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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CITICASTERS CO.,	-	Case No. 3:07-CV-00117
d/b/a WSPD, RADIO 1370,	-	
et al.,	-	
	-	
Plaintiffs,	-	Toledo, Ohio
	-	January 16, 2006
v.	-	Hearing Re: Temporary
	-	Restraining Order
CARLETON FINKBEINER, in	-	
his official capacity as	-	
Mayor of the City of	-	
Toledo, et al.,	-	
	-	
Defendants.	-	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT CHIEF JUDGE.

APPEARANCES:

For the Plaintiffs: Shumaker, Loop & Kendrick
 By: Thomas G. Pletz
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For the Defendants: City of Toledo Department of Law
 By: Adam W. Loukx
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Proceedings recorded by mechanical stenography,
transcript produced by notereading.

15:21:06 1 (Commenced at 3:22 p.m.)

15:22:44 2 THE COURT: I don't have a docket sheet.

15:22:48 3 Mr. Pletz, you represent the plaintiff; is that right?

15:22:50 4 MR. PLETZ: Yes, Your Honor, with Jim
15:22:52 5 O'Doherty with the firm Shumaker, Loop & Kendrick in the
15:22:58 6 case of Citicasters Co. and Kevin Milliken for a
15:23:02 7 temporary restraining order. We have filed a verified
15:23:06 8 complaint. Notice has been given to the defendants,
15:23:08 9 who are present. We are prepared to argue the motion
15:23:10 10 for temporary restraining order. We have filed a
15:23:14 11 memorandum in support of that motion. And at the
15:23:18 12 Court's pleasure --

15:23:20 13 THE COURT: Your client or clients are
15:23:22 14 present? They're welcome to sit at the table.

15:23:26 15 MR. PLETZ: Yes. Mr. Andrew Stuart, who
15:23:30 16 is the general manager for the region of Clear Channel;
15:23:34 17 and Mr. Kevin Milliken, who is a named party plaintiff
15:23:40 18 employee of WSPD 1370 are present.

15:23:46 19 THE COURT: And for the City?

15:23:46 20 MR. LOUKX: Thank you, Your Honor. Adam
15:23:50 21 Loukx, general counsel, and Bill Bracy. And we have
15:23:52 22 with us Brian Schwartz, who is a named defendant in this
15:23:56 23 action, public information officer.

15:24:00 24 THE COURT: Okay. The record should show
5:24:02 25 that I've read the motion and the memorandum. I think

15:24:16 1 it's probably appropriate to call on the city for a
15:24:20 2 response, then I'll hear from you, Mr. Pletz.

15:24:24 3 MR. LOUKX: Thank you, Your Honor.

15:24:26 4 THE COURT: First of all, is there a dispute
15:24:28 5 as to the underlying factual allegations?

15:24:34 6 MR. LOUKX: For purposes of today's motion
15:24:36 7 there's only one significant dispute, and that is
15:24:38 8 whether or not the status quo as it exists today is a
15:24:42 9 bar existing against Kevin Milliken appearing at
15:24:48 10 organized press conferences at the City of Toledo. We'd
15:24:50 11 submit if a press conference were to occur right now,
15:24:54 12 Mr. Milliken can attend. I understand there will be
15:24:56 13 two tomorrow. He can attend those press conferences.
15:25:00 14 We do not dispute the fact there was an issue, as
15:25:02 15 spelled out in the complaint, regarding some press
15:25:06 16 conferences that occurred last week. We do not dispute
15:25:08 17 the fact that notices have not been sent inviting --

15:25:14 18 THE COURT: For what period of time?

15:25:20 19 MR. LOUKX: June, 2006.

15:25:24 20 MR. PLETZ: : Your Honor, in light of this
15:25:24 21 concession, we would ask for a consent TRO so that there
15:25:28 22 is no further interference or threats.

15:25:34 23 MR. LOUKX: We would oppose that simply on
15:25:36 24 the fact that access to information is what --

15:25:38 25 THE COURT: This has been going on since

15:25:42 1 June?

15:25:42 2 MR. LOUKX: Yes, no invitation. There's
15:25:44 3 only been two instances. There are some disputes of
15:25:48 4 fact which we'll have to get into at a preliminary
15:25:50 5 injunction hearing when that occurs, but there were two
15:25:54 6 incidents last week where the plaintiff will allege that
15:25:58 7 they did not get into two different organized press
15:26:04 8 conferences.

15:26:04 9 THE COURT: Who was responsible for that, if
15:26:06 10 that happened?

15:26:08 11 MR. LOUKX: Well, one of them, the
15:26:10 12 plaintiff, Mr. Milliken. The second one, which
15:26:14 13 occurred on Wednesday, I'm not certain of the calendar
15:26:18 14 date -- January 10, he was told he could not come in
15:26:22 15 yet. And what you saw -- perhaps saw on the publicity,
15:26:26 16 trying to force his way in, and ultimately that press
15:26:30 17 conference did not occur.

15:26:32 18 The day before, which would be the 9th,
15:26:36 19 there was a press conference. We don't dispute the
15:26:38 20 allegation in the complaint that that involved Martin
15:26:42 21 Luther King celebrations, and Mr. Milliken was not
15:26:44 22 invited into that one.

