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May 2, 2023

Milton Datsopoulos [1940-2022]
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▲ Also admitted in Massachusetts
► Also admitted in North Dakota
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• Also admitted in Idaho
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VIA EMAIL: NugentJ@ci.missoula.mt.us

AND U.S. MAIL

Mr. Jim Nugent, City Attorney
City of Missoula
435 Ryman
Missoula, Montana 59802

Re: Our Client: MC Real Estate Development, LLC
FOIA Request

Dear Mr. Nugent:

Under the provisions of the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and pursuant to the authority set forth in Mont. Code Ann. § 2-6-1001 *et seq.*, attorneys for MC Real Estate Development, LLC (“MC”) request copies of the following public records relating to MC, its owners, Matt Sullivan and Caroline McCauley, the property and project located at 333 and 401 East Front Street in Missoula, and MC’s applications and efforts to develop 26 one-bedroom apartments with 15 covered parking spaces, including, without limitation, MC’s application for an easement for fire access and request for TIF:

All records, including, without limitation, phone logs/records, emails, text messages, Signal messages, social media posts and direct messages (e.g., Twitter, Instagram, Facebook, YouTube, WhatsApp, TikTok, Snapchat, Pinterest, Reddit, LinkedIn, etc.), emails or other documents, correspondence, and other tangible things of Ward 3 Council Member Daniel Carlino relating to the property located at 333 and/or 401 East Front Street, MC’s applications and development efforts,

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the easement issue, Matt Sullivan, Caroline McCauley, and TIF issues pertinent to the property and project.

As you know, the public records laws authorize requesters to inspect or obtain copies of “records” created or maintained by an authority. “Record” is defined, in part, as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. Essentially, content, not format, determines whether something is a record. It does not matter how or where the information is stored, whether it be on a piece of paper, in a database, or in an email.

Mr. Carlino’s emails, text messages, or other records sent to or from a City (or related authority) email account are clearly records subject to disclosure because they are material created and/or maintained by the City on its email system. Such emails, like all records, are presumed to be open to public inspection and copying. Any email sent to or from Mr. Carlino’s email account – government business-related or personal – is subject to disclosure.

Generally, personal email accounts of government employees are not subject to disclosure. But the exception is if an employee uses his or her personal email(s) account for government business. Any email sent to or from Mr. Carlino’s personal account(s) that pertains to government business is subject to disclosure. Again, the content of the email determines whether it is a record, not its location.

For example, in *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016), the court held the government agency improperly refused to provide records on the basis that the agency head maintained them on a private email account at a site other than the government email site because an agency could not thusly shield its records under FOIA, and if the agency controlled what would otherwise be an agency record, then it was an agency record under FOIA.

Mr. Carlino may use his personal email account(s) for work purposes relevant to the scope of this request. Thus, we kindly ask that a careful search be conducted of these personal accounts when the City receives this public records request.

Social media is a more complex topic from both a legal and policy standpoint. As governments and their officials increasingly rely on social media to communicate with the public, this triggers a need to identify and comply with public records responsibilities related to conducting government business using social media. The FOIA law has adapted over time to capture advanced technology and, much like email, social media content can be considered a public record. For example, public business, meetings, correspondence, and the like – that happen on a government’s social media site – are considered a public record subject to FOIA law.

It is well established that state and federal FOIA laws require governments such as the City to retain and produce electronic records. Social media accounts and government social media

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activity constitute records of the conduct of government business that must be preserved and produced under FOIA laws.

For example, the Court of Appeals in Washington state held in 2018: “We confirm that a public official’s posts on a personal Facebook page can constitute an agency’s public records subject to disclosure under the PRA if the posts relate to the conduct of government and are prepared within a public official’s scope of employment or official capacity.” *West v. City of Puyallup*, 410 P.3d 1197 (2018).

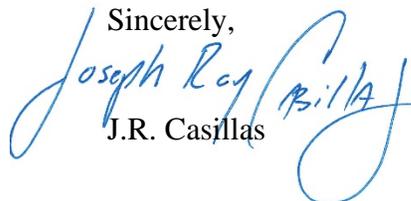
A Massachusetts Federal District Court held in 2018: “The Agency is required to search for and produce the record even though it is hosted on Twitter’s website because the Agency has sufficient control over the document.” *Johnson v. CIA*, 330 F. Supp. 3d 628 (D. Mass. 2018). *See also Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (affirming decision of federal district court finding school board’s chairperson Facebook page constituted a public forum and that she did not maintain it in a lawful manner).

Social media records in Montana are subject to the Montana Public Records Act (Mont. Code Ann., Title 2, Chapter 6). This law very broadly defines records as, “any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other document, including copies of the record required by law to be kept as part of the official record, *regardless of physical form or characteristics...*” This definition covers posts made by government entities on social media.

The Montana Operations Manual (“MOM”) contains policies, procedures, and standards applicable to the operations of Montana state government. This online resource includes “Guidelines for Social Media Use” which recognizes the importance of social media to government and clearly states that, “[u]nder Montana law, public records include records in electronic form (§ 2-6-110, M.C.A.). Therefore, communication to or from state personnel through Social Media is likely presumed to be a public record.” Please include all responsive social media content with the City’s response.

If there will be any cost associated with searching for or copying these records, please provide us with an invoice so we can reimburse those expenses. In addition, please provide an estimate of when we may expect to receive this information. If you deny or object to any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify us of the appeal procedures available to us.

Thank you for your assistance with this request.

Sincerely,

J.R. Casillas

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C: Client (email only)

Client file