

695 So.2d 1126  
Court of Appeal of Louisiana,  
Fourth Circuit.

The ALLIANCE FOR AFFORDABLE ENERGY and Gary L. Groesch

v.

Jacquelyn M. FRICK and the City of New Orleans.

No. 96–CA–1763.  
May 28, 1997.

*Custody and Control*

The City and Frick assert that the duty to produce the documents is not purely ministerial because the City does not possess all of the records, and therefore, mandamus is improper. They argue that they cannot produce records which they do not have. That argument is relevant to those items that were the subject of the trial court's judgment and which Frick denied possessing. Frick claimed that she did not possess item Nos. 1, 3, 4, 5 and 24 in the January 29, 1996 request or the items in the April 18, 1996 request. Frick does not deny that the City Council Utilities Regulatory Office possesses the remaining documents which the trial court ordered her to produce.

The court ordered the City and Frick to modify their written responses to comply with [La. R.S. 44:34](#), but did not order production of documents which Frick claimed were not in her custody.

[La. R.S. 44:34](#) prescribes the response when the person does not have custody of the records.

If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person then has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody or control. He shall include in the certificate ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter.

Frick and the City maintain that the enforcement provision of the Public Records Law, [La. R.S. 44:35](#), presupposes that the records are located in the custodian's office, citing [Revere v. Taylor, 613 So.2d 738 \(La.App. 4th Cir.\)](#), *writ den.* [615 So.2d 332 \(La.1993\)](#). They argue that mandamus is improper because the records are not in Frick's physical possession. That argument equates physical possession with control and has no merit.

In *Revere*, a convicted felon incarcerated in Angola requested documents from the New Orleans Police Department in connection with a 1987 homicide. The Department notified the defendant that the requested documents could not be found and *the item numbers furnished by the applicant were issued*

by the St. Tammany sheriff's office who should be contacted. That suggested the St. Tammany sheriff's office, not the New Orleans Police Department, was the custodian. This Court held that the mandamus was properly denied.

Frick advised the Alliance that she did not possess certain documents, but did not certify that another person was the custodian of those records.

The custodian may not avoid its responsibility to control public records by transferring physical possession to another. In [Times–Picayune Publishing Co. v. Johnson, 645 So.2d 1174](#), the defendant legislators argued that they did not have custody of the requested records because they had transferred possession to Tulane University. This Court rejected that argument because the legislators were required by law to maintain the records for three years and therefore had “control” of the documents. Moreover,

Although [La. R.S. 44:1\(A\)\(3\)](#) ... permits transfer of the physical custody to another, this does not mean legislators can avoid their responsibility to *control* their public records merely by transferring physical custody to another. [Emphasis in original.]

*Id.* at 1176.

Citing [Common Cause v. Morial, 506 So.2d 167 \(La.App. 4th Cir.\)](#), *writ den.* [512 So.2d 458 \(La.1987\)](#), Frick and the City contend that they fulfilled their duty to the Alliance by advising that they did not have the requested documents. In *Common Cause v. Morial*, the Mayor's office certified to the plaintiff “as required by [La. R.S. 44:34](#)” that neither the Mayor nor the Director of Public Information had possession of the requested record (a tape) and they were unaware of its existence. *Id.* at 169.

Frick's response that “the requested documents are not in (her) possession” does not comply with § 34. Frick did not certify that she is not in “custody or control” of the records as defined by [La. R.S. 44:1\(A\)\(3\)](#), state the reason for the absence of the records, provide the location of the documents, identify the person who has custody or control, or state when and how that person gained control. Frick did not include “ample and detailed answers ... which may facilitate” the Alliance's exercise of its rights under the Public Records Law. [La. R.S. 44:34](#).

The trial court properly ordered Frick to supplement those responses to comply with § 34.