15:26:46 23 THE COURT: What was the basis for not
15:26:48 24 letting him attend, so far as you are aware and can
15:26:52 25 inform me?

15:26:54 1 MR. LOUKX: The basis was there was a belief
15:26:56 2 that he was not a reporter.

15:27:00 3 THE COURT: The basis for that belief?

15:27:02 4 MR. LOUKX: Apparently -- we hope to be able
15:27:08 5 to present evidence at the preliminary injunction
15:27:10 6 hearing stating he was an entertainer at different
15:27:16 7 occasions for talk show radio.

15:27:20 8 THE COURT: Is there some distinction
15:27:22 9 between -- at least in the law, between a talk show and
15:27:26 10 a newscast?

15:27:28 11 MR. LOUKX: We'll need to research that
15:27:30 12 certainly in more detail. But I guess for purposes of
15:27:34 13 today's hearing, the status quo, as it is now, is that
15:27:36 14 Mr. Milliken certainly can appear at any press
15:27:38 15 conference the City holds, an organized press
15:27:46 16 conference. The reason why we would not consent to a
15:27:48 17 TRO would be we do not believe that the invitations are
15:27:52 18 actually something that is -- as the plaintiff is
15:27:56 19 framing the constitution --

15:27:58 20 THE COURT: Are you suggesting a public
15:28:00 21 official can call a press conference then selectively,
15:28:04 22 quote, "issue invitations," quote close?

15:28:06 23 MR. LOUKX: Certainly.

15:28:06 24 THE COURT: How so?

15:28:08 25 MR. LOUKX: To some extent, certainly. A

15:28:10 1 public official most assuredly can give a scoop to an
15:28:14 2 individual reporter. A public official can have a press
15:28:18 3 briefing with an editor or a newspaper reporter that he
15:28:22 4 likes without having all --

15:28:22 5 THE COURT: Are you telling me that if a
15:28:28 6 press conference which other members of the press are
15:28:30 7 allowed in, suddenly becomes, quote, "invitation only"
15:28:38 8 when certain members show up?

15:28:38 9 MR. LOUKX: No. What I'm suggesting --

15:28:40 10 THE COURT: But that's what you alleged,
15:28:42 11 isn't it, Mr. Pletz, in essence?

15:28:44 12 MR. PLETZ: We have alleged he has been
15:28:48 13 barred from public news conferences on public property
15:28:50 14 by public officials to which he was always previously
15:28:54 15 routinely admitted.

15:28:56 16 THE COURT: Go ahead.

15:28:58 17 MR. PLETZ: And that there's no distinction
15:29:00 18 in the law between a reporter and some other form of
15:29:02 19 journalist, whether talk show host or otherwise, and
15:29:06 20 that the law is fairly clear, especially in the Ehrlich
15:29:10 21 case, which makes the distinction between a person who
15:29:12 22 was not properly invited to the inside briefing but was
15:29:16 23 entitled to attend the public news conference.

15:29:22 24 MR. LOUKX: Thank you, Your Honor. As I
15:29:22 25 understand it, it's a temporary restraining order. The

15:29:26 1 plaintiff now seeks basically two things: One, to allow
 15:29:28 2 Mr. Milliken to attend news conferences at city hall or
 15:29:32 3 where ever the public news conference is. The City
 15:29:36 4 says at this point -- the City's position is fairly
 15:29:38 5 clear; that is, he's welcome to attend.

15:29:40 6 THE COURT: What about the Mayor's position?
 15:29:46 7 He's a named defendant.

15:29:46 8 MR. LOUKX: The Mayor's position is he's
 15:29:48 9 welcome to attend news conferences.

15:29:50 10 The second issue raised, as I understand it
 15:29:52 11 from the quick reading of the TRO proposed order --

15:29:56 12 THE COURT: Let me ask you this: As part of
 15:30:00 13 the, quote, invitation or permission, is there any
 15:30:12 14 reason to believe or apprehend, at least the part of the
 15:30:16 15 concession, is there any reason to apprehend that the
 15:30:20 16 name of the game will be changed, and instead of press
 15:30:24 17 conferences we'll have "briefings," close quote, from
 15:30:30 18 which he'll be excluded while other members of the press
 15:30:34 19 are admitted?

15:30:36 20 MR. LOUKX: I don't know if that would be
 15:30:38 21 anything new. Obviously the Mayor --

15:30:40 22 THE COURT: Well, wait a minute. I'm
 15:30:42 23 trying to avoid semantic hairsplitting so we don't wind
 15:30:48 24 up back here Wednesday afternoon with the City and the
 15:30:54 25 Mayor saying, Well, it was a briefing. It wasn't a

15:30:58 1 conference. Sure, he was the only person not admitted
15:31:04 2 in, but, hey, it was a briefing.

15:31:06 3 MR. LOUKX: As I've indicated, I believe
15:31:08 4 there's two press conferences tomorrow, so I would think
15:31:12 5 that we would know rather soon.

15:31:14 6 THE COURT: What about the day after
15:31:14 7 tomorrow?

