MUNFA

MEMORIAL UNIVERSITY OF NEWFOUNDLAND FACULTY ASSOCIATION

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TO: All MUNFA Members

FROM: The MUNFA Executive Committee

DATE: May 26, 2011

SUBJECT: CUSTODY AND CONTROL OF ACADEMIC STAFF FILES, RECORDS AND DOCUMENTS

The Canadian Association of University Teachers (CAUT) recently distributed the following addendum regarding the Custody and Control of Academic Staff Files, Records and Documents. This addendum should be reviewed by all Academic Staff Members.

INFORMATION BULLETIN 2010/11:25

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CAUT ACPPU
Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

April 21, 2011

MEMORANDUM 11:17

TO: Presidents and Administrative Officers – Local, Federated & Provincial Associations

FROM: James L. Turk, Executive Director

SUBJECT: Addendum re: Custody and Control of Academic Staff Records

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I. Introduction

On September 23, 2009, we advised you by memo (attached) of the emerging threat to the customary practice in Canadian universities of academic staff having custody and control of their own files and records – both hard copy or electronic. The Association of Professors at the University of Ottawa (APUO), with the assistance of CAUT, had won an important arbitration award on this matter. The details were described in the 2009 memo so you could use this information should the matter arise at your institution.

Our concern about custody and control stems from the fact that academic staff's custody and control of their files and records is a vital underpinning of academic freedom. Were the employer, as in non-academic workplaces, to have custody and control, academic staff would be vulnerable to the kind of surveillance that is anathema to academic freedom and creative work.[1] That is the reason that academic staff custody and control of their records has been the longstanding practice at all universities across Canada.

When we wrote you in 2009, it was because that practice was under attack through misunderstandings about the implications of access to information legislation. As we pointed out in the attached memo, access legislation does not specify or change what is in a public institution's custody or control. The purpose of access legislation is to provide access to government information in order to promote democracy, but not to change the nature of any

[1] In a recent decision, *R v. Cole*, 2011 ONCA 218 (March 22, 2011), the Ontario Court of Appeal affirms employees' reasonable expectation of privacy.

public institution, its mandate or its function. Records that are not in the public institution's custody and control are not affected by access legislation.

The situation at the University of Ottawa has evolved, and there have been attempts elsewhere to use access legislation to take custody and control away from academic staff. This memo describes those developments as well as other ways in which staff custody and control of their records is being threatened – by new university policies concerning electronic communications services, privacy, and cloud computing. Finally, it makes suggestions for steps your association can take to protect your members' rights.

II. The Issue Continues at uOttawa

While Arbitrator Chodos was considering the matter at the University of Ottawa in 2008-2009, the Office of the Ontario Information and Privacy Commissioner (IPC) suspended consideration of the appeal filed with the IPC by the requester until the Arbitrator made his award[2]. In November, 2009, the IPC reopened its consideration of the case[3] – asking APUO, the University and the requester to make submissions on the matter of custody and control of the documents in possession of academic staff.

The IPC made a further request to the parties in March, 2011, after the Ontario Divisional Court made two important rulings on custody and control[4] (for more about these rulings, see below). Specifically, the parties were asked to provide to the IPC any further representations on custody or control in light of these two Ontario Divisional Court decisions. These subsequent representations were provided in March and April 2011.

The parties are now awaiting the decision of the IPC Adjudicator.

III. Meanwhile elsewhere in Ontario

While the events in relation to the original case at Ottawa were unfolding, a different Ontario IPC Adjudicator was issuing a series of decisions within weeks of each other in relation to an appeal against a denial of three new requests – one at Wilfrid Laurier, one at Guelph and one at Ottawa. The Adjudicator's decisions, issued days apart -- on November 9, 2009 (Wilfrid Laurier)[5], November 10, 2009 (Ottawa)[6] and November 19, 2009 (Guelph)[7] – were in reference to requests from one requester for all e-mail communications between three members[8] of a Social Sciences and Humanities Research Council of Canada (SSHRC) Selection Committee[9] and SSHRC officials. All three universities declined to provide the requested material (the right decision but for the wrong reasons). The Adjudicator granted the requester's appeal –

