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**TO:** Council Member Paul Ostrow,  
Chair, Free Speech Work Group  
Public Safety & Regulatory Services  
Committee Members

**FROM:** Lisa M. Needham, Assistant City Attorney

**DATE:** April 21, 2008

**RE:** Voluntary Registration Plans for the  
Republican National Convention

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## **MEMORANDUM**

### **FACTS**

At the April 9, 2008 Public Safety and Regulatory Services (PS&RS) meeting, you provided the following staff direction:

That in one cycle (April 23rd), the City Attorney's Office be directed to provide an assessment of legal issues regarding possible voluntary notification models. That research should include discussing legal causes of action that may arise from adoption and enforcement of the voluntary notification resolution that the Free Speech Work Group has discussed.

Below, please find a legal analysis of three possible voluntary notification schemes that the Free Speech Work Group has considered:

1. The City may choose to enact no new ordinances or resolutions and simply enforce existing laws consistent with protecting freedom of speech and public safety.
2. The City may choose to enact a "bare bones" voluntary notification resolution that simply affirms the City's commitment to freedom of speech and public safety.
3. The City may choose to enact a comprehensive voluntary notification scheme, modeled after the Washington, D.C., First Amendment Assemblies ordinance.



## LEGAL ANALYSIS

### **I. FIRST AMENDMENT ISSUES GENERALLY**

Even if the City chooses to enact no new ordinances or resolutions relating to public assemblies, the City will nonetheless be dealing with First Amendment issues extensively during the Republican National Convention (RNC). It is therefore useful to briefly review some general legal principles related to freedom of speech and assembly.

It is most likely that free speech and public assembly issues will arise in the context of demonstrations on public streets and sidewalks. This memorandum does not attempt to deal with the entirely separate legal issue of how the MPD or other City personnel will respond to matters such as demonstrators trespassing on private property. As the Minneapolis Park and Recreation Board has the authority to regulate demonstrations on park property, this memorandum also does not deal with park protests.

Public streets and sidewalks are what are typically called traditional public fora and enjoy the highest level of first amendment protection. See Frisby v. Schultz, 487 U.S. 474, 481 (1988) (“All public streets are held in the public trust and are properly considered traditional public fora.”). However, freedom of speech, while fundamental, is not unlimited:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Cox v. Louisiana, 379 U.S. 536 (1965). Therefore, though the First Amendment prohibits abridgement of the freedom of speech, government entities are free to impose certain types of restrictions on speech. For example, the state is free to impose reasonable time, place, and manner restrictions on free speech. Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647 (U.S. 1981). Such restrictions must generally be content-neutral. The Court in Heffron stated that such restrictions are often approved “provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.” Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647-648 (U.S. 1981). Moreover, such restrictions must be narrowly drawn. Goward v. Minneapolis, 456 N.W.2d 460, 464 (Minn. Ct. App. 1990).

### **II. ISSUES IF THE CITY CHOOSES TO ENACT NO NEW ORDINANCES OR RESOLUTIONS AND SIMPLY ENFORCES EXISTING LAWS**

One option considered by the Free Speech Work Group is that the City not enact any new ordinances or resolutions in anticipation of the upcoming Republican National Convention



(RNC). The City would then only enforce violations of existing ordinances and statutes. Such a plan has both advantages and disadvantages.

If the City chooses to pass no new laws in light of the upcoming RNC, such restraint may send a message to concerned individuals and groups that the City is extremely committed to preserving free speech. Very few major metropolitan go without a permitting process, particularly in light of such a large gathering as the RNC. See, e.g., D.C. Code § 5-331.01 (“First Amendment Assemblies Act of 2004”); Saint Paul Code of Ordinances ch. 366A (“Parades, Races, and Public Assemblies). Further, the City is also not faced with the possibility of lawsuits based on passage of a new ordinance or resolution. Since the RNC is now less than 6 months away, it is increasingly unlikely that any new initiative that required creation of internal policies would be finished quickly enough to reasonably allow large groups to familiarize themselves with the regulations. Finally, MPD personnel would be able to enforce the full range of Minnesota statutes and City ordinances as needed.