15:31:16 8 MR. LOUKX: I don't know factually how long
15:31:20 9 press conferences will go on. I would suggest that
15:31:22 10 there's always been briefings, there's always been --
15:31:26 11 every politician, every office holder has always given
15:31:32 12 off to the side --

15:31:34 13 THE COURT: Let me ask you this: The events
15:31:36 14 that bring us here, was anybody else excluded, any other
15:31:46 15 member of the press?

15:31:48 16 MR. LOUKX: I do not know the answer to
15:31:50 17 that. I do not believe so.

15:31:50 18 THE COURT: Is there any reason to believe
15:31:52 19 they were?

15:31:52 20 MR. LOUKX: No, I have no reason to believe
15:31:54 21 that. In fact, as I --

15:31:56 22 THE COURT: Candidly, my concern is that
15:31:58 23 there will be two conferences tomorrow; he can attend.
15:32:02 24 And as of Wednesday morning there will be briefings; and
15:32:10 25 they'll basically have all the characteristics and

15:32:12 1 hallmarks of a press conference except they're called,
15:32:16 2 quote, a briefing. And perhaps even there's a list of
15:32:18 3 people who are called in advance and said, By the way,
15:32:22 4 you're invited to my briefing.

15:32:24 5 MR. PLETZ: Your Honor, if I may interject.
15:32:26 6 On Friday we had provided to the City Law Department a
15:32:30 7 two-page letter outlining our request. This is the
15:32:36 8 very first notice, despite conversations that we've had
15:32:40 9 with Mr. Loukx and Mr. Bracy since then, this is the
15:32:44 10 very first notice of any sort of concession, having
15:32:50 11 spent a good deal of time without any responsive
15:32:56 12 statement from the City. And now they've made a
15:33:00 13 judicial admission he is to be admitted to all press
15:33:04 14 conferences. And it seems to me the only way to avoid
15:33:08 15 this matter coming back to the Court's docket promptly
15:33:10 16 is for an order.

15:33:18 17 THE COURT: Tell me a little bit more about,
15:33:20 18 quote, a press conference. How is it normally set up
15:33:24 19 and structured and run?

15:33:26 20 MR. PLETZ: Having never attended them, I
15:33:28 21 cannot tell you firsthand, but my understanding is that
15:33:30 22 there are routine notices, I think generally now by
15:33:34 23 e-mail, sent out to all local news organizations which
15:33:38 24 regularly cover the City Council and the Mayor's press
15:33:42 25 conferences to both print and electronic local area

15:33:46 1 media. One of our complaints is that back this summer
15:33:52 2 WSPD was deleted from that list of routine --

15:33:56 3 THE COURT: Entirely?

15:33:58 4 MR. PLETZ: It was, according to the e-mail
15:34:02 5 from Mr. Schwartz, which is attached as Appendix 1 to
15:34:08 6 the verified complaint, he wanted to give notice to a
15:34:10 7 reporter at WSPD Radio 1370 rather than to the news
15:34:14 8 director, who is in charge of assigning reporters and
15:34:20 9 organizing the schedule for his employees. And he said
15:34:22 10 that he would give notice to whoever he chose. It was
15:34:32 11 only last week that there was any notice given since
15:34:36 12 sometime this summer, June or July. That notice to the
15:34:38 13 reporter only began this last week. That's the first
15:34:42 14 element.

15:34:44 15 The second element is to ban someone who has
15:34:48 16 been previously recognized and routinely accepted as a
15:34:52 17 member of the news media, who is now prohibited from
15:34:58 18 attending the general public press conferences held in
15:35:02 19 the large conference room, I think it's the 22nd floor
15:35:06 20 of Government Center, and it was only this week, this
15:35:10 21 past week, that he was -- Kevin Milliken was first
15:35:14 22 banned and barred and prohibited from attending that
15:35:16 23 public press conference.

15:35:18 24 I share the Court's concern about quibbles
15:35:22 25 and squabbles between briefings and conferences, and the

15:35:26 1 cases that we've reviewed in our memorandum address
15:35:30 2 those subjects and those distinctions. A public press
15:35:34 3 conference is a matter at which all members of the
15:35:38 4 media, indeed all members of the public are entitled to
15:35:42 5 attend.

15:35:42 6 THE COURT: Is that correct, Mr. Loukx; the
15:35:48 7 press conference, once called and convened, can anybody
15:35:52 8 walk in, a member of the public?

15:35:52 9 MR. LOUKX: I don't think that we've ever
15:35:54 10 had that issue really arise, but I suppose if the person
15:35:58 11 were to show up at a press conference today, regardless
15:36:00 12 of whether he was a reporter or not, we would let him
15:36:04 13 in.

