

ACADEMIC SENATE
of
THE CALIFORNIA STATE UNIVERSITY

AS-2591a-03/FA
March 6-7, 2003

Campus Policies on Privacy of Electronic Communication

- RESOLVED: That the Academic Senate of the California State University (CSU) reaffirm its support for privacy in communication, including electronic communication, among students, staff, faculty and others as enumerated in AS-2263-95/FA "Policy on Email Privacy" adopted March 9, 1995; and be it further
- RESOLVED: That the Academic Senate CSU endorse the attached privacy provisions of paragraph nine of the American Association of University Professors' statement on "Academic Freedom and Electronic Communication"; and be it further
- RESOLVED: That the Academic Senate CSU urge the campus senates of those campuses that have adopted electronic communication policies to ensure adequate privacy protections with these statements; and be it further
- RESOLVED: That the Academic Senate CSU urge the campus senates where such policies have yet to be developed to draft and develop policy language with the inclusion of these privacy protections.

RATIONALE: An important aspect of academic culture implies the essential reliance on the confidentiality and privacy of all communications between the parties of the academic process consistent with the law. The Senate adopted a "Policy on E-Mail Privacy" (AS-2263-95/FA) on March 9-10, 1995, which "urged the individual campuses to support privacy in the use of email to the maximum extent possible." The Office of the Chancellor also promulgated a "Statement on Internet Use Policy" which applies to Chancellor Office activities. However, a review of individual campus policy statements reveals that most campuses have not yet developed policies at all or have policies providing inadequate protections for privacy in electronic communications among students, staff, faculty and others. It is the intention of the Academic Senate CSU to encourage campuses to provide maximum protection of privacy consistent with the law.

APPROVED UNANIMOUSLY – March 6-7, 2003

Policy on E-mail Privacy

AS-2263-95/FA - March 9-10, 1995

RESOLVED: That the Academic Senate of the California State University urge the Chancellor and the individual campuses to support privacy in the use of e-mail to the maximum extent possible under state and federal laws, consistent with computer system maintenance demands; and be it further

RESOLVED: That the Academic Senate CSU urge the Chancellor and the individual campuses to institute policy to implement this goal in keeping with the following principles:

1. All authorized e-mail accounts stored on the CSU telecommunications network shall be considered to be confidential.
2. Requests for access to these accounts or disclosure of confidential information, for any purpose other than technical problem resolution will be reviewed by the senior Academic Affairs Officer, and honored only when required by state or federal law, or when there is probable cause to suspect illegal activity.
3. Inspections solely for the purpose of technical problem resolution must be approved by the appropriate computer affairs administrator and only for the resolution of a specific technical problem.
4. Except when under extraordinary circumstances or when prohibited by law, computer users will receive notice prior to such inspections, access, or disclosure.
5. Except where prohibited by law users not notified prior to inspection, access or disclosure will receive notice after the fact within three working days; and be it further

RESOLVED: That the Academic Senate CSU urge the Chancellor and individual campuses to adopt policies in a timely fashion; and be it further

RESOLVED: That the Academic Senate CSU urge the Chancellor's Office and the individual campuses to inform all authorized accounts of their e-mail privacy policy and of the limitations of privacy on e-mail. E-mail is subject to disclosure under the Public Records Act, and when relevant, to discovery in civil litigation.

RATIONALE: Chancellor' Office Interim Counsel has circulated a memo describing the limits of e-mail privacy and noting that "in limited and appropriate circumstances...e-mail messages may become subject to internal monitoring by an employment supervisor." This resolution attempts to limit e-mail access to the maximum extent possible, consistent with the law and technical problem resolution.

APPROVED -- May 4-5, 1995

American Association of University Professors

Academic Freedom and Electronic Communications

The report which follows, prepared by a subcommittee of the Association's Committee A on Academic Freedom and Tenure, was approved for publication by Committee A in June 1997.

The advent of electronic and digital communication has profoundly changed the ways that university faculty members conduct research, store data, and share information and insights. Such changes make timely the consideration of whether--and how--new media and information systems may alter traditional approaches to safeguarding academic freedom within the university community. While basic principles of academic freedom clearly transcend changes in media, new issues will inevitably arise in cyberspace, to which time-tested policies and precepts may need to be adapted in imaginative ways.