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[2] Three decisions were rendered by Arbitrator Chodos on September 29, 2008, January 20, 2009, and May 11, 2009.
[3] The original uOttawa case is IPC File PAO7-119.
[4] *City of Ottawa v. Ontario,* 2010 ONSC 6835 and *Ministry of Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172
[5] Ontario IPC Order PO-2836
[6] Ontario IPC Order P0-2842
[7] Ontario IPC Order P0-2846
[8] One at Wilfrid Laurier, one at Ottawa and one at Guelph
[9] Selection Committee No. 15 (2007/8 competition)

concluding that the requested documents were in the custody and under the control of the university because: 1) the records have been sent using the university's electronic communications services, and were stored on the university's server; and 2) the records related to activities [serving on a SSHRC committee) that were part of the academic staff's workload, and therefore were in the custody and under the control of the university.

None of the academic staff associations had been informed that their members' records were being sought and so had no opportunity to intervene before the Adjudicator. Because of the previous case at Ottawa and the arbitration award, the Adjudicator's decision in this second case at Ottawa was challenged. Prior to receiving the notice of the IPC's decision to reopen the original Ottawa case, APUO had not been notified of the second case or of the appeal of that decision, even though it was issued almost concurrently and was included with the notice of the reopening of the first case. As a result, APUO filed a request for reconsideration of the Adjudicator's order in the second case[10] and for a stay of that order on November 30, 2009. The Adjudicator ordered a Stay of Order PO-2842 and requested submissions on the request for reconsideration and the merit of the decision. APUO is awaiting a decision from the Adjudicator.[11]

IV. Now to Alberta

On February 26, 2010, an Adjudicator with the Alberta IPC issued an order[12] in an appeal by the same requester regarding the same SSHRC competition as in the three Ontario cases. The requester was seeking all communication between a fourth member of the SSHRC Selection Committee (at the University of Alberta) and officials at SSHRC. The Alberta Adjudicator ruled that: "The Public Body's evidence therefore establishes that it conducted a search for records responsive to the Applicant's access request and found that such records either never existed or no longer existed."[13]

While this meant that no academic staff records had to be turned over, the Adjudicator's analysis of custody and control deemed the university to have custody and control – using reasoning similar to the Ontario decisions.

The Association of Academic Staff: University of Alberta (AASUA), with the assistance of CAUT, and the University of Alberta both filed petitions for judicial review of the Adjudicator's decision – albeit for very different reasons. Hearings of these petitions are presently proceeding.

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[10] Ontario Order P0-2842

[11] On January 13, 2011, Adjudicator Loukidelis issued Order P0-2942 in response to Wilfrid Laurier University [Order P0-2836,] denying access to the four records identified as responsive to request. The University claims that section 65(8.1) (a) of FIPPA operates to oust the jurisdiction of the Act. The Adjudicator confirmed the University's decision. This leaves standing the claim that these records were in the University's custody or control, even if not available to the requester.

[12] Alberta IPC Order F2009-23

[13] Para 71, Alberta IPC Order F2009-23

V. Back to Ontario – Wilfrid Laurier (again), Carleton and Western Ontario

The Ontario IPC Adjudicator who issued the orders at Wilfrid Laurier, Ottawa and Guelph in 2009 issued additional orders in January 2011. First the Adjudicator issued an order in the 2009 Wilfrid Laurier University case upholding the University's denial of access to the four relevant records on the grounds that they excluded from the scope of the *Act* under section 65(8.1)(a).[14] Days later the Adjudicator issued orders with reference to Carleton[15] and Western Ontario[16] where the same requester had sought correspondence between SSHRC 2008-9 Selection Committee members and SSHRC officials. The IPC Adjudicator applied the same analysis, concluding that the requested documents were exempted under section 65 (8.1)(a). While this prevented release of the emails, it left standing the claim that these records were in the University's custody or control, even if not available to the requester.

VI. The Ontario Divisional Court Enters the Picture

Both an Ontario IPC Adjudicator in five appeals from the same requester and an Alberta IPC Adjudicator, in relation to the same requester and the same set of facts, have made decisions that treat academic staff records as if they were in the custody or under the control of the university. Proceedings supported by CAUT are underway in both jurisdictions.