15:36:06 14 MR. PLETZ: It's the plaintiff's position
15:36:08 15 that the Mayor's policy of prohibiting Mr. Milliken from
15:36:14 16 attending this last week's press conference is a
15:36:18 17 situation which may readily recur and which is an
15:36:22 18 invasion of his free speech right to gather the news.
15:36:28 19 State action under color of law with an impairment of
15:36:32 20 his first amendment rights is presumed unconstitutional,
15:36:36 21 per se unconstitutional, entitling us to a TRO. The
15:36:40 22 likelihood of success on the merits, and irreparable
15:36:44 23 harm --

15:36:48 24 THE COURT: Do you have an understanding as
15:36:48 25 to how or why two practices that you've alluded to have

15:36:52 1 come about, namely the failure to provide notice and --

15:37:00 2 MR. PLETZ: I have some understanding we
15:37:02 3 have put into our verified complaint and our memorandum
15:37:06 4 very sketchily, what we understand to be some reasons as
15:37:10 5 far as some past conflicts between the mayor and Mr.
15:37:14 6 Milliken. But we would maintain that it makes no
15:37:18 7 difference what the underlying reasons might be.

15:37:24 8 THE COURT: Let me ask you this: I gather
15:37:26 9 from your pleadings that there's been no contention that
15:37:32 10 Mr. Milliken or any other representative of that station
15:37:36 11 has somehow acted in an excessively disruptive or
15:37:40 12 otherwise inappropriate manner?

15:37:44 13 MR. PLETZ: There is no such knowledge that
15:37:46 14 I have as to -- I understand there were both
15:37:48 15 representatives of the Law Department and the Toledo
15:37:52 16 Police present at the time of these events last week,
15:37:56 17 but no activity further.

15:38:02 18 THE COURT: Mr. Loukx.

15:38:04 19 MR. LOUKX: I think obviously we'll get into
15:38:06 20 a lot more --

15:38:08 21 THE COURT: Basically what you're saying is
15:38:10 22 whatever's happened in the past, rest assured it won't
15:38:14 23 happen again?

15:38:14 24 MR. LOUKX: No, not really. What I'm
15:38:16 25 saying is the press conference -- I see two issues here.

15:38:20 1 One is the alleged violation of their right. There is
15:38:28 2 the allegation of the plaintiff regarding the First
15:38:32 3 Amendment rights of Mr. Milliken to attend the press
15:38:36 4 conference. And there's also allegations alleging that
15:38:38 5 there's been a First Amendment right violation by
15:38:42 6 somehow failure to give preferable treatment --

15:38:46 7 THE COURT: Not preferable; equivalent.
15:38:48 8 There's a difference.

15:38:50 9 MR. LOUKX: Well, the difference is -- I
15:38:52 10 believe the Mayor also has a First Amendment right as
15:38:56 11 well, who he wants to speak and who he does not.

15:38:58 12 THE COURT: I would not think so when
15:39:00 13 there's, quote, an open press conference.

15:39:02 14 MR. LOUKX: Oh, yeah, they're welcome to
15:39:04 15 listen. But I'm still addressing --

15:39:06 16 THE COURT: Not listen, but attend.

15:39:08 17 MR. LOUKX: -- the briefing. I think the
15:39:12 18 fear the Court has --

15:39:12 19 THE COURT: The fear I have is starting
15:39:14 20 after the two that are already scheduled tomorrow, there
15:39:16 21 will be nothing but, quote, briefings, that in some
15:39:22 22 substance will be exactly the same --

15:39:24 23 MR. LOUKX: If everyone was invited --

15:39:26 24 THE COURT: Please don't interrupt.

15:39:28 25 My point simply is that it seems to me to be

15:39:32 1 excessive to permit an official who allegedly has
15:39:40 2 unilaterally excluded a member of the press from
15:39:46 3 attending, and has also unilaterally declined to notify
15:39:54 4 a media outlet, to have an entirely free hand saying,
15:40:02 5 Well, I'm no longer having "press conferences," closed
15:40:06 6 quote; they're "briefings," closed quote, and I
15:40:10 7 determine when they're held and who attends. I think
15:40:16 8 that's what you're asking me to do.

15:40:18 9 MR. LOUKX: The fear I have is if an order
15:40:20 10 is issued, that I guess just as the Court has concerns
15:40:24 11 over the semantics --

15:40:26 12 THE COURT: Again, I think that Mr. Pletz
15:40:30 13 would agree, sure, if any public official contacts
15:40:36 14 somebody in the media and says, if you have a few
15:40:40 15 minutes, stop by, I have something I want to tell you
15:40:42 16 about, that's a briefing. And if a public official has
15:40:48 17 what Washington has called the gaggle in, that's a
15:40:52 18 conference. Now, a public official calls three people,
15:41:00 19 five people, we can worry about that in due course.
15:41:06 20 But it seems to me that the City's rather excessive or
15:41:12 21 rather exclusive focus on the idea of a briefing is
15:41:18 22 troublesome to me.

15:41:20 23 MR. LOUKX: Because we see that in case law
15:41:22 24 it's not some --

15:41:24 25 THE COURT: I understand. But in light of

15:41:26 1 the allegations in the complaint, it's appropriate for
15:41:32 2 me to be concerned that somehow everything doesn't just
15:41:38 3 get to be declared a briefing and that the same practice
15:41:46 4 is followed, then we're back here shortly thereafter.

15:41:50 5 Let me ask you this, though. Apparently
15:41:52 6 they waited eight months, seven months, or whatever
15:41:56 7 before complaining about the, quote, "invitation
15:41:58 8 exclusion." Did that really prejudice your ability to
15:42:00 9 learn about these events?