One overriding principle should govern such inquiry: Freedom of expression and academic freedom should be limited to no greater degree in electronic format than in printed or oral communication, unless and to the degree that unique conditions of the new media warrant different treatment. While expression in cyberspace is obviously different in important ways from print or oral expression--for example, in the far greater speed of communication, and in the capacity to convey messages to far wider audiences--such factors do not appear to justify alteration or dilution of basic principles of academic freedom and free inquiry within the academic community.

Several specific issues, however, concerning academic freedom and electronic communications deserve to be addressed. The principles that follow, reflecting transcendent values of academic freedom, apply with equal force to public and private institutions--even though the formal constraints of the First Amendment may apply only to publicly supported colleges and universities.

1. **Freedom of Research and Publication.** The basic precept in the 1940 *Statement of Principles on Academic Freedom and Tenure* that "teachers are entitled to full freedom in research and in the publication of results" should apply with no lesser force to the use of electronic media to conduct or disseminate research findings or data. Two particular concerns may, however, occasion slightly different treatment and ultimately slight differences in policy.
 - A. **Access to information in digital format.** Faculty access to print format materials (e.g., in library collections) is seldom a concern; universities rarely seek to limit or restrict the availability of even the most controversial among the monographs or serials they hold. Access to material in digital format may, however, present quite different problems. Several universities have curtailed access, through the campus computing system, to sexually explicit graphics (typically "alt.sex" newsgroups) under conditions where access to comparable print material would be routine. A federal district court recently dismissed a professor's challenge to such restrictions imposed by the University of Oklahoma. The incidence of such disputes is likely to increase in response to public pressures to limit availability of this material.

An appropriate institutional policy would ensure that access to sexually explicit and other materials through university computing networks and systems would be limited to no greater degree than access to print and visual materials in library collections is limited. Such a policy might, however, recognize that a university is not obligated to incur special expense in extending access to electronic materials that are not currently available through its system

simply because a faculty member may wish such access--any more than the university library is obligated to acquire every book or periodical in which there may be a faculty or student interest.

The law in this area may be significantly affected by challenges recently filed in federal court against a Virginia law which forbids state employees from using state-owned or leased computers to "access, download, print or store...sexually explicit content." Five Virginia state college and university professors filed suit in May of 1997, claiming such restrictions abridge their First Amendment freedoms, even though the law exempts a "bona fide, agency-approved research project" authorized by an "agency head."

A caution is also appropriate with respect to accessing or downloading material that is protected by copyright. While the Communications Decency Act contains a provision that may absolve Internet service providers of liability for copyright infringement under some conditions, that provision would not apply to individual users of protected material. The only safe assumption is that intellectual property in electronic form is as fully protected as in print.

- B. Posting of sexually explicit and other controversial material.** The other area where new policy may be needed is the posting by faculty members of material that could evoke controversy on or off campus. In many academic disciplines, faculty members may share and distribute sexually explicit and other potentially controversial material. Faculty in other fields may legitimately wish to access or transmit such materials. Such dissemination is generally accepted in the print environment, though even in recent times there have been external pressures to curb such materials. But even if the material posted in cyberspace is controversial, so long as it is not unlawful it should not be barred simply because it comes in electronic format. Universities may, however, take (and may require system users to take) steps that are designed to keep such material from reaching minors or others to whom its distribution would be unlawful. If material would be unlawful in print for any and all users or recipients--e.g., child pornography--then such material may be banned or removed from a computing network or system. [In a recent case in which AAUP participated as a friend-of-the court, the Supreme Court sustained the Communications Decency Act's ban on the Internet posting of child pornography. The court, however, struck down as unconstitutional the broader prohibition on the posting of "indecent" material accessible to minors.]

2. **Freedom of Teaching.** A basic precept of the 1940 *Statement of Principles* is that "teachers are entitled to freedom in the classroom in discussing their subject...." The scope of that principle is relatively clear in the physical setting, where a "classroom" is bounded by walls, floor, and ceiling. But where the learning site may be a virtual space, the import of this principle is far less clear. The focus of the course might be a web site or a home page. Each student might post course material, even term papers, on his or her own web page. Much of the course-related communication may occur through e-mail, either individually targeted or addressed to the class as a group. Under these conditions, the scope of the operative term "classroom" must be enlarged to encompass electronic formats for those virtual spaces and areas where the communication inherent in the teaching and learning process may occur--web sites, home pages, bulletin boards, chat rooms, and e-mail lists that convey or share information and ideas within the context of a university class or course--as well as to the traditional physical classroom in which much teaching will continue to take place.
3. **Access to the System: Acceptable Use Policies.** Colleges and universities have adopted "acceptable use policies" which regulate access to their computing networks and, through those networks, to the Internet. Such policies should not, however, impose conditions of access and use

