CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: July 28, 2011

MEMORANDUM

TO: Ald. Cnare and CCOC

FROM: Katherine C. Noonan, Asst. City Attorney

RE: Use of Photographs and/or Published Material on Alderperson pages of the City's website.

Using photographs and/or published material on Alderperson pages of the City's website implicates both the right to privacy and issues of intellectually property, e.g., copyright.

RIGHT OF PRIVACY

Wisconsin did not have a right of privacy statute until 1979. The current law, Wis. Stat. §995.50, is modeled on Restatement (Second) of Torts and both recognizes a right of privacy and provides relief for one whose privacy is invaded. Wis. Stats. §995.50(2) specifies that "invasion of privacy" means:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct. (s. 942.09 is titled, Representations depicting nudity.)

As guidance for determining whether an invasion of privacy has occurred, Wis. Stat. §995.50(3) states that:

> "The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media."

There is little reported Wisconsin case law applying or interpreting Wis. Stat. §995.50, however, many jurisdictions model their legislation on the same Restatements provision and are similarly guided by common law.

Although (2)(b) above relates specifically to photographs, privacy violations under (2)(a) and (c) also may occur from the use of photographs. General questions to ask when contemplating putting a photograph on a web page are: 1) is the method/context of taking the photograph an invasion of privacy? (Wis. Stat. §995.50(2)(a)); 2) is the photograph used in a way that is an invasion of privacy? (Wis. Stat. §995.50(2)(b)); and 3) is information conveyed to others by a photograph an invasion of privacy? (Wis.Stat. §995.50(2)9c)). I will discuss each issue below.

1. Wis. Stat. §995.50(2)(a) - Method/Context – Intrusion in a Private Place.
As a general rule, taking photographs in a public place, even without consent, is not an invasion of privacy. *Ladd v. Uecker,* 2010 WI App 28 (photographing a problem attendee at Major League baseball parks); *Berg v. Minneapolis Star & Tribune Co.,* 79 F.Supp. 957 (1948, DC Minn) (photographing a party to a divorce during an open court proceeding); *Forster v. Manchester,* 189 A2d 147 (1963) (surveillance on a public street of a claimant on automobile insurance policy); *Munson v. Milwaukee Board of School Directors,* 969 F.2d 266 (7th Cir., 1992) (surveillance from a public street of a school district employee suspected of residency violation).

A photograph taken in a place that a reasonable person would consider private, however, such as a person's home, may be an invasion of privacy if done so "in a nature highly offensive to a reasonable person." Sec. 995.50(1)(a). Surreptitious videotaping of woman in her bedroom by her husband was an invasion of privacy. *In re Marriage of Tigges and Tigges,* 758 NW2d 824 (Iowa 2008). The Iowa Supreme Court held that videotaping his wife in a place where she had an expectation of privacy was "highly offensive to a reasonable person", and that it was irrelevant that no compromising behavior was recorded. *Id.* at 830. Recording voices of neighbors from outside the boundary of the neighbors' property was not an invasion of privacy. *Poston v. Burns,* 2010 WI App 73. The court determined that recording voices on neighboring property with a recorder on a window sill of one's own home was not an intrusion a reasonable person would consider highly offensive. *Id.* at ¶28.

In all cases, consent to being photographed generally is an absolute defense to an allegation of invasion of privacy, even when a photograph is taken in a place a reasonable person would consider to be private.

Before posting a photograph on a web page, it is important to determine that the photograph was taken in an appropriate context and, if necessary, whether or not the

subject of the photograph consented to being photographed. In addition to right of privacy concerns, it may be prudent to consider safety, or other issues before using photographs. For example, even though posting a photograph of a child in a public location may not be an invasion of privacy, parents may not want images of their children displayed in such a manner. Obtaining consent to use photographs of this nature may be a wise option.

2. Wis. Stat. §995.50(2)(b) - Use/Misappropriation

Although this subsection relates to the use of photographs, the right of privacy it addresses is more of a property right than an issue of personal identity. Just prior to the effective date of Wis. Stat. §995.50, the Wisconsin Supreme Court decided *Hirsch v. S.C. Johnson, Inc,* 90 Wis.2d 379 (1979). In that case, S.C. Johnson marketed a shaving gel for women called "Crazylegs", even though it knew that Elroy Hirsch was nicknamed "Crazylegs" and had not obtained Hirsch's permission. Because the court found that Hirsch had a cause of action under common law, the decision informs the analysis of this subsection of the right of privacy statute. The court found evidence that a jury could conclude that the "Crazylegs" name had commercial value. A Michigan court similarly found commercial exploitation when a company marketed portable toilets called "Here's Johnny". *Carson v. Here's Johnny Portable Toilets, Inc.,* 698 F.2d 831 (6th Circ.).