15:42:04 10 MR. PLETZ: I think the knowledge was delayed
15:42:06 11 in being received, although I think they learned about
15:42:08 12 it from whatever sources locally.

15:42:12 13 THE COURT: And fairly promptly
15:42:14 14 afterwards -- I mean, was it somebody who tipped them
15:42:16 15 off?

15:42:18 16 MR. PLETZ: I don't know if there was actual
15:42:20 17 impairment of their ability to attend. But I would
15:42:24 18 address --

15:42:24 19 THE COURT: Which may have explained why you
15:42:28 20 didn't bother coming in this June.

15:42:32 21 MR. PLETZ: Correct, Your Honor. And I
15:42:34 22 would address to the Court's attention --

15:42:36 23 THE COURT: There was no -- regardless of
15:42:38 24 the propriety of that sort of discriminatory treatment,
15:42:50 25 there is no impairment of the ability to show up,

15:42:54 1 participate, and report whatever happened?

15:42:56 2 MR. PLETZ: In the hierarchy of values, that
15:42:58 3 was not the same level of potential irreparable injury,
15:43:04 4 but I would point out to the Court there's a case from
15:43:06 5 Louisiana involving the sheriff from Jefferson Parish in
15:43:12 6 which only the issue of advance notice was raised. And
15:43:16 7 in that case, that district court issued a preliminary
15:43:18 8 injunction requiring only the advance notice. As a
15:43:22 9 practical matter, I think that the notice, even though
15:43:24 10 not given directly, information was obtained, and they
15:43:28 11 learned of it, and there was not such dire irreparable
15:43:32 12 injury as now as is compounded.

15:43:34 13 THE COURT: They lived with it?

15:43:36 14 MR. PLETZ: Yes, sir.

15:43:46 15 THE COURT: Mr. Loukx, in any event --

15:43:48 16 MR. LOUKX: Well, the notice issue, that
15:43:52 17 access issue was something far less than what the
15:43:56 18 plaintiff alleges. The fact is the plaintiffs are
15:44:00 19 representatives of WSPD, were at press conferences,
15:44:04 20 whether or not they were invited by a specific e-mail,
15:44:08 21 or however it was done. We note in Raycom v. Campbell,
15:44:12 22 a case decided by Judge Oliver of the Northern District
15:44:16 23 of Ohio back in 2004, there was a discussion in there
15:44:20 24 about the difference between freedom of the press and
15:44:24 25 the First Amendment, and the right of access is

15:44:30 1 certainly not a fundamental right.

15:44:30 2 THE COURT: Do you have a citation for that
15:44:34 3 case?

15:44:52 4 MR. LOUKX: 361 F.Supp 2d. 679. In
15:45:06 5 particular I was referring to page 687.

15:45:36 6 THE COURT: Mr. Pletz, are you familiar with
15:45:38 7 that case?

15:45:40 8 MR. PLETZ: : No, sir, I am not. But I
15:45:40 9 would contest the proposition that an impairment of a
15:45:46 10 right to access to a news conference is not a
15:45:48 11 fundamental right.

15:46:16 12 THE COURT: It looks as though that's
15:46:18 13 different. Apparently the Mayor of Cleveland
15:46:20 14 instructed the police and fire officials not to talk
15:46:26 15 with representatives of a particular radio station. I
15:46:32 16 think that's a different kind of circumstance than we
15:46:36 17 have here, although I'm not sure candidly I wouldn't be
15:46:40 18 also concerned about that. But that's not what they're
15:46:46 19 talking about.

15:46:48 20 MR. PLETZ: I would say that is possibly
15:46:50 21 something that is not the level of deep fundamental
15:46:52 22 right which attending a public news conference is.

15:46:56 23 THE COURT: There's also a difference
15:46:58 24 between an elected city official acting in that manner
15:47:04 25 unilaterally and such official instructing certain

15:47:10 1 members of the administration to refrain from speaking
15:47:18 2 about their performance or their duties or other matters
15:47:22 3 within their authority with the press. So I -- having
15:47:28 4 glanced at that case, Mr. Loukx, it doesn't seem to me
15:47:32 5 that it's pertinent.

15:47:34 6 MR. LOUKX: Though not from this circuit,
15:47:36 7 Baltimore Sun Company v. Ehrlich has a very similar
15:47:40 8 holding in its dicta, at least it addresses the scenario
15:47:46 9 of the notice issue. There's actually two cites; I'll
15:47:50 10 give you the District Court cite and the Circuit Court
15:47:52 11 cite on that. The district court --

15:47:54 12 THE COURT: Which one has the dicta that
15:47:56 13 you're talking about?

15:47:58 14 MR. LOUKX: I'm thinking that I saw it in
15:48:00 15 the district court case, 356 F.Supp 2d 577, but I would
15:48:10 16 like to give you the other cite in case my memory --

15:48:16 17 THE COURT: I can only look at one case at a
15:48:18 18 time.

15:48:18 19 MR. PLETZ: I'd like to comment.

15:48:24 20 THE COURT: That involved, quote, briefing.
15:48:28 21 I think that's entirely distinguishable. We're not here
15:48:32 22 because the Mayor is alleged to have tipped off WTOL
15:48:40 23 about this, that, or the other thing, and not WXPB.
15:48:44 24 Correct?

