



ABOVE BOARD

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Contact Information

Office of the Information
and Privacy Commissioner

3rd Floor, 2 Canada Drive
Sir Brian Dunfield Building
P.O. Box 13004, Station A
St. John's, NL A1B 3V8

Telephone:

709-729-6309

Fax:

709-729-6500

Toll Free in Newfoundland
and Labrador:

1-877-729-6309

Email:

commissioner@oipc.nl.ca

Website:

www.oipc.nl.ca

Follow us on social media!

LinkedIn:

[https://LinkedIn.com/com
pany/oipc-nl](https://LinkedIn.com/company/oipc-nl)

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Congratulations Commissioner Harvey on New Appointment

We are saying goodbye to our province's Information and Privacy Commissioner, Michael Harvey. As many of you likely have heard by now, Commissioner Harvey was recently appointed as the next Information and Privacy Commissioner of British Columbia, effective May 6, 2024.

Outgoing BC Commissioner Michael McEvoy welcomed Commissioner Harvey:

"I warmly welcome the appointment of Michael Harvey as BC's next Information and Privacy Commissioner. As Commissioner for Newfoundland and Labrador, Michael has been a valued colleague and leader at the federal/provincial level, and he will bring that leadership to the British Columbia office,"



Commissioner Harvey commented on his time as Information and Privacy Commissioner for Newfoundland and Labrador stating:

"It has been a great privilege to serve as Information and Privacy Commissioner for Newfoundland and Labrador since 2019. I have enjoyed the honour of serving people of this province, which will always be my home, as a public servant for almost two decades. I am deeply grateful to the House of Assembly for entrusting me with these responsibilities, and to the expert, dedicated and professional staff of the Office of the Information and Privacy Commissioner for their support throughout my term. The rights of access to information and privacy are fundamental for our democratic governance and our way

of life. As we advance onward into the Information Age, the context for these rights is becoming ever more complex. I encourage all Newfoundlanders and Labradorians to value and protect their access and privacy rights and to advocate for their enhancement.”

While we are saddened by Commissioner Harvey’s departure, we are heartened that he will continue his leadership role in protecting the principles of access and privacy within Canada. We wish you all the best!

OIPC New Forms, Guidelines and Website

Our Office has new forms and new guidelines to assist coordinators and individuals in the complaint process. We have also changed the design and layout of our website in an effort to make the information more user friendly and accessible.

We ask that all Coordinators please start using our new forms when submitting a Disregard Application or Time Extension Application to our Office. Please visit our [Public Body Forms webpage](#) to view the new forms. If you would like to see the new complaint forms that applicants will be using please, visit our [Public Forms webpage](#).

We have new guidelines to assist public bodies when responding to access complaints, third party complaints and privacy complaints. Analysts will send a copy of the applicable guidelines at the beginning of the complaint process. If you would like to review these guidelines ahead of time, please visit our [Complaint Process webpage for Public Bodies](#).

Here are some website links that Coordinators may find useful:

- [Public Body Forms \(Disregards, Time Extensions, and Breach Reporting\)](#)
- [Commissioner’s Access Reports](#)
- [Commissioner’s Privacy Reports](#)
- [Complaint Process Guidelines for Public Bodies](#)
- [OIPC Resources for Public Bodies](#)
- [Above Board Newsletter](#)

If you have any questions about these changes, please do not hesitate to call or email us!

If you have any feedback about what you like, dislike, or would like to see improved about these new changes (website redesign and form updates), please email us with your comments and title your email “Feedback”.

Data Privacy Week 2024 - Recap and Winner

Like many of our counterparts across Canada, we celebrated and highlighted the importance of privacy during Data Privacy Week which took place January 22-28, 2024.

We kicked off the week by extending a friendly challenge to our province’s Access to Information and Protection of Privacy (ATIPP) Coordinators in the form of our Crossword Puzzle and Multiple Choice Quiz. Congratulations to Kenessa Windsor, the Coordinator for the City of St. John’s on

winning our random prize draw! While the challenge is over, for anyone who may have missed out, feel free to test your knowledge by visiting these activities on our [Data Privacy Week webpage](#).

Commissioner Michael Harvey spoke about Data Privacy Week and generative AI during his discussion with Linda Swain on [VOCM radio's News Talk](#) (30:30 mark). To hear Commissioner Harvey speak about the privacy rights of employees and privacy rights of children, be sure to listen to his discussion with Adam Walsh on [CBC Radio's The Signal](#).

For those wanting to know more about Data Privacy Week, the Information Commissioner of Canada has further information available on [their website](#).

Recent Court Case - Memorial University of Newfoundland v. Oleynik

Court Applications

Memorial University of Newfoundland (“Memorial”), as the Applicant, filed two applications with the Supreme Court of Newfoundland and Labrador General Division (the “Court”) asking the Court to:

1. declare Anton Oleynik (the “Respondent”) a vexatious litigant and subject him to a Vexatious Litigant Order restricting access to the Court; and
2. find that the Respondent’s use of the **Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2** (“ATIPPA, 2015”), constitutes abuse justifying the imposition of restrictions on his ability to make access to information requests under the legislation.

