

CAUT Advisory

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Custody & Control of Academic Staff Records

With universities now under access to information legislation in all provinces and federally, there is a growing number of requests for academic staff records. The term “record” is generic and refers to almost any document (regardless of format) that you create or receive, e.g., letters, notes, post-it notes, emails, telephone messages, notes on the margin of meeting agendas, *aide-mémoire*; lecture notes, drafts of articles and books, text messages.

Most records an academic staff member creates or receives in the course of their jobs are *not* in the custody or control of the university and therefore are not subject to access to information legislation.¹

- Access to information legislation does not define “custody” or “control.” Nor does it extend or change what records are in an institution’s custody or control. It simply states that those documents that are in a public institution’s custody or control are accessible subject to certain exemptions and exceptions.
- A key factor in determining custody and control is customary practice.
- The customary practice in universities, antedating collective bargaining, is that most records created by academic staff are not in the university’s custody or control. The origin of this customary practice is to protect academic freedom.²

Customary Practice

One simple indication of customary practice is if, coming into your office on a weekday morning, you found 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.”

Errors are often made in relation to electronic records, such as emails, as they are usually stored on the university’s server. But the physical location of a record is not determinative of “custody” or “control.”³



Access to Information Requests

Should you be advised by your administration that a record of yours has been requested under access to information legislation and that you should turn it over to them so they can consider whether to comply with the request, you should decline until you have consulted with your academic staff association or CAUT.

Generally, unless the requested record is one you created or received in fulfilling an administrative role for the university (as opposed to your normal teaching, research and community service), the record is not in the university's custody or control and the university has no right to require you to produce it for their examination in relation to an access request.

The exception, records created or received in relation to an administrative role for the university, includes documents such as letters and emails written or received as a chair or a dean in fulfilling the duties of the position; material that is part of a member's participation in a university committee (but not including the faculty member's notes taken during the meeting); or official correspondence between you and a university administrator.

The longstanding practice of academic staff records being primarily in their custody and control has been an essential protection of academic freedom. It frees you from inappropriate employer surveillance normal in other employment settings where there is no role for academic freedom. The customary practice is undermined if, through misunderstanding or deliberate action, universities are able to use access requests to override your custody and control of your own records.

Seek Advice First

This is a complex issue so please seek advice from your academic staff association or CAUT before you consent to any request for access to your records. The most recent CAUT memo on custody and control is available online. For further information, please contact custody&control@caut.ca.

¹ The principal exceptions are records created in and for the fulfillment of an administrative role for the university, e.g., letters and emails written or received as a chair or a dean in fulfilling the duties of the position or material that is part of a member's participation in a university committee (but not including the faculty member's notes taken during the meeting).

² See summary [para 174] Ontario Privacy Commission Final Order PO-3009-F (November 7, 2011) University of Ottawa www.canlii.org/en/on/onipc/doc/2011/2011canlii74312/2011canlii74312.html and "Commissioner's Message" at the conclusion of Ontario Privacy Commission Order PO-3084 (June 7, 2012) www.ipc.on.ca/images/Findings/PO-3084.pdf.

³ See, *City of Ottawa v. Ontario*, 2010 ONSC 6835, para 31. Available at: www.canlii.org/en/on/onscdc/doc/2010/2010onsc6835/2010onsc6835.html.