15:48:46 25 MR. PLETZ: : Correct. The Ehrlich case is

15:48:48 1 the case where if someone was properly excluded from
15:48:52 2 briefings but was invited to attend the public news
15:48:56 3 conferences. That's just the distinction the Court was
15:48:58 4 making earlier. That's not the latest word even in the
15:49:02 5 Fourth Circuit. There is a later case in our favor
15:49:04 6 called Blankenship.

15:49:06 7 THE COURT: The cite?

15:49:08 8 MR. PLETZ: : 2006 U.S. Appellate Lexis
15:49:14 9 31339.

15:49:16 10 THE COURT: I only did Westlaw.

15:49:18 11 MR. PLETZ: That's the only cite we have,
15:49:20 12 December, 2006.

15:49:24 13 THE COURT: Are you familiar with that case,
15:49:24 14 Mr. Loukx?

15:49:26 15 MR. LOUKX: No.

15:49:26 16 THE COURT: Do you have an extra copy?

15:49:30 17 MR. PLETZ: I'm sure we do. It's cited in
15:49:32 18 our brief.

15:49:48 19 MR. LOUKX: Actually, I am familiar with
15:49:50 20 this case. I'm sorry. I might have the cite.

15:49:58 21 THE COURT: This is basically a retaliation
15:50:00 22 case.

15:50:00 23 MR. PLETZ: Yes, sir, it is, which goes
15:50:02 24 further than our facts and circumstances entitling us to
15:50:08 25 a TRO. And in that case enough retaliation was shown

15:50:12 1 that a preliminary injunction was granted.

15:50:42 2 THE COURT: It seems to me the only question
15:50:44 3 is whether or not to issue the TRO and set the matter
15:50:50 4 down for preliminary injunction hearing, or not issue a
15:50:54 5 TRO and proceed to preliminary injunction hearing.

15:50:58 6 It does seem to me that with regard to the
15:51:04 7 likelihood of success on the underlying merits both with
15:51:08 8 regard to the refusal to unilateral refusal to notify an
15:51:20 9 established media outlet that the press conference is
15:51:28 10 going to be held violates the First Amendment. A
15:51:32 11 variation on that, I gather, has occurred here, and
15:51:40 12 correct me if I'm wrong, namely by passing the news
15:51:44 13 director and insisting on only a specific chosen
15:51:50 14 designee be allowed to attend, that seems to me that
15:51:54 15 that would violate the First Amendment. It would be an
15:52:04 16 effort to manage the news by manipulating who comes to
15:52:10 17 hear what's to be said and therefore who reports it.
15:52:18 18 And it also seems to me that the flip side of that,
15:52:24 19 namely barring the selected and designated
15:52:30 20 representative without apparent cause to do so, and
15:52:34 21 that's why I asked whether there was any such cause
15:52:36 22 being offered, would also violate the First Amendment.
15:52:42 23 A press conference is a public event. And to pick and
15:52:48 24 choose who can attend seems to me clearly to violate the
15:52:52 25 First Amendment.

15:52:52 1 So I think there's a very strong likelihood
15:52:54 2 of success on the merits, at least with regard to those
15:52:58 3 contentions.

15:53:00 4 And, Mr. Pletz, those are the contentions
15:53:02 5 you've made, correct?

15:53:04 6 MR. PLETZ: That's correct, Your Honor.

15:53:12 7 THE COURT: Skipping over the second
15:53:14 8 criterion, namely the irreparable harm, looking to the
15:53:18 9 third, I can't see, Mr. Loukx, but tell me how I'm
15:53:24 10 wrong, how issuance of the TRO could cause substantial
15:53:28 11 harm to the Mayor of the City and its legitimate
15:53:34 12 interests. What harm is it?

15:53:38 13 MR. LOUKX: I don't believe that there is
15:53:38 14 any, Your Honor.

15:53:40 15 THE COURT: Okay. That favors issuance of
15:53:42 16 the TRO.

15:53:46 17 The fourth criterion is whether the public
15:53:50 18 interest would be served by issuance of an injunction.
15:53:52 19 If not the most fundamental right the citizenry enjoys,
15:54:00 20 it is among the most fundamental, and namely, the right
15:54:06 21 to be informed in a day and age, for better or for
15:54:10 22 worse, whatever information the public gets comes from
15:54:14 23 the broadcast media. And I assume that the press is
15:54:22 24 allowed to attend with recording devices and so forth,
15:54:26 25 cameras and so forth.

15:54:28 1 MR. PLETZ: I'm sure they are, Your Honor.

15:54:30 2 THE COURT: A benefit to the public that is
15:54:32 3 gained by the attendance of the broadcast media is it
15:54:36 4 gets to hear and/or see, in any event witness firsthand
15:54:42 5 what the public official is saying, what questions are
15:54:44 6 being asked, what responses are given. It is not even
15:54:50 7 the filtration that might otherwise occur through the
15:54:56 8 reporter who then relates what he or she saw and heard.
15:55:04 9 The public hears firsthand, or at least there's the
15:55:08 10 opportunity to hear firsthand. There is, of course,
15:55:10 11 the filtration that occurs in terms of what is
15:55:14 12 broadcast, but nonetheless, in a unique way the ability
15:55:20 13 of the broadcast media to attend offers an enhanced
15:55:24 14 opportunity for the public to be informed. And
15:55:30 15 curtailment of that opportunity can distinctly and
15:55:40 16 adversely diminish the public's ability to be informed.
15:55:46 17 So it seems to me that the public interest would be well
15:55:48 18 served by issuance of the restraining order. Again,
15:55:56 19 Mr. Loukx, do you have any comment on that observation?

