Coates' Canons Blog: Custodians of Public Records

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The North Carolina Court of Appeals has ruled that a lawsuit seeking access to public records should be dismissed if it fails to name a proper custodian (as defined in state law) as the defendant in the complaint. The case *(Cline v. Hoke*) involved a request for emails that the plaintiff alleged to be in the physical custody of an employee in the Administrative Office of the Courts (AOC). The plaintiff sued the assistant director of the AOC. The state, on behalf of the defendant, argued that the lawsuit should have been brought against the employee who was alleged to have the emails. The court said they were both wrong. It held that the proper party is the director of the AOC as the official custodian, defined in the public records law as the public official who is in charge of the AOC's public records. The case also holds that 1) a person who has physical custody is not necessarily the custodian of the record for purposes of the public records law, and 2) an individual employee's responsibility to manage and retain records is distinct from the obligation to provide access.

Certainly, a legal custodian is an appropriate party for a lawsuit seeking access to records. But other public officials and employees have legal responsibilities in providing access to records, and may be liable for violating the public records law. The definition and responsibilities of custodians are sufficiently unclear that a narrow pleading requirement may have the unintentional effect of limiting access to public records.

Individual, Custodian, and Agency Obligations

The right of access to records under North Carolina's public records law has four key components. First, it opens up to any member of the public records relating to public business. G.S. 132-1. Second, it prohibits individual public officials and employees who have public records from destroying them except as provided in the rules of the Department of Cultural Resources, which are mostly set out in records retention schedules. Individuals may be guilty of a misdemeanor for unlawfully destroying records. G.S. 132-3(a). Third, it requires "custodians" of records to provide access to public records as follows: "Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law." G.S. 132-6(a). Finally, the law provides a remedy under which "[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records" may file a lawsuit to compel disclosure or obtain a copies of public records. G.S. 132-9. This provision allows a court to award attorneys fees to be paid by the public agency, as well as to be "paid personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of [the public records law]."

This framework makes clear that public officials and governmental employees have obligations to manage and retain records in order, at least in part, to preserve the right of public access. Under the framework, the "custodian" has specific responsibility for allowing access. Although it is not explicit in the statutes, it is also clear that individuals who have physical custody of records must be understood to have a legal obligation to provide them to custodians when those records are the subject of a request. Both the agency and individuals, including perhaps, individuals who are not custodians, can be liable for failing to comply with the law.

A New Pleading Requirement?

Into this mix of obligations, the court in *Cline* has established a restrictive pleading requirement, which apparently requires naming the person who is the custodian of records for the agency in question in order to state a claim. What about only naming the agency itself as the defendant? That wasn't done in this case, so it's unclear whether the court would have allowed it. But a narrow interpretation of the pleading requirements for a public records case seems inconsistent with the

broad policy of open access to records. Indeed, nothing in the statute that provides a remedy to those seeking access specifically requires the custodian to be named in a lawsuit.

Problem With the Concept of the “Custodian”

The main problem with the court’s focus on custodians lies with the vagueness and practical difficulties with the concept of the custodian as it is defined in the public records law. Here’s what the statute says about custodians:

§ 132-2. Custodian designated. The public official in charge of an office having public records shall be the custodian thereof. (1935, c. 265, s. 2.)

The law does not define what an “office” is, but the court in *Cline* seems to assume that it means a state agency, and that the person in charge of the state agency is the custodian. Slip op p. 9-10, citing *Employees Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 214, (2010), in which the State Treasurer was named, and *Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __,754 S.E.2d 223, 225, *supersedeas and disc. review allowed*, __ N.C. __, 758 S.E.2d 862 (2014), in which the director of the AOC was named. The court takes note, however, of the Attorney General’s advice that state agencies should designate a custodian to provide access to records. So it might be the case in *Cline* that if the assistant director had been officially designated as the custodian, the case could have gone forward. Presumably any custodian designated by the agency or one of its divisions would be recognized as an appropriate named defendant. But in the absence of a designation, it appears that the court will require the head of the agency to be named.

The matter is more complicated in local governments. For cities, G.S. 160A-171 creates the office of the city clerk, and provides, among other duties, that the clerk is “the custodian of all city records.” There is no comparable provision for county clerks. David Lawrence, in his book on public records for local governments, suggests that the best reading of this provision is that the clerk is responsible primarily for official city and board records, including minutes, ordinances, policies and the like, but perhaps not for literally all of the city’s records. He interprets the concept of “office” to roughly coincide with departments (but not individual, physical offices) and suggests that having a single individual as custodian (such as the clerk or the manager) for the entire unit would be inconsistent with the requirement for custodians to provide access. See *Public Records Law for North Carolina Local Governments,* pp.37, 66-67. Indeed, members of the press often resist as unlawful the concept of a city or county having a “gatekeeper” through whom all public records requests must be filtered.