Meanwhile, the Ontario Divisional Court has in *City of Ottawa v. Ontario*[17], articulated important principles concerning the determination of custody and control of records under Ontario's *Freedom of Information and Protection of Privacy Act*. The Court granted a petition for judicial review concerning an Ontario IPC order[18] regarding an appeal against the City of Ottawa's decision to refuse access to "...All emails, letters and faxes sent or received by the City Solicitor, and/or his assistant of Ottawa's Legal Services Department, addressed to and received from [an association whose Board the City Solicitor was a volunteer member]."

Using similar reasoning as in the university cases, the Ontario IPC Adjudicator had based her decision on the following:

> First, the City has physical possession of the records on its e-mail server, as well as the right to such possession. The fact that the Solicitor kept the e-mails in a separate folder in the e-mail system does not alter the fact that they were received and stored in the City's e-mail server. Following Order PO-1725, I do not accept the argument that the City does not have "custody" of records voluntarily received and subsequently stored by an employee on a City owned, maintained and regulated e-mail system, which has the primary purpose of facilitating City business.

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[14] Order P0-2942 issued January 13, 2011. Available at: http://www.canlii.org/en/on/onipc/doc/2011/2011canlii1316/2011canlii1316.html

[15] Order PO-2946 issued January 26, 2011. Available at: http://www.canlii.org/en/on/onipc/doc/2011/2011canlii3432/2011canlii3432.html

[16] Order PO-2947 issued January 27, 2011. Available at: http://www.canlii.org/en/on/onipc/doc/2011/2011canlii3365/2011canlii3365.html

[17] 2010 ONSC 6835 (December 13, 2010)

[18] Order MO-2408

> Second, the City's submissions indicate that it has the authority to regulate the use of the e-mail system upon which the records are kept as well as the disposal of such records, demonstrating that it clearly has "control" over the e-mails that are within its custody.[19]

The Divisional Court overturned the Ontario IPC decision and upheld the City of Ottawa's decision that it did not have custody or control of the requested documents:

> Thus, in my opinion, an examination of these factors from the perspective of scrutinizing government action and making government documents available to citizens so that they can participate more fully in democracy, points overwhelmingly to the conclusion that the documents cannot be said to be within the control of the City. The Arbitrator did not err in considering these factors to be relevant to her determination of what constitutes custody or control. She did err, however, in failing to consider those factors contextually in light of the purpose of the legislation.[20]

The Court continued:

> Employers from time to time may also need to access a filing cabinet containing an employee's personal files. That does not make the personal files of the employee subject to disclosure to the general public on the basis that the employer has some measure of control over them. The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature of the City's conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.[21]

VII. The Supreme Court Renders a Key Decision

In mid-2010, the Supreme Court of Canada addressed important custody and control principles in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association.*[22] These are:

1. "Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance."[23]

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[19] Order MO-2408. Available at: http://www.canlii.org/en/on/onipc/doc/2009/2009canlii16569/2009canlii16569.html

[20] *City of Ottawa v. Ontario*, 2010 ONSC 6835, para 31. Available at: http://www.canlii.org/en/on/onscdc/doc/2010/2010onsc6835/2010onsc6835.html

[21] Ibid., para 42

[22] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. Available at: http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html

[23] Ibid., para 1

2. "The first question to be addressed is whether s. 2(*b*) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(*b*) does not guarantee access to all documents in government hands. Section 2(*b*) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government." [24]

3. "...The historic function of a particular institution may assist in determining the bounds of the institutional confidentiality..."[25]

VIII. Conclusion

Questions concerning custody and control of academic staff records are still to be resolved in the legal arena. Access to information legislation brings the matter to the forefront since it forces a decision about whether customary university practice of academic staff having custody and control of their records and files will be overturned. Since the protection of academic freedom depends on customary practice being upheld, CAUT will actively assist any association where access requests are used by administrations to claim custody and control.

But, academic staff custody and control are at risk through other administrative initiatives. The issue of custody and control is linked to all decisions and policies that universities want to apply to records written, received, accessed or used by the academic staff in performing their duties.

New policies and practices with respect to cloud computing and use of computer services require particular scrutiny. Contractual agreements between universities and these third-parties, as well as contractual agreements imposed on users, contain provisions requiring that all documents received or sent using these services must be under the control of the university and the university should have access. These agreements provide implicitly or explicitly that these documents are subject to the laws governing access to information. The consequence of these agreements, when the third-party is a U.S.-linked corporation or where the documents are stored or processed in the U.S., is to be subjected to the application of U.S. laws, specifically the *Foreign Intelligence Surveillance Act* as amended by the *USA Patriot Act.*

IX. What Your Association Can Do:

1. Make sure your members are aware of their rights with respect to custody and control of their records in the academic workplace.