which are more stringent than the limits found acceptable for access to traditional communications media (e.g., the campus mail or telephone system), unless and to the extent that the special nature of a computing system may warrant special restrictions. Requiring each user to obtain a password, for example, is clearly a necessary condition of electronic access, even though it has no precise print counterpart. Moreover, requiring that each user keep his or her password secret may also be a necessary (if unique) safeguard for a computing system.

More problematic are such restrictions as those barring use of the system for other than "official university business." Clearly computing time is a scarce and valuable resource. Equally clearly, some limits may need to be imposed on the availability of that resource. Growing numbers of universities have found that they must limit the time during which a user may be online, especially during peak use periods. Such time-based restrictions may reduce the availability of a vital research tool, but they do so on content-neutral grounds. The difficulty with language like "official university business" is that, in its generality and lack of precision, it might empower administrators to differentiate on impermissible content-based grounds. Thus, to the extent that criteria beyond time-of-use may be contemplated, great care should be taken to avoid content-based discretion.

Institutions must also be certain to ensure access to a functioning system of electronic communication on a non-discriminatory basis, without regard to the perceived merit of a particular content or subject matter or the views of users. Equality of access must, of course, be assured without regard to such forbidden factors as race, gender, nationality, age, religion, disability, and sexual orientation.

4. **Responsibility in Extramural Utterances.** The 1940 *Statement* cautions that faculty members, speaking as citizens, should be accurate and "exercise appropriate restraint" as well as "respect for the opinions of others" in their extramural utterances. Whatever difficulties there may be in the print world in distinguishing between intramural and extramural expression, in cyberspace such distinctions may become meaningless with respect to geography, though they retain significance with regard to subject matter. Are statements on a faculty member's home page, for example, "extramural" since they may be accessed by millions outside the campus community? Or are they "intramural" since they were created and are primarily accessed by links through the university system? Perhaps any reference to "extramural utterances" as a separate category of faculty speech should simply be deleted from AAUP policy--at least with regard to electronic speech--recognizing the obvious fact that institutional concern and interest will vary according to several elements, of which geographical site is of diminishing importance. The accident of physical location--whether an outspoken professor (or a student) happens to be at home, or at school, or thousands of miles from campus when posting or accessing a given message--has little bearing on the status of the message, its potential impact, or the degree of responsibility that ought to accompany such communication.
5. **Avoiding Unwarranted Inference of Speaking for the Institution.** The 1940 *Statement* cautions that faculty members "should make every effort to indicate that they are not speaking for the institution [when in fact they are not]." The import of that injunction is reasonably clear in regard to spoken and written messages. One may, for example, usually identify one's professorial position in off-campus communications, but must be careful not otherwise to risk attributing personal views to the institution. In the electronic world, however, avoiding inappropriate inferences of this type may be more difficult. Recent events have heightened concern; a Northwestern University instructor suggested, for example, that a senior colleague's Holocaust-denial statements posted on his web page through the university's computer network may, in contrast to similar statements made in book form, "make it appear that I and other faculty members are a party to what I consider a libel." When a faculty member creates a home page, using the university computing network typically linked to that system, the need for disclaimers may therefore be greater than it would be for print messages. Even

though the institution may post general disclaimers, the responsibility for being certain that a professor's personal views are clearly identified as his or her own must be shared between individual and institution. Thus it may be appropriate to insist that special care be taken in posting or disseminating digital material, on a web page or site created and accessed through the campus computing system, to avoid or dispel any inference that the speaker represents the views of the institution or of faculty colleagues.