15:56:00 20 MR. LOUKX: No, Your Honor.

15:56:04 21 THE COURT: Then finally the issue is
15:56:06 22 irreparability of harm. And it's the city's contention
15:56:12 23 and the Mayor's contention that, hey, whatever's
15:56:16 24 occurred in the past won't occur in the future. And
15:56:20 25 how can I be confident of that, Mr. Loukx? Because I

15:56:26 1 believe, Mr. Pletz, I need to be confident in light of
15:56:30 2 the other three factors and how they favor issuance of
15:56:34 3 the TRO.

15:56:38 4 Mr. Loukx or Mr. Pletz, would you agree?

15:56:42 5 MR. PLETZ: Yes, Your Honor.

15:56:44 6 MR. LOUKX: Yes, Your Honor.

15:56:46 7 THE COURT: So what assurance can you give
15:56:50 8 me that there won't be further continuing interference
15:56:58 9 with the rights of Mr. Milliken and his employer to
15:57:02 10 have -- to attend or have its representative attend
15:57:06 11 pending preliminary injunction hearing? How can I be
15:57:16 12 sure the door, once opened, won't be closed again,
15:57:20 13 particularly in view of the City's insistence that it
15:57:24 14 sees this kind of opportunity to treat members of the
15:57:34 15 press differently by simply declaring something a
15:57:36 16 briefing rather than a press conference? Candidly, I'm
15:57:40 17 very concerned about that given what has been alleged in
15:57:44 18 the complaint and what I've heard this afternoon.

15:57:46 19 MR. LOUKX: I hope I haven't made the City's
15:57:50 20 position misunderstood. I guess the concern the City
15:57:52 21 had is we don't want an order so broad that prevents
15:57:56 22 briefing. You said we acknowledge --

15:57:58 23 THE COURT: That will be up -- if I issue
15:58:00 24 the order, issue a preliminary injunction, that's
15:58:04 25 obviously up to the plaintiffs to come in and seek a

15:58:06 1 show cause order and to allege that it's been violated
15:58:12 2 because some city official called one or two friends in
15:58:16 3 the media and had a cup of coffee and gave them
15:58:20 4 information that wasn't made available generically to
15:58:22 5 other members of the media. Sure, maybe somewhat an
15:58:28 6 indistinct gray area, but I suspect that's rather modest
15:58:32 7 in dimension, and it wouldn't be that hard to tell
15:58:36 8 whether there's a briefing or a press conference.

15:58:40 9 MR. LOUKX: Indicating everyone other than
15:58:42 10 WSPD, that would be one thing, but then if the Mayor
15:58:48 11 talks to one or two reporters, a sort of noose is
15:58:56 12 hanging over his head --

15:58:56 13 THE COURT: That's the purpose of a
15:58:58 14 restraining order, is to make clear to a public official
15:59:02 15 that you disregard the First Amendment at your risk and
15:59:10 16 peril. That's the whole point. And maybe it's not
15:59:14 17 such a bad thing that you're making a choice between,
15:59:20 18 quote, a briefing with a couple of pals and an open
15:59:24 19 press conference of which the press and public are
15:59:28 20 invited to attend. Maybe that's a good thing. But to
15:59:34 21 the extent that there might be some restraint on the
15:59:40 22 part of any public official developing that kind of
15:59:46 23 relationship with members of the press to the exclusion
15:59:48 24 of others, I happen to think that's not all bad. More
15:59:54 25 sunshine, more disinfectant; more light, more knowledge;

16:00:00 1 a better informed public. That's a risk that I think
16:00:10 2 is well worth imposing. I can't imagine they're going
16:00:20 3 to come in here because somebody from WTOL got a scoop;
16:00:26 4 they might, but who knows, or any of the other stations,
16:00:30 5 or The Blade, or City Paper, or Free Press, or whatever,
16:00:34 6 the Journal. It does seem to me that given the
16:00:44 7 allegations in the complaint and conduct that it
16:00:48 8 alleges, it's appropriate for me to be concerned that
16:00:56 9 unless restrained, the Mayor and the City might simply
16:01:00 10 say, Well, we're going to hold briefings; and I don't
16:01:04 11 think that would be appropriate. That would defeat the
16:01:06 12 whole purpose that brings the plaintiffs here, which is
16:01:12 13 to insure to the maximum extent possible equivalence of
16:01:20 14 access to public officials when they decide to speak to
16:01:24 15 the public on their behalf or on behalf of the City.
16:01:30 16 That's what a free press is all about.

16:01:34 17 Unless you have something further, I will
16:01:36 18 issue the TRO. Although before I do, let's take a look
16:01:40 19 at it, see if there are provisions to which you would
16:01:44 20 like me to consider some amendment or change.