This type of privacy violation typically occurs in a commercial context because it requires that a photograph is used for advertising or trade purposes. For that reason, it is not likely to be an issue with an alderperson's web page. It is unclear, however, whether non-commercial promotion could be considered "advertising", therefore, any use of a photograph or language with a known commercial identification should be considered carefully. If use of photographs were considered to be related to a political campaign to benefit the user, a court might view it similarly to the commercial use in *Hirsch.* Finally, use of photographs under this section requires the written consent of the person(s) represented in the photograph, or in the case of minors, permission of a parent or guardian.

3. Wis. Stat. §995.50(2)(c) - Publicity and Private Facts

A violation of this provision requires publicity of private facts that would be highly offensive to a reasonable person of ordinary sensibilities, by a person who unreasonably or recklessly fails to consider whether there is legitimate public interest in the publicity. *Zinda v. Louisiana Pacific,* 149 Wis.2d 913 (1989). Determination of this type of privacy violation is very fact-specific.

Publicity means to disclose a matter to the public at large or to a limited number if such disclosure would likely become public knowledge. Examples of publicity include disclosure of prisoner's HIV status to jail employees and inmates (*Hillman v. Columbia County,* 164 Wis.2d 379 (Ct. App. 1991); disclosure in a company's newsletter of employee's termination for falsifying employment forms (*Zinda v. Louisiana Pacific,* 149 Wis.2d 913 (1989); EMT's disclosure of the basis for an emergency call to only one person, when that person was known to have "loose lips" (*Pachowitz v. LeDoux,* 265

Wis.2d 631 (Ct. App. 2003). A violation does not require that the publicity result in any specific mental or emotional distress. *Marino v. Arandell Corporation,* 1F.Supp.2d 947 (E. D. Wisc. 1998). There is little doubt that posting a photograph or other personal information on a web page could be publicity.

Private facts are those personal facts that individuals wish to keep to themselves or share with limited persons in their lives, however, the privacy law does not shield the hypersensitive from a typical level of public exposure. *Zinda v. Louisiana Pacific Corporation,* 149 Wis.2d at 929-930. Private facts may include health care status and treatment, basis for employment termination, financial account information, and sexual relationships. *Hillman v. Columbia County,* 164 Wis.2d 379 (Ct. App. 1991); *Zinda v. Louisiana Pacific,* 149 Wis.2d 913 (1989); *Pontbriand v. Sundlun,* 669 A.2d 856 (R.I. 1977); and *Ozer v. Borquez,* 940 P.2d 371 (Colo. 1997). This type of privacy violation typically involves written or spoken communication, however, it is possible that a private fact could be communicated by a photograph. It is important to note that a private fact that is accessible as a public record is not protected by this law.

A privacy violation under this subsection also requires that the publicity and private fact be "highly offensive to a reasonable person". Generally, if the associated publicity of a private fact made public would make a person feel seriously aggrieved, this element of the violation is met. *Zinda v. Louisiana Pacific Corporation,* 149 Wis.2d at 930.

COPYRIGHT AND WEB PAGES

As a general rule, use of another's intellectual property implicates copyright law, whether it involves use of a photograph or other image, or a written, audio, or visual product. The intellectual property of another need not have formal copyright registration to be protected, and material on the internet is considered "published" intellectual property.

Some use of copyrighted work without permission is allowed under the Fair Use doctrine. 17 USCA §107. Determination of fair use is based on four considerations.

a. The purpose and character of the use. Commercial use is less favored than personal, nonprofit, and educational use are more favored.

b. The nature of the use. Creative work is favored over more fact-based work.

c. The amount of work used. Although there is no absolute limit, the less work used, the more likely it will fall under the fair use exception.

d. The effect on the market for or value of the work. The more a use negatively impacts the market and value, the less likely it is to be considered fair use.

One way in which internet use has dealt with the issue of copyright infringement is through the use of linking. Linking, however, is not without risk. Always make sure that

the identity of the owner is clear, and remove information if and when an owner requests. Also, links should go directly to the site of the work. Don't make a link open into a frame showing your own identity or site name as it may confuse a reader as to the ownership of the work. If you link to a page other than the home page of another site, try to include a link to the home page.
If use of copyrighted work does not fall under the fair use exception or is not done through linking, it is important to obtain permission for use. For example, a variety of art exists on the internet, some of which is free, other is free as long the user has purchased the software containing the art and uses it in the manner allowed by the software owner (e.g., Claris Home Page, Microsoft Front page, Adobe PageMill). In addition, there are sites that contain licensed art and require permission for use. These site often have an agreement online. Such agreements should be avoided because they typically require the user to indemnify the site against copyright infringement and such indemnification requires Common Council approval.

In conclusion, if you want to include on your page on the City website photographs or other intellectual property that does not belong to you, consider carefully the source of the work, how it was obtained, how you intend to use it, and whether permission is required for its use. Finally, The City's APM No. 3-13, which is titled, **Web Linking Policy,** should be followed.