6. **Sanctions: Terminating Access to the Network or System.** There is at least anecdotal evidence that some institutions treat computer access as a lower-order faculty benefit, which may be suspended or terminated for minor infractions, with little if any formal process. Such notions need to be rejected. Access to computing facilities and electronic communication, including Internet access, is a resource of great value and utmost importance to faculty scholarship. Increasingly, the availability of computing time plays a significant role in the academic community, resembling access to university library resources. Such access may be curtailed or denied in individual cases only for the most serious of reasons, and only after following procedures that would accompany serious charges of misconduct which could result in the imposition of major sanctions.
7. **Freedom of Artistic Expression.** AAUP policy recognizes that academic freedom includes freedom of artistic expression "in visual and performing arts."¹ Increasingly, artistic expression that challenges conventional taste and norms will involve digital images, even more than images on canvas, or on film, or movement in dance. It is thus important to affirm that academic freedom includes freedom of artistic expression in novel as well as in familiar and traditional media--digital images, as fully as two- and three-dimensional images in more tangible form, and computer-generated or transmitted graphics as fully as more traditional performances and portrayals.
8. **Campus Speech Codes and Harassment Rules.** The Association has condemned speech codes and harassment rules that target speech on the basis of viewpoint or message.² Such principles must apply with equal force to regulation of speech in cyberspace. Such differences as exist between printed words and digital messages do not warrant harsher treatment of threats, slurs, epithets, or harassing language. That precept might seem obvious, but for actions that have already been taken, both by institutions and by at least one federal agency, seeking to punish or ban digital communication of messages that would be protected in printed or spoken form. The distinctions are complex, and deserve further analysis. On one hand, speech in cyberspace may be protected to a greater degree than is oral expression. The doctrine of "fighting words," which is the basis for certain campus speech codes (as at the University of California) simply has no counterpart in digital expression; the imminent threat of physical response that may warrant silencing a provocative speaker does not have an obvious analogue in the virtual world. On the other hand, extreme and intemperate "flaming" may raise concerns that warrant some form of intervention consistent with the guarantees of free expression. Judgments about the volatility and offense of electronic harassment must also be tempered by the inevitable separation between speaker and listener in cyberspace, so that rules designed to avert face-to-face shame and opprobrium simply do not carry over to the digital world. Speech codes are no more acceptable as an antidote to offensive or insulting words in digital form than in spoken or written form. Rules aimed at harassing or threatening speech may apply no more broadly to electronic expression than to messages in more traditional media, and are subject to the same limitations.
9. **Privacy of Electronic Communications.** Early experience suggests that some institutions regard personal e-mail quite differently from print mail, and accordingly are less inclined to ensure privacy. In the relatively few early cases on privacy of e-mail, courts have shown some willingness to condone invasions that probably would not be allowed in more familiar settings. Regardless of the medium,

privacy of communication is vital to the quality of an academic institution. There are undoubted differences among communication media, such as the propriety of the widespread practice of "backing up" of substantial portions of electronic message material, verification of passwords, etc. University ownership of the hardware, and its supervision of the network or system, may also create different expectations. Yet, given the growing importance of electronic mail as a substitute for or alternative to print mail, a need exists for a comparable degree of privacy. Several principles deserve consideration.

1. Every college or university should make clear, to all users, any exceptions it considers it must impose upon the privacy of electronic communications.
2. There must be substantial faculty involvement both in the formulation and in the application (with due process) of any such exceptions.
3. The general standard of e-mail privacy should be that which is assured to persons who send and receive sealed envelopes through the physical mail system—that envelopes would not be opened by university officials save for exigent conditions (e.g., leaking a noxious substance, indicia of a bomb, etc.).
4. If a need arises to divert or intercept a private e-mail message, both sender and recipient should be notified of that prospect in ample time to pursue protective measures—save in the highly improbable case where any delay would risk danger to life, or destruction of property.
5. The contents of any such message that has been diverted or intercepted may not be used or disseminated more widely than the basis for such extraordinary action may warrant.
6. Finally, similar safeguards should be fashioned and applied to other dimensions of electronic communication within the campus community—for example, the posting of sensitive evaluations or course materials, as to which maintaining confidentiality may prove harder than those responsible for the system might assume. Careful consideration should, in fact, be given to privacy needs in myriad situations where unauthorized disclosure of electronic messages or materials could jeopardize personal reputations and interests, and could deter free and open communication within the campus community.

Such principles as these, designed to ensure privacy of electronic communication, will require careful and extensive study by each institution and the tailoring of specific principles consistent with state law and campus needs and conditions. This report is meant to help start that process.

Notes

1. *Academic Freedom and Artistic Expression* (1990) [Back to text.](#)
2. *On Freedom and Expression and Campus Speech Codes* (1992); [Sexual Harassment: Suggested Policy and Procedures for Handling Complaints](#) (1995) [Back to text.](#)

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