Furthermore, courts have not required naming the city clerk as a party in cases seeking records. Indeed, in *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council, 181* N.C. App. 1, 17-18, 639 S.E.2d 96, 106-07 (2007), the court of appeals rejected the defendant’s claim that the town clerk was a necessary party to the action, which sought billing records from the contracted town attorney. The court noted:

“[T]he policy underlying our Public Records Act is designed to give liberal access to public records, and to construe the statute so narrowly as to require the town clerk, to be a necessary party would be in contravention of the statute’s intent. Having named the Town through the Town Council, the Mayor, the individual Town Council members, the Town Manager, and the Town Attorneys as parties to this suit, and given the nature of the documents involved, we cannot hold the town clerk constitutes a necessary party without whom a valid judgment cannot be rendered in this action completely and finally determining the controversy.”

Physical Custody vs. Legal Custody

The distinction between physical custody and legal custody is another challenge in applying the custodian concept. The concept of a single point of responsibility in a custodian clearly means, as the court in *Cline* concluded, that many public officials and employees have physical custody of public records, but not all of them are considered custodians under the public records law. The court in *Kitty Hawk* eventually held that the records in the private law firm of the town attorney were public records. Courts have consistently recognized that public agencies cannot limit or deny the right of access based on the fact that they don’t physically possess a record. Indeed, in the age of electronic documents the whole concept of physical possession may have lost its mooring.

But here is another troubling effect of the vague definition of custodian. It assumes that records exist in an office, and the

custodian is the person in charge of that office. How should this concept be applied to an email message? In many cases, a single email "physically" exists in more than one place. The law makes clear that an agency that physically stores records is not the custodian of those records if it only "holds the public records of other agencies for purposes of storage or safekeeping." G.S. 132-6 (a). The IT department for a local government or a separate IT agency retains emails on back up devices and servers. Who is the custodian of those records? And since the records retention laws allow an individual employee to delete records of short terms value (which covers many, many email messages) what is the status of the copy of those emails that is archived in bulk on a storage system operated by an agency or perhaps a different agency from the one in which the employee works?

A Narrow Ruling

The Court of Appeals is not in a position to rewrite the definition of "custodian." But given the challenges in interpreting that provision in the law, perhaps a broader option for litigants to name the unit of government, the official custodian, or a person with administrative responsibility or physical custody of the records sought, would be more consistent with the broad right of access to the records that belong to the people. A broader standard may be necessary, given that any person who participated in a violation of the law can potentially be personally liable for attorneys fees.

It could be argued that if a plaintiff is asking the court to order a public agency to provide access to a record, then the order should be made to the custodian, since he or she is the one who has the statutory responsibility for providing access. On the other hand, a lawsuit against the agency itself or a person in a high level position of responsibility within the agency should be sufficient, since the agency is either headed by the presumptive custodian (in the case of a state agency) or by a board or public official who could direct the custodian to comply (in the case of a local government). To add to the complexity of this issue, sometimes it is the person who has (or had) *physical* custody of the record (who may not be the custodian) who is refusing to release the record, in which case an order binding the custodian may not be effective. For example, suppose a city council member refuses to provide access to emails created on her personal computer. How would an order to the city clerk as custodian be effective in providing access? In such a case, perhaps it is appropriate to consider the person with physical custody as the custodian for purposes of providing access.

In the end, the concept of a single custodian, defined as a person in charge of an "office" in which public records exist is simply too outmoded and too difficult to apply in an age where text messages and social media postings, as well as records created on privately owned devices are all potentially subject to public access. This may be all the more important in light of previous legislative proposals that would have imposed criminal liability on custodians for failure to provide access to public records. The reality in many agencies is that there are multiple players, including the person with the physical custody, the governing official or board, and the attorney representing the agency, who are involved in the decision to release or withhold a record.

How Do Other States Define "Custodian?"

Set out below are several examples of provisions from other states that appear to address more directly and clearly the specific responsibilities of public agencies and their employees when it comes to managing and providing access to public records.

Arkansas:

(1)(A) "Custodian", with respect to any public record, means the person having administrative control of that record. A.C.A. § 25-19-103 -1(A).

Maryland:

(c) "Custodian" means:

(1) the official custodian; or

(2) any other authorized individual who has physical custody and control of a public record.

(d) "Official custodian" means an officer or employee of the State or of a political subdivision who is responsible for

keeping a public record, whether or not the officer or employee has physical custody and control of the public record. Maryland § 4-101(c), (d)

Kentucky:

(5) “Official custodian” means the chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control;

(6) “Custodian” means the official custodian or any authorized person having personal custody and control of public records;

If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records. KRS § 61.872

Iowa:

The term “lawful custodian” means the government body currently in physical possession of the public record. The custodian of a public record in the physical possession of persons outside a government body is the government body owning that record. The records relating to the investment of public funds are the property of the public body responsible for the public funds. Each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter and shall publicly announce the particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated. “Lawful custodian” does not mean an automated data processing unit of a public body if the data processing unit holds the records solely as the agent of another public body, nor does it mean a unit which holds the records of other public bodies solely for storage. Iowa Code Ann. § 22.1

Florida:

(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. Fla. Stat. Ann. § 119.07

Idaho:

(3) “Custodian” means the person having personal custody and control of the public records in question. If no such designation is made by the public agency or independent public body corporate and politic, then custodian means any public official having custody of, control of, or authorized access to public records and includes all delegates of such officials, employees or representatives. Idaho Code Ann. § 9-337

Links

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