2. Ask your members to inform their association of any requests for their records under access legislation.

3. Meet with your administration to advise them of your determination to protect the customary practice of your members'custody and control of their records. In some cases, hopefully many,

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[24] Ibid., para 30
[25] Ibid., para 40

your administration will recognize the importance of maintaining this practice. But be on guard against a frequent but dangerous administrative offer to protect your members against inappropriate access requests: "We'll protect your members. Have then turn over any requested material to us and we'll ensure that nothing exempted or excluded by the *Act* is released." That promise is a trap. For all their records for which your members have custody and control, there is no obligation to turn them over to the employer in the first place. The key advice when a request is made for what is properly an academic staff member's records is to *just say "No."*

4. Please send our legal department a copy of any proposed university policy or agreement that you feel may compromise your members' custody and control rights. These include all policies relating to cloud computing, privacy, records management, intellectual property and confidentiality.

If you have any questions or would like someone to speak to your members on these issues, please let us know.

/mmp

Attachment

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CAUT ACPPU
Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

September 23, 2009

MEMORANDUM 09:41

TO: Presidents and Administrative Officers – Local, Federated & Provincial Associations

FROM: James L. Turk, Executive Director

RE: Custody and Control of Academic Staff Records

I. Introduction

Academic staff custody and control of their own files and records is a vital underpinning of academic freedom. For that reason, it has been the longstanding practice in Canadian universities that, with limited exceptions[1], documents and records in academic staff members' files and offices, whether hard copy or electronic, have been in their custody and control, not the universities'. In some cases, this practice has been codified in university policies.

This tradition is now being threatened. The purpose of this memo is to alert member associations to the danger, discuss the issue, summarize the first case that has been adjudicated, and recommend steps that members associations should take to protect their members' rights and their academic freedom.

Imagine, for a moment, coming into your office on a weekday morning and finding the dean going through your file cabinet or reading your email. The typical response would rightly be outrage because your files and records are *your* files and records, not the university's.

Similarly, if you retire or take a job in another university, the practice is not that you must leave all your records, notes, and files – taking only pictures of your family and your coffee cup with you – as is the norm in most workplaces where the departing person is given a box in which to put "personal effects."

Recently, some university administrations have begun asserting that they have custody or control of academic staff's records and documents. This new position has typically arisen in relation to

[1] The exceptions are documents an academic staff member received or produced in relation to an administrative function for the university, such as, in the capacity of departmental chair, graduate secretary or member of a university/faculty/departmental committee. Even then, only those records pertaining directly to those administrative functions would be in the university's custody or control. Email sent to colleagues while chair, but not in the person's capacity as chair, would not be in the university's custody or control.

access to information legislation. As universities are now under such legislation in most provinces, they have started receiving requests for records, and have, in turn, deemed academic staff notes, emails, correspondence as material in the university's custody or under its control and thus subject to being accessed by the public, not to mention the university administration.

As a result, university administrations, in response to access to information requests, have demanded that academic staff turn over all records in their files or in their email – whether at their offices or in their homes – that contain the name or phrase specified by the person requesting access. One university administration has even offered to provide academic staff with someone to go through their email if it is too time-consuming a task for the academic staff member.

The university's line in these instances has often been: "Turn over all records, documents, emails you have making reference the requested name or phrase, and then we will determine which can be given to the requester and which are exempt under access to information legislation."

We believe this position is wrong in that it violates customary practice, threatens academic freedom, contravenes collective agreements, and goes beyond the scope of access legislation.

Access to information legislation only applies to documents that are in a public institution's custody or control. As access legislation does not extend or change what documents are in an institution's custody or control nor does it define "custody" or "control." Customary practice in each sector becomes a key basis for determining what is in any type of institution's custody or control and what is not – thereby defining what falls under access to information legislation.

