

2-D-4 | ROLE OF THE RECORDS CUSTODIAN

Section 119.011(5), F.S., 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.”

The custodian of public records, or a person having custody of public records, may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records. Section 119.07(1)(b), F.S. And see s. 119.0701(2), F.S. (discussed more fully on page 65) requiring that certain agency contracts for public services must contain contact information pertaining to the agency’s custodian of public records.

However, the courts have concluded that the statutory reference to the records custodian does not alter the “duty of disclosure” imposed by s. 119.07(1), F.S., upon “[e]very person who has custody of a public record.” *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996). [Emphasis supplied by the court]. Thus, the term “custodian” for purposes of the Public Records Act refers to all agency personnel who have it within their power to release or communicate public records. *Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4th DCA 1998) (citing *Williams v. City of Minneola*, 575 So. 2d 683, 687 [Fla. 5th DCA 1991]). But, “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.” *Id.* at 1361. In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping or guardianship. *Id.*

In *Siegmeister v. Johnson*, 240 So. 3d 70 (Fla. 1st DCA 2018), the court rejected the requester’s claim that he was entitled to view the records at the office of an assistant state attorney in Lake City when office policy required that the records be sent to the state attorney’s main office in Live Oak to be reviewed for exemptions. The court reasoned that the assistant state attorney “couldn’t have, for instance simply handed over the records on the spot” when the requester asked for them in Lake City because both the “[Public Records] Act and office policy” required that the records “be reviewed for exempt information by the public records custodian (who was also responsible for supervising the record inspection and copying process)” as provided in s. 119.07(1)(a), F.S. *Id.* at 74



The custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. Section 119.07(1) (c), F.S. See *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 128 (Fla. 2016), noting that the “good faith language” was intended “to strengthen the responsibilities of records custodians by imposing an explicit requirement on public agencies that they act in good faith in responding to public records requests.”

A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed. *Id.* Cf. *SDE Media LLC v. City of Doral*, 25 F.L.W. Supp 243a (Fla. 11th Cir. Ct. May 5, 2017) in which the circuit judge found that the city had violated the Public Records Law by “misrepresenting to SDE Media LLC that all responsive records had been located and produced when, in fact, [the city] knew that a good faith search had not been made and that additional responsive records may not have been produced”. And see *Raydient LLC v. Nassau County, Florida*, No. 2019-CA-000054 (Fla. 4th Cir. Ct. August 24, 2021), available online in the Cases database at the open government site at myfloridalegal.com (“If public agency employees and officials transact public business on their privately-owned accounts or devices, then the agency has an affirmative duty in response to public records requests to do what is reasonably necessary to promptly retrieve any public documents from those employees or officials”).

The duty of “good faith” imposed on public officers who are charged with the responsibility of complying with the law is “subjective.” *Consumer Rights, LLC v. Union County*, 159 So. 3d 882, 885 (Fla. 1st DCA 2015), review denied, 177 So. 3d 1264 (Fla. 2015). “Whether a governmental entity acted in ‘good faith’ in the manner in which it responded to a request for disclosure of public records is necessarily a question for the court to decide based on the circumstances of a case.” *Id.*

Sections 119.12(1)(b) and (2), F.S mandate that the complainant in a public records lawsuit must provide written notice identifying the public records request to the custodian of public records at least 5 business days prior to filing a civil action. However, the notice is not required if the agency fails to prominently post the contact information for the custodian in the manner prescribed in the statute. Cf. *City of St. Petersburg v. Dorchester Holdings*,



LLC, 331 So. 3d 799, n.2 (Fla. 2d DCA 2021), in which the court noted that “[a]lthough there appears to be no prohibition against using the [Public Records] Act as a discovery device, thereby circumventing the rules of procedure regarding discovery, this does not provide an attorney who represents a party in pending litigation with carte blanche to directly contact a represented opposing party. See R. Regulating Fla. Bar 4-42; Fla. Bar Ethics Opinion 09-1 (concluding that a lawyer may not communicate with government officers, directors, or employees who are directly involved or whose acts can be imputed to the government entity in a represented matter).” Questions relating to the application of the Rules of Professional Conduct should be addressed to The Florida Bar.

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