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ACCESS AND PRODUCTION REQUIREMENTS AND RECORDS POSSESSED BY FACULTY MEMBERS

The Canadian Association of University Teachers recently published a memorandum about records in the possession of faculty members that raises some significant issues for Ontario universities.

In a memorandum dated April 8, 2009, and now published on the internet, the association states, “Based on collective agreements, memorandum of agreements, faculty handbooks and on past practice in our sector, it is CAUT’s position that virtually all 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.” CAUT makes an exception for records prepared in an official administrative capacity and records received in relation to official administrative duties, but states that personal notes or annotations on such records are not within a university’s custody or control.

There is no single correct response to the CAUT position. The question of custody or control of records is a highly record-specific and contextual question. Universities should therefore be cautious in agreeing to treat specific records or classes of records in certain ways if they engage in discussions with their associations based on the CAUT memorandum.

Universities should also consider the potential conflict between the CAUT position and their own legal obligations. The CAUT memorandum mentions the right of public access to information that is granted under freedom of information legislation. The “custody or control” concept in such legislation has been interpreted broadly by adjudicators and courts in order to promote public access to information. The privacy interests of individuals do not weigh against custody or control, but rather, are addressed through the application of an exemption for disclosures of information which would constitute an “unjustified invasion of privacy.” In the Ontario *Freedom of Information and*

Protection of Privacy Act there is also an exclusion for records that are related to teaching and research that will apply to some records possessed by faculty members. Subject to these limitations, Ontario universities may be required by law to provide access to records in the possession of their faculty members notwithstanding the CAUT position.

If you have any questions about these matters please contact Dan Michaluk (Toronto) at 416.864.7253, Paul Broad (London) at 519.931.5604 or your regular Hicks Morley lawyer.

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