Because of the customary practice in universities that most records and documents held by academic staff are *not* in the institution's custody or control, we believe the institution has no right to see them, whether in reference to an access to information request or otherwise.[2] Under access legislation, in CAUT's view, universities only have the right to see that subset of records and documents arising from someone's administrative function that were produced in relation to that function. Of this subset, some will be excluded from application of the legislation. In Ontario, as in most provinces, records that are already in a university's custody or control but that refer to teaching materials or research are specifically "excluded" from coverage of the legislation. Of those documents or records already in a university's custody or control and ***not*** excluded from coverage of the legislation, there is a test that reduces still further those that can be released under access legislation. These are "exceptions" that typically deal with personal information or records whose release could damage the economic interests of the institution.

I would like to try to clarify this by outlining the process to be followed when the university receives an access to information request. There are three sequential considerations that must be followed:

1. Are the requested records in the custody or under the control of the university? If they are not, that is the end of the matter.

[2] Exceptions would be when the university administration believes that documents or emails pose threats to the integrity of the electronic record system (e.g., due to the presence of viruses or other malware) or when the university must comply with an order of the court. If the administration feels that there may be records pertaining to illegal activities, they should bring the matter to the attention of the police.

2. If the records are in the custody or under the control of the university, a second question must be asked: Are any of those records excluded under the legislation? For example, in most provinces teaching material and research are excluded. For example, in Ontario, Section 65 (8.1) of the FIPPA states:

   This Act does not apply,

   (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or

   (b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution. 2005, c. 28, Sched. F, s. 8 (2)

   If the records are excluded, the matter stops here.

3. If there are records that are not "excluded", a third question must be asked: Are the requested records (or part of these records) "exempted" or "excepted" under the legislation. If so, they cannot be released. Most legislation has exemptions or exceptions on the grounds of personal privacy,[3] prejudice to the economic or competitive interest of the institution,[4] among others.

   Only those records that pass all three tests can be released.

In short, the first (and most essential) determination is what documents are under the institution's custody or control. For those that are not, the access to information legislation does not apply.

II. Custody or control in universities – the first arbitration

The determination of who has custody or control must be examined from three perspectives – *collective rights* embedded in the collective agreement, *individual rights* embedded in freedom of information and protection of privacy legislation, and *past practice* within the institution.

Despite universities being subject to access to information legislation in some provinces for many years, the first case of who has custody and control of university academic staff documents, files and records did not come before a judicial body or administrative tribunal until last year – in a case at the University of Ottawa where the University made a broad demand for academic staff documents and email in response to an access to information request. The Association of Professors at the University of Ottawa (APUO) filed a grievance because much of what was demanded was not in the University's custody or control.

CAUT joined APUO in arguing the case before Arbitrator Philip Chodos. The arbitrator rendered his decision on September 29, 2008 and remained seized of the matter. He subsequently issued two supplementary awards – in January 2009 and May 2009.

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[3] E.g., in Ontario, FIPPA Section 21
[4] E.g., in Ontario, FIPPA Section 18 (1)(c)

The position argued before the arbitrator (as reproduced below) was that, based on collective agreements, memorandum of agreements, faculty handbooks and on past practice in our sector, most records in the possession of academic staff are in the academic staff members' custody or under their control, ***not*** in the custody or under the control of the institution.

In his September 29, 2008 decision, Arbitrator Chodos stated:

> "The University has at least implicitly recognized that there may well be documents originated by and in the possession of professors that are not in the custody and control of the University, as that term is used in the FIPPA. Both parties have also agreed that the collective agreement informs and provides context to the notion of "custody and control" as do the practices and customs at the University vis-à-vis the three major academic endeavours: (1) teaching, (2) research, and (3) community activities. I entirely agree with them in this respect."[5]

The Arbitrator, in a supplementary award, reiterated the key issue:

> "It may be desirable to note yet again that at the heart of this dispute, and what I am seized with as an arbitrator, is whether, pursuant to the collective agreement between the parties, the University administration has custody or control over documents that are normally in the possession of the members of the APUO bargaining unit."[6]

APUO's submission was included by the Arbitrator in full as the Appendix to his Supplementary Award No. 2. It is reproduced in full below:

INTRODUCTION

The arbitrator has kept jurisdiction to determine the application of the access request to specific types of documentation, which ultimately requires a determination of what documents may be in the custody or control of the University [par. 231 & 236 of the award];

The University's right to seek access to documents, in answer to a FIPPA request, is limited by the provisions of section 65 of FIPPA (non application of the Act) and by the collective agreement and the customs and practices of academic institutions.

