemented with a "clear and objective standard that limits the exercise of discretion by the person or entity empowered to approve or reject requests." *See, Daniel M. Olson, Assistant Legal Counsel, Internet Speech and Local Government Computers and Web Sites, The Municipality, 323 (September 2007).* We also recommend that the CIMC develop a process for appealing a denial of an application to place a link on the City's website.

If you have any additional questions, please do not hesitate to contact us.

Very truly yours,



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