16:02:24 21 Mr. Pletz, does your complaint seek --

16:02:30 22 MR. PLETZ: It seeks declaratory and
16:02:34 23 injunctive relief, no money damages, no compensatory.

16:02:40 24 THE COURT: Fee shifting under Section 1988?

16:02:44 25 MR. PLETZ: Yes, sir, in the Court's

16:02:46 1 discretion.

16:03:04 2 THE COURT: Mr. Loukx, is there anything in
16:03:06 3 the prefatory language that you would ask that I
16:03:12 4 consider changing?

16:03:34 5 MR. BRACY: Your Honor, if I may. The only
16:03:36 6 reservation I have in regard to the proposed order is
16:03:42 7 where it enjoins the defendants, their officers, agents,
16:03:46 8 and affiliates, and employees. I'm not sure exactly
16:03:50 9 what an affiliate would be.

16:03:54 10 THE COURT: Radio stations have affiliates,
16:03:54 11 but not cities.

16:03:56 12 MR. PLETZ: I'm happy to delete or excise
16:04:00 13 that word if it causes a problem. That's the problem
16:04:02 14 with some form books, Your Honor.

16:04:08 15 THE COURT: I'm deleting that word.

16:04:10 16 MR. BRACY: And, Your Honor, perhaps this
16:04:14 17 could be nitpicking, and I don't mean to be, but the
16:04:16 18 order also says failing to give timely advance notice.
16:04:20 19 I don't know what timely means either.

16:04:24 20 THE COURT: Reasonable?

16:04:26 21 MR. PLETZ: Equivalent -- reasonable or
16:04:28 22 equivalent.

16:04:34 23 THE COURT: Well, I'm going to put in
16:04:36 24 equivalent.

16:04:40 25 MR. BRACY: And reasonable.

16:04:42 1 THE COURT: It will read, "Failure to give
16:04:44 2 equivalent advance notice to news director of WSPD
16:04:50 3 1370" -- hold on a second. "Failing to give advance
16:05:02 4 notice equivalent to that which is given to other
16:05:06 5 similar organizations."
16:05:08 6 MR. PLETZ: Thank you, Your Honor.
16:05:46 7 THE COURT: Mr. Bracy or Mr. Loukx, anything
16:05:50 8 further at this time?
16:05:50 9 MR. BRACY: Nothing further, Your Honor.
16:05:52 10 MR. PLETZ: If I may be heard on bond.
16:06:02 11 THE COURT: \$100?
16:06:02 12 MR. PLETZ: I have a decision from Judge
16:06:04 13 Lambros in an expression of speech, free speech case
16:06:08 14 where he indicated that no bond would be required since
16:06:12 15 no damages will occur.
16:06:14 16 THE COURT: Mr. Bracy?
16:06:16 17 MR. BRACY: We don't request any bond.
16:06:20 18 THE COURT: I will strike that. I'll
16:06:24 19 strike -- paragraph 1 will be struck.
16:06:30 20 MR. PLETZ: Thank you. Thank you, Mr.
16:06:32 21 Bracy.
16:06:36 22 THE COURT: Okay. Then the business about
16:06:54 23 bond on the last page will be struck as well.
16:06:56 24 MR. PLETZ: Thank you.
16:07:10 25 THE COURT: Preliminary injunction date?

16:07:12 1 MR. PLETZ: At the Court's pleasure.

16:07:12 2 THE COURT: Ten days would be the 26th at
16:07:16 3 8:30 in the morning. If we're going to have a hearing
16:07:28 4 I would like briefs to be filed on the 24th by 4:00 in
16:07:34 5 the afternoon.

16:07:54 6 Mr. Pletz, anything further?

16:07:56 7 MR. PLETZ: No, Your Honor. Thank you.

16:07:58 8 THE COURT: You've got the relief you sought
16:08:00 9 to get.

16:08:00 10 MR. LOUKX: I'm sorry, what time is the
16:08:02 11 preliminary injunction?

16:08:06 12 THE COURT: 8:30. Mr. Loukx, Mr. Bracy,
16:08:08 13 anything further?

16:08:08 14 MR. LOUKX: Nothing further.

16:08:10 15 THE COURT: Anything further about the TRO?
16:08:12 16 I trust you'll communicate it promptly.

16:08:16 17 MR. LOUKX: We'll need to get the
16:08:20 18 information from the news director, but other than that,
16:08:22 19 we're fine.

16:08:22 20 THE COURT: I suspect, quite candidly, if
16:08:24 21 you look in the phone book you'll be able to get their
16:08:28 22 number.

16:08:30 23 MR. LOUKX: A fax number.

16:08:30 24 THE COURT: Amy, if you'll make copies of
16:08:34 25 that for Mr. Loukx and Mr. Bracy so they can be

16:08:38

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transmitted promptly. Anything else?

16:08:42

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Counsel, that will conclude this proceeding.

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(Concluded at 4:08 p.m.)

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C E R T I F I C A T E

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I certify that the foregoing is a correct transcript

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from the record of proceedings in the above-entitled

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matter.

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Tracy L. Spore, RMR, CRR

1-18-07

Date

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