The question is (i) what, if any, documents, that may be in the possession of bargaining unit members, are within the custody or control of the University, (ii) which of those documents are subject to an access request under the Act (i.e. not exempted by section 65), and (iii) which of those documents are subject to a request by the University to the members.

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[5] Award of Arbitrator Philip Chodos, September 29, 2008, para 229 (in part)
[6] Supplementary Award No. 2 of Arbitrator Philip Chodos, May 11, 2009, para 21

PROPOSAL

A. The Question of Custody or Control by the University

The University may have custody or control of documents in possession of bargaining unit members only with respect to the following categories of documents, whether in hardcopy or electronic format:

1) Administrative duties:
documents held by members of the bargaining unit acting in an administrative role such as chairs or directors of schools, vice-deans, associate deans, program directors, and which are related to those administrative duties, but excluding any personal notes or annotations [para. 207 & 235 of the award].

2) Committees within the University regarding general policies:
documents received by a member of the bargaining unit, acting in his or her capacity as a member of a department, faculty or University committee when the committee plays an official role in the University, such as Ethics in research committee, Internal research grants committee, parking committee, or space committee, etc, but excluding any personal notes or annotations added by the member. However, FIPPA does not apply to those documents if related to research or teaching as generally described in sections 20.2 and 20.3 of the collective agreement (i.e. to which FIPPA does not apply according to section 65 of the Act).

3) Personnel or peer review committees:
documents received or consulted by a member in his or her capacity as a member of a department, faculty or University committee, such as hiring committee, personnel committee, and tenure or promotion committee, excluding any personal notes or annotations added by the member. However, FIPPA does not apply to those documents as they are employment related documents under section 65 of the Act.

4) Career path and performance evaluation:
documents submitted to the University (i.e. to the personnel committees, deans, or Joint Committee) by the member, such as an application for tenure, promotion, or sabbatical leave. These documents, once sent by a member to the University in order to obtain those rights, are in the custody and control of the University. However, FIPPA does not apply to those documents as they are employment related documents under section 65 of the Act.

5) General University communications:
(documents sent to all members or a large group of members) the original is in the custody and control of the University. So far as the application of FIPPA is concerned, this is all that is needed. No access request to members is required.

6) Student Exams: (this category, depending on the different stages, could be qualified as a "transformed custody or control category ".)

a) draft of the exam (custody and control of academic staff)

b) original as printed by the University (custody and control of academic staff)

c) collected for and received by the academic staff for grading (shared custody or control between academic staff and student)

d) annotated copy kept by academic staff (shared custody or control between academic staff and student)

e) marks sent to Department (marks, not exams, in custody and control of the University)

f) appeal by student, individual exam sent to Department (in University custody and control once received)

7) Exam Copies that are Submitted to the University by the Member:

a) submitted under category 4 by faculty member (see above)

b) University or departmental policy whereby exam copies are maintained in a "bank" or are used for accreditation purposes (those copies are in the custody and control of the University). Since the actual copy is in the custody and control of the University, no further action by the individual member is required. However, FIPPA likely does not apply according to section 65 of the Act (teaching materials).

[Note: issue of control and custody is separate from the issue of copyright of exam material, which is not being addressed in this arbitration.]

B. Which of the above documents are subject to the application of an access request under FIPPA

Category 1

Category 2, unless related to research or teaching as generally described in article 20 of the collective agreement, as FIPPA would not apply according to section 65 of the Act.

Category 5

Category 6, (e) and (f)

C. Which of the above documents are subject to a request by the person designated as head under FIPPA to the members of the bargaining unit

Category 1

Category 2, to the extent noted above.[7]

[7] Chodos Supplementary Award No. 2, Appendix

After having recognized in his first decision the unique context in which academic staff fulfill their functions, the Arbitrator acknowledged the APUO's proposal:

> "I believe the Association's proposal provides a useful starting point in addressing the issues that remain in dispute."[8]

The Arbitrator subsequently concluded:

- That Paragraph A2 (see above) of the Association's proposal is correct;
- That the University has no custody or control over personal notes or annotations made by academic staff;
- That the decision on "exemptions" [of those documents that are in the University's custody or control] pursuant to section 65 of the Ontario FIPPA is best left to the determination of the Privacy Commissioner.