The Court pointed out that the first application engaged the Court’s inherent jurisdiction to control and manage its own procedures and processes while the second application required the Court to examine its authority to use its inherent jurisdiction to protect subordinate, statutory decision-makers where they are unable to protect themselves from abuse.

Abusive Litigation

At the outset, the Court took the time to explain how courts are public property that anyone can use but they are not a resource to be commandeered to advance the private interest of one person and denying access to others. Courts seek to employ efficient and orderly processes within which to prosecute civil claims and since there are limited resources, courts expect litigants to pursue practical resolution of their legal issues so as to facilitate, not frustrate, the litigation process.

The Court commented on the growing incidence of abusive litigation in Canadian courts:

...Abusive litigants require far more resources to resolve their litigation and complaints. Their practices, both in court and outside, inflict a disproportionate load on the trial courts’ apparatus, often clogging up the legal system to the cost and prejudice of those who have to face and deal with them.

...

Any abuse of court processes and procedures directly affects the parties and the fairness of the particular proceeding, but it has a broader impact on the integrity of the adjudicative function of the court and on the administration of justice as a whole. Civil, criminal, and family cases are delayed; justice is denied; judicial and other resources are wasted; and the fundamental confidence in the Court and, by extension, the Rule of Law is impacted.

Abusive litigants are often highly adept at identifying and exploiting procedures, such that rules and parts of legislation which are intended to provide for due process are instead used to prolong and frustrate litigation and inflict unnecessary expense. ... Rules of courts that set out procedural pathways or guidelines for the conduct of litigation are used without restraint and become tools used by the abusive litigant to high-jack the litigation, taking it down a path best described as a rabbit hole.

The Respondent's Court Proceedings

The Court attempted to provide the context for the matter by tracing back the matters presently before the Court to their origins.

The Respondent's initial Originating Application on September 27, 2017, contesting the response Memorial had provided in relation to a request for information made under ATIPPA, 2015 was the precipitating factor giving rise to multiple court actions and access requests which in turn gave rise to subsequent legal proceedings, interlocutory applications, appeals, and appeals of appeals.

The Court provided a summary table listing 35 court proceedings, none of which were resolved. The Court noted that the table only provided information respecting originating proceedings and did not provide information on the frequent interlocutory applications that have been made.

Vexatious Litigant Criteria

In assessing whether a vexatious litigant order ought to be made respecting the Respondent, the Court reviewed factors referred to in established case law as indicia of vexatiousness. These factors included the following:

- raising issues that have already been determined and bringing actions that have no possibility of success;
- bringing actions for improper purposes;
- rolling issues into subsequent proceedings, making unnecessary appeals, and obfuscating any potentially legitimate dispute; and
- unsubstantiated allegations of misconduct, bias, retaliatory complaints, conspiracy theories, and inappropriate behavior.

After assessing the above criteria in light of the Respondent's numerous proceedings, the Court concluded that the Respondent is a vexatious litigant. In its decision, the Court provided a full list of the criteria considered specific to the Respondent.

The Respondent's use of ATIPPA, 2015

Memorial also requested that the Court make an order to the effect that the Respondent's use of ATIPPA, 2015 amounts to abuse and that restrictions be placed on the Respondent's ability to make access to information requests under that legislation.

This application is not as straightforward as Memorial's first application, as this application goes to the root of the Court's authority to use its inherent jurisdiction to protect subordinate, statutory decision-makers where they are unable to protect themselves from abuse.

The Court cautioned that the behavior that constitutes sufficient abuse to grant a vexatious litigant order may not necessarily amount to abuse sufficient enough to justify judicial intervention to impose restrictions on access to an administrative process or decision-maker.

The Court explained that while it is within the Court's jurisdiction to plug a gap in legislation, it does not have the capacity to impose a policy decision within the sphere of authority constitutionally provided to a legislature. The Court stated that it is essential to ensure that sufficient deference is paid to legislative intent.

Ultimately, as the legislation provides for an avenue for public bodies to disregard an access request with the approval of the Commissioner, this is essentially the tool the legislature incorporated into ATIPPA to help deal with situations where applicants are working against the spirit of ATIPPA. The Court therefore determined that there is not a gap in the legislation appropriate for the Court to rectify using its inherent jurisdiction.

Court Conclusions

The Court declared the Respondent to be a vexatious litigant for his abusive use of the Court's processes and procedures; his engagement in litigation for improper purposes; and his systemic and tactical use of ATIPPA and the Court in an attempt to punish Memorial. The Court imposed a Vexatious Litigant Order requiring the Respondent obtain leave before continuing with any ongoing proceeding or initiating any new proceeding, however, the Order does not restrain the Respondent from commencing proceedings in the Court of Appeal.

