

Records, duties of record custodian

Number: INFORMAL

Date: January 24, 2006

Subject:
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The Honorable Chris Smith
House Democratic Leader, District 93
603 N.W. 7th Terrace
Ft. Lauderdale, Florida 33311-7310

Dear Representative Smith:

This is in response to your recent letter in which you ask for legal advice concerning the responsibility of employees within an agency to provide public records as set forth in a hypothetical set of facts. You state that you are contemplating legislation to clarify an agency's duty to provide records and that your request falls within your legislative duties. In such instances, this office has responded to requests by informing the legislator of the current state of the law as was done in responding to your previous request on this issue.

You ask whether Chapter 119, Florida Statutes, imposes a responsibility on "public relations staff" or other employees of an agency to make a good faith effort to locate requested documents. As indicated in this office's prior correspondence, the courts and Chapter 119 have imposed responsibilities relating to the disclosure of public records on those who have custody of public records, as defined in Chapter 119. For example, section 119.07(1), Florida Statutes, provides:

- "(1)(a) *Every person who has custody of a public record* shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.
- (b) *A person who has custody of a public record* who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying.
- (c) *If the person who has custody of a public record* contends that all or part of the record is exempt from inspection and copying, he or she shall state the basis of the exemption that he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute.
- (d) If requested by the person seeking to inspect or copy the record, *the custodian of public records* shall state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential.

* * *

(f) Even if an assertion is made by the *custodian of public records* that a requested record is not a public record subject to public inspection or copying under this subsection, the requested record shall, nevertheless, not be disposed of for a period of 30 days after the date on which a written request to inspect or copy the record was served on or otherwise made to the custodian of public records by the person seeking access to the record. If a civil action is instituted within the 30-day period to enforce the provisions of this section with respect to the requested record, the custodian of public records may not dispose of the record except by order of a court of competent jurisdiction after notice to all affected parties.

(g) The absence of a civil action instituted for the purpose stated in paragraph (e) does not relieve the *custodian of public records* of the duty to maintain the record as a public record if the record is in fact a public record subject to public inspection and copying under this subsection and does not otherwise excuse or exonerate the custodian of public records from any unauthorized or unlawful disposition of such record." (e.s.)

Other provisions of section 119.07, Florida Statutes, also impose duties relating to public records on the custodian of public records. See, e.g., section 119.07(2), Florida Statutes (permitting remote access to public records); section 119.07(3), Florida Statutes (permitting photographing of public records); section 119.07(4), Florida Statutes (fees for copying or inspection of public records) *And see s. 119.021(4), Fla. Stat., providing:*

"(4)(a) Whoever has custody of any public records shall deliver, at the expiration of his or her term of office, to his or her successor or, if there be none, to the records and information management program of the Division of Library and Information Services of the Department of State, all public records kept or received by him or her in the transaction of official business.
(b) Whoever is entitled to custody of public records shall demand them from any person having illegal possession of them, who must forthwith deliver the same to him or her. Any person unlawfully possessing public records must within 10 days deliver such records to the lawful custodian of public records unless just cause exists for failing to deliver such records."

Section 119.011(5), Florida Statutes, defines the term "custodian of public records" to mean "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee." Nothing in Chapter 119, Florida Statutes, speaks to the responsibilities of public relations staff unless such individuals are the custodian of the record or acting as the custodian's designee.

Thus, Chapter 119, Florida Statutes, dictates the responsibilities of the custodian of public records. The case law which has been provided to you in prior correspondence elaborates on the determination of which employees within an agency may be deemed the custodian for purposes of imposing the significant responsibilities dictated by Chapter 119. As noted, the Fourth District Court of Appeal in *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996) considered who was responsible for responding to a public records request. The court, in reversing a motion to dismiss, stated that regardless of whether or not the designated custodian was served with a records request, section 119.07(1)(a), Florida Statutes, imposes a duty of disclosure upon "every person who has custody of a public record."

Subsequently, however, the Fourth District found it necessary to clarify who is considered to have custody of a public record. In *Mintus v. City of West Palm Beach*, 711 So. 2d 1359, 1361

(Fla. 4th DCA 1998), the plaintiff had requested a police officer provide him with a copy of a document which the officer had in his possession relative to an internal affairs investigation. The document was not provided to the plaintiff, and the plaintiff filed a petition for mandamus to compel production of the document, asserting that a public document had been wrongfully withheld. The lower court held, and the district court affirmed, that the officer to whom the plaintiff had made his request was not a person who had custody of a public record within the meaning of the Public Records Law, as he had mere temporary possession of the document for an internal affairs hearing.

Thus, the *Mintus* court concluded that in order to have custody of a public record, one must have supervision and control over the document or have legal responsibility for its care, keeping, or guardianship. The court held that the "mere fact that an employee of a public agency temporarily possesses a document does not necessarily mean that the person has custody as defined by section 119.07." 711 So. 2d at 1361.

In short, therefore, the records custodian is the person designated by the agency head to perform the responsibilities imposed by Chapter 119, Florida Statutes, on such individual, as well as any other person who has legal control over the records as discussed in *Mintus, supra*. The current law does not address the responsibilities of persons who are not deemed to have custody of public records. Thus, your question relating to the responsibilities of "public records staff" depends upon whether those individuals are either designated as records custodians by the agency head or whether they otherwise "have supervision and control over the document" under the *Mintus* standard. If you believe that those holding the position of "public relations staff" should be deemed to have the legal responsibilities of a records custodian in all cases, you may wish to consider expanding the definition of records custodian contained in section 119.011(5), Florida Statutes. Otherwise, the current state of the law is set forth in *Puls v. City of Port St. Lucie, supra*, and *Mintus v. City of West Palm Beach*.

Accordingly, your inquiries as to whether "public relations staff" are required, under Chapter 119, to make a good faith effort to locate a particular record depends on whether such staff are the designated records custodian or have custody of the public record as discussed in the above cases. Whether an individual is a records custodian or the custodian's designee presents a mixed question of law and fact that this office cannot resolve. Resolution would necessarily turn on the policies and procedures of a particular agency. Moreover, whether there has been a violation of Chapter 119, Florida Statutes, is a matter which must be resolved by the courts of this state and not by this office.

As this office has previously advised you, the current framework in the Public Records Law provides remedies for violations of the statute's terms, including the ability of a citizen to bring a civil action, as well as the establishment of an informal mediation program which is located within the Attorney General's Office as an alternative for the resolution of open government disputes. See, e.g., ss. 119.10 and 119.11, and 16.60 Florida Statutes, respectively.

Sincerely,

L. Clayton Roberts
Deputy Attorney General

LCR/tjw