In his three decisions, the Arbitrator has:

- Declared the University's request for "...copies of all documents, written or electronic, which mention or refer to (a) [Professor X], (b) courses [x. y. z, and a, b, c, and d, (c) [Professor X's] research direction in [course x] including graduate student [A]; (d) website [B]; (e) the free documentary film series hosted by [Professor X], and (f) [a specific radio show]"[9] was contrary to the collective agreement and should be withdrawn.
- Asserted that he has jurisdiction to "hear submissions with respect to the question as to which types of documents in the possession of members of the Association are subject to the access or control of the University."[10]

Overall, the Arbitrator has upheld the APUO's concerns and his awards have served to protect members' customary rights in relation to the custody and control of documents in their possession.

III. The uniqueness of the university and why custody and control are important

In his initial award, Arbitrator Chodos recognized the context for the whole discussion of custody and control in the university is unique. Noting that while academic staff are employees of the university, he added:

> "Nevertheless, in light of the collective agreement and the age-old customs and practices of academic institutions, including the University of Ottawa, it can hardly be argued that university professors are typical employees who are subject to close scrutiny of management. In general...academic staff have a considerable degree of independence in the exercise of their academic functions, i.e. teaching, research and

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[8] *Ibid.* (para 23)

[9] Request from Pamela Harrod, Secretary of the University sent by email to faculty in the University of Ottawa on Nov. 9, 2006

[10] Supplementary Award No. 1 of Arbitrator Philip Chodos, January 20, 2009, para 26

community activities. Indeed, it is hard to conceive how they could fulfill those functions without such latitude and independence."[11]

It is clear that our ability to protect the integrity of our profession and our ability to fulfill our academic roles depend on recognition of the unique nature of higher education and the requirements for us to be able to do our work. This, in turn, makes it vital that we spell out in our collective agreements as clearly and uncompromisingly as possible our rights and requirements – especially academic freedom. Maintaining custody and control of our records, files and materials is a prerequisite for protecting our academic freedom. In that regard, we feel the position advanced by APUO [the six points on pp 2-3 above] is excellent.

IV. The importance of access to information legislation

Access to information and protection of privacy laws have created an important new right for citizens – the right to acquire official information from a public institution. In practice, citizens have acquired the right to request access to records in the custody or under the control of a public institution. But it is essential to recognize that the legislation **did not** modify the type of documents that are in the custody or under the control of the institutions.

Universities never had custody or control of the overwhelming majority of documents and records in the possession of academic staff before the introduction of freedom of information and protection of privacy laws. We cannot allow university administrations to claim that the introduction of those laws gives them a new right of custody and control.

V. What local associations can do?

We are asking our member associations to do several things:

1) Share the substance of this memo with your members so that all are aware of their rights with respect to any of their documents, emails and records.

2) Ask your members to advise you of any requests they may receive, whether in relation to access to information or otherwise, that would require them to provide the administration access to their documents, email or records.

3) If, after talking with your association, the administration persists in making requests for access to documents that are not in their custody or control, please advise CAUT so we can assist you in protecting the rights of your members.

4) Send us a copy of any current policy at your institution with respect to the status of academic staff records and documents.

5) Consider putting forward language in your next round of bargaining that would clarify longstanding practice about what documents are in the custody and control of your members. CAUT will be pleased to assist you with the drafting of that language.

[11] Chodos Award, September 29, 2008, para 230

6) Negotiate language in your collective agreement or in a memorandum of understanding about the limited circumstances under which the administration could have access to your members' email or files or records that are under the members' custody and control. These include the need to protect the integrity of the computer system (St. Mary's has good language[12]) and the requirement to comply with an order of the court. In either case, there should be the twin requirements that the university notify the association and the member whose email or files were examined at the earliest possible moment and that it maintain a log indicating the time, duration and reason for access.

If you have any questions about any of this, please feel free to get in touch with me.

[12] 8.5 (e) As per [the right that "Employees have a right to privacy in their personal and professional communications" specified in] 8.5(a) Employee files and personal communications, including those that are stored or transferred electronically on University computer systems, are private. The Employer reserves the right to monitor and access user accounts in order to maintain the integrity of the computer system in a secure and reasonable manner. Only authorized personnel in the performance of their employment duties may access and monitor the use of information technology and computing facilities. The Union shall be provided with a list of these personnel." (St. Mary's University and the St. Mary's University Faculty Union Collective Agreement)