

# Navigating the Appeal And Privacy Complaint Processes

## Office of the Information And Privacy Commissioner of Ontario

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