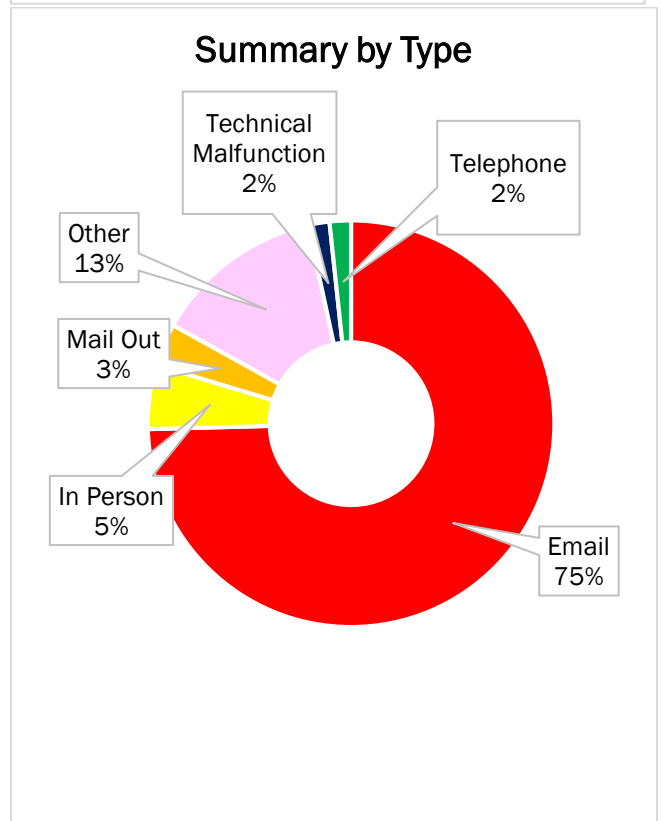
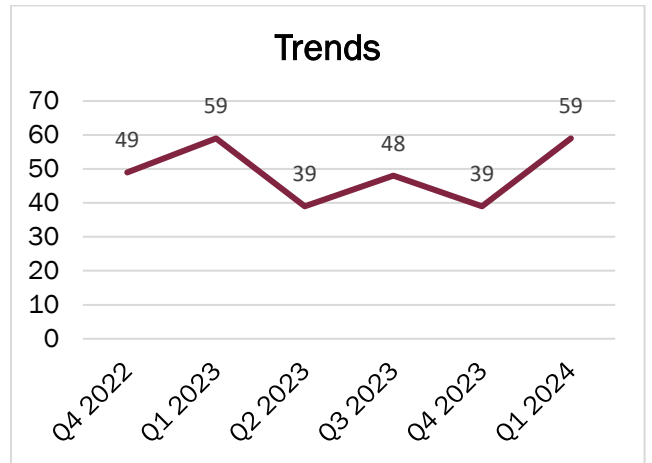
The Court dismissed Memorial's second application holding that the evidence of legislative intent suggested no gap exists in the litigation to justify judicial intervention to protect the statutory decision-maker.

To read the entire Court decision please see [Memorial University of Newfoundland v. Oleynik, 2024 NLSC 42.](#)

ATIPPA, 2015 Privacy Breach Statistics January 1 – March 31, 2024

During the first quarter of 2024 (January 1 – March 31, 2024), OIPC received 59 privacy breach reports from 26 public bodies under ATIPPA, 2015. This is a significant increase from the 39 breaches reported during the previous quarter. Similar to previous quarters, email breaches continue to be the most common type, accounting for 75% of the breaches this quarter.

Summary by Public Body	
City of Corner Brook	1
City of Mount Pearl	1
City of St. John's	2
College of the North Atlantic	10
Department of Digital Government and Service NL	1
Department of Education	8
Department of Environment and Climate Change	1
Department of Health and Community Services	2
Department of Industry, Energy and Technology	1
Legal Aid NL	2
Memorial University	5
Newfoundland and Labrador English School District	3
Newfoundland and Labrador Housing Corporation	1
NL Health Services	2
NL Hydro	1
Public Service Commission	3
Public Utilities Board	1
Royal Newfoundland Constabulary	4
Town of Gander	1
Town of Musgrave Harbour	1
Town of Pilley's Island	1
Town of Portugal Cove-St. Philip's	1
Town of Torbay	1
Town of Victoria	2
Treasury Board Secretariat	2
Workplace NL	1



Reminders to Help Prevent Email Breaches

Given the high number of email breaches, here are some reminders that employees can take to reduce and prevent email-related breaches.

- Turn off Outlook’s Auto-Complete address feature under File > Options > Mail > Send Messages. This can prevent you from inadvertently sending an email to a recipient with a similar name.
- Use your address book to populate To, Cc and Bcc fields.
- Remember to use the Bcc field for mass electronic mail outs.

- Delay the delivery of emails through Outlook's Rules & Alerts. An extra two minutes spent in the Outbox might be enough to realize a mistake and catch an error in an email before it is sent.
- Our Office has issued a [Tip Sheet](#) on avoiding inadvertent privacy breaches.

Reminder on Timely Reporting of Privacy Breaches

Please file breach reports with our Office as soon as possible and do not wait for a number to accumulate before reporting. It is important to report as soon as possible so that if notification is necessary and not already completed, individuals will be aware of the breach and their right to file a privacy complaint with our Office.