The most significant legal issue that arises if the City chooses not to enact any notification scheme whatsoever is that it provides very little guidance to City personnel. Policymakers may see a distinct advantage in not being perceived as “restricting” public assemblies by enacting any regulations, but such a decision likely means that major decisions as to how to best manage large assemblies will be made “on the fly” by the MPD with little or no guidance.

The City has many large public events each year, such as the Pride Parade, the Aquatennial, and Holidazzle, but these events are planned and authorized via the City’s Parades and Races Ordinance. See generally M.C.O. ch. 447. Currently, the City chooses to manage some public assembly events, such as Critical Mass, by not aggressively enforcing City ordinances related to, for example, blocking City sidewalks and streets. See M.C.O. 466.240. Such management works well if there are very few demonstration events in the City or when the demonstrations are recurring, similar, and easily managed, such as Critical Mass. However, during the RNC, it is reasonable to expect that the City will see an extensive number of demonstrations in various locations across the City, perhaps occurring simultaneously. If policymakers provide no guidance as to how MPD officers and other City personnel should handle demonstrations, there is a risk that those demonstrations will be managed differently by different officers.

In the event that one officer disperses a group that is blocking a sidewalk, pursuant to M.C.O. 446.240, and another officer fails to disperse a different group that is blocking a sidewalk elsewhere, the City could face a lawsuit based on legal theories such as a violation of equal protection based on selective enforcement. To establish a violation of equal protection based on selective enforcement, a demonstrator would have to show that he or she, compared with others similarly situated, was selectively treated, and that the selective treatment was based on an impermissible consideration, such as the intent to inhibit the exercise of constitutional rights. See Advantage Media L.L.C v. City of Hopkins, 379 F. Supp. 1030, 1045-1046 (D. Minn. 2005 (citing LaTrieste Restaurant & Cabaret, Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994))). In the event the City is perceived to be “selectively enforcing” its ordinances as they relate to protestors, the City would have to prove that such enforcement was not based on the content of demonstrators’ speech.



### III. ISSUES IF THE CITY ADOPTS A “BARE-BONES” VOLUNTARY REGISTRATION SCHEME

The Free Speech Work Group gave extensive consideration to a scheme whereby the City Council would pass a voluntary registration scheme that simply affirms the City’s commitment to preserving both free speech and public safety. The proposed language has varied across various drafts but is substantially similar to Exhibit A, attached.

This voluntary registration resolution simply states that “any person planning on holding any public rally of any size is encouraged to register the rally with City staff.” See Ex. A. The resolution defined a public rally as “any meeting, demonstration, or gathering of persons for a common purpose in or upon any street, sidewalk or other public grounds in a place open to the general public” and specifically clarified that a public rally was not the same as a parade or a block party, both of which are defined in the City’s Code of Ordinances. See Ex. A.

Earlier drafts of the resolution provided that “any person who voluntarily registers a public rally will take precedence for use of that area over those who do not register.” However, such language proved problematic, as it essentially promised registrants a privilege that, by definition, would exclude others from the free and complete use of the same public space. Under that clause, the City might be expected to remove a non-registered group from an area that had been “claimed” by a registered group of protesters. Such an expectation is largely unworkable in practice. Under that plan, MPD personnel would find themselves removing the unregistered group from a public area with no legal authority to do so. The registered group would claim full use of the space, including, presumably, the right to ignore certain ordinances, such as those prohibitions on blocking traffic or sidewalks. See M.C.O. 466.240. Groups that registered would likely be free of the strictures of this ordinance and be allowed to occupy a sidewalk or a street with the City’s permission. In contrast, a group that did not register but wished to occupy the same space could not be removed simply because they did not notify the city, as notification is strictly voluntary. Nor could the group fairly be moved because they violated a City ordinance, such as blocking the sidewalk, because such a dispersal would give rise to the same selective enforcement claim discussed above. With that in mind, this office recommended to the Free Speech Work Group that the “precedence” provision be removed from the “bare bones” voluntary notification plan.

Without that provision, the bare bones voluntary notification plan does not create any significant new legal issues for the City. The plan serves to encourage groups to notify the City of the occurrence of a rally and in return provides groups with the opportunity to meet with City staff to discuss what City services may be available. Advance knowledge of where large groups may be congregating and what services they may need would be very helpful for City staff, including the MPD, MFD, Public Works, and Regulatory Services. In addition, having advance knowledge of large gatherings would allow the City to better coordinate with other entities, such as the Park Board and Hennepin County, in the event that demonstrations are such that they would cross jurisdictional lines.



As the bare bones plan does not provide significant guidance to the MPD or other City officials, the City may still face legal issues such as selective enforcement of ordinances.

#### **IV. LEGAL ISSUES IF THE CITY ADOPTS A VOLUNTARY NOTIFICATION PLAN BASED ON THE WASHINGTON, D.C. PUBLIC ASSEMBLY ORDINANCE.**

During the Free Speech Work Group, it was suggested that the City could consider adopting an ordinance or resolution similar to that used by Washington D.C. This office drafted a proposed resolution based on the D.C. model, which is attached to this memorandum.

Washington D.C.'s current "First Amendment Assemblies" ordinance has been in effect since 2005. The ordinance came about in response to substantial complaints and litigation about difficulties protestors encountered in Washington D.C., particularly after the events of September 11, 2001. The ordinance contains extensive information as to how police may respond to first amendment assemblies in addition to detailing the plan approval process.

The D.C. model contains a plan approval process, but also specifically declares that it shall not be an offense to assemble on a street or sidewalk without having provided notice or obtained an approved assembly plan. It is mandatory for any group planning on holding a public assembly of greater than 50 persons in a location that will prevent other pedestrians from using the sidewalks and crosswalks or will prevent the orderly flow of vehicular traffic to provide notice of the assembly and obtain plan approval. However, it is not an offense, under the Minneapolis Code of Ordinances, to fail to provide notice or obtain a plan approval.

The D.C. model provides mechanisms for enforcement, even if there is no penalty for the failure to notify. The resolution allows the MPD to enforce reasonable time, place, and manner restrictions on First Amendment assemblies in a number of ways. These restrictions vary. In the event that a plan is submitted for approval in advance of the assembly, the MPD may impose restrictions in the plan approval.<sup>1</sup> Next, MPD may impose new additional restrictions during an assembly which has received plan approval if certain circumstances arise during the event. Additional time, place, and manner restrictions on an approved assembly are permissible if:

- the new restrictions are ancillary to the restrictions already set forth in the plan approval and are intended to implement the intent of the plan approval;
- the new restrictions are enforced in response to occurrence of unanticipated events not caused by the plan-holder, counter-demonstrators, or the police;
- the new restrictions are enforced because the MPD determines, during the assembly, that there is an imminent likelihood of violence.

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<sup>1</sup> Washington D.C. vests authority for granting approval of plans with the police department. The City resolution, as drafted, follows this model. However, there is no legal necessity for that authority to remain with the police department. The City may choose to have Regulatory Services or another City entity be in charge of the plan approval process.



Finally, in the event that no plan was approved, the MPD may enforce reasonable restrictions” during a First Amendment assembly. Under no circumstances can the time, place, and manner restrictions cannot be based on the content of the beliefs expressed or anticipated to be expressed at the event. The restrictions also cannot be based on the attire or appearance of individuals participating in the event. In this way, the D.C. model provides flexibility for officers on the scene without creating the danger that restrictions will be based on the content of the speech expressed.

The resolution lays out a framework for approval of plans. In brief, plans must be approved unless:

- The event would substantially interrupt safe and orderly pedestrian and vehicle traffic.
- The event would divert such a great number of police officers that normal police duties would go unfulfilled.
- The event would interfere with police, fire, and other emergency vehicle movement.
- The event would interfere with designated emergency evacuation routes.
- The event is not scheduled to move from one location to another expeditiously.
- The event substantially interferes with another event for which an assembly plan has already been approved.
- The applicant seeking approval materially misrepresented facts set forth in the application.

The application for approval of an assembly plan cannot inquire as to the nature of the event, but instead consists only of the following:

- Name, address, telephone number of sponsoring organization, if any
- Name, address, telephone number of persons responsible for conduct of the event
- Date of event
- Approximate beginning and end times
- Proposed route, if the assembly is a march
- Location of assembly area and related stands or structures
- Approximate number of persons, animals, and vehicles expected
- Number of persons designated to monitor the event

The resolution provides specific guidance to police officers as to how they may respond to First Amendment assemblies. First, it states that when participants in an assembly fail to adhere to reasonable time, place, and manner restrictions, the MPD shall first try to enforce those restrictions through voluntary compliance and then by issuing citations or arresting only those specific non-compliant persons.

The “D.C. model” also addresses when the police are permitted to issue a general order to disperse. Police may only issue such an order when



- A significant number of the assembly participants do not adhere to the imposed time, place, and manner restrictions and voluntary compliance has failed or there is no likelihood of substantial compliance.
- A significant number of the assembly participants are engaging in or are about to engage in unlawful disorderly conduct or violence towards persons or property.
- A public safety emergency has been declared, and that emergency is not based solely on the fact that the assembly is occurring.

In the event police choose to issue an order to disperse, the MPD must issue at least one clearly audible and understandable order via an amplification system. The MPD must also provide the participants in the demonstration a reasonable time to disperse. The resolution also requires the MPD to make a recording (audio or video) of dispersal orders whenever possible. Under no circumstances can an order to disperse be based solely on the fact that the participants did not obtain plan approval.

The D.C. model contains a number of other restrictions on how the police may respond, including:

- Police may not encircle assemblies unless there is probable cause to believe that a significant number of individuals in the assembly have committed unlawful acts.
- Police must ensure that all uniformed officers assigned to assemblies wear enhanced identification.
- Police shall document every arrest related to a First Amendment assembly at the scene.

The D.C. model provides significant protections for freedom of expression by providing explicit limitations on how police may respond to demonstrations. By requiring notification in most circumstances, it also allows the City to decide how to deploy limited City resources. Finally, it provides for the precedence unavailable in the “bare bones” model, as it provides a legal framework whereby the police can give greater leeway to groups that have provided advance notice, including excluding other groups from use of the same space if necessary. This exclusion would be content-neutral, as it is based only on giving preference to groups that have notified the City. The government is not required to interpret the fundamental right to free speech as requiring the government to allow two parades to simultaneously march down the same street. See Cox v. New Hampshire, 312 U.S. 569, 576 (1941). Permitting schemes, be they voluntary or mandatory, have long been recognized as a content-neutral method for allocating free speech rights in the public forum. See id. As it is anticipated that there will be a large number of groups vying for a limited number of attractive demonstration spots in the City, some police regulation of these spots is inevitable. The D.C. model gives the police a framework to make these decisions.

This resolution does provide considerable restrictions on what the police may do. This office has not yet consulted with the MPD to determine whether such restrictions are desirable or viable. In the event the Council decides to consider the “D.C. model” it is recommended that the MPD be allowed to provide input as regards these restrictions.



Finally, it bears mentioning that the ACLU played a significant role in the drafting of the Washington, D.C. ordinance. See “D.C. Council Listened to Widespread Concerns About Police Actions and Protected Freedom of Speech and Assembly; Bill Became Law without Mayor’s Signature” available on the web at <http://www.aclu-nca.org/boxSub.asp?id=77>.

## V. CONCLUSION

The Free Speech Work Group made clear that it did not wish to consider any option that criminalized a failure to notify the City about a demonstration. The Work Group therefore recommended that the Council explore voluntary notification options, as discussed above. It is evident that voluntary options can provide extensive restrictions and requirements or may require no action on the part of individuals who are considering demonstrations.

Please feel free to contact me with any additional questions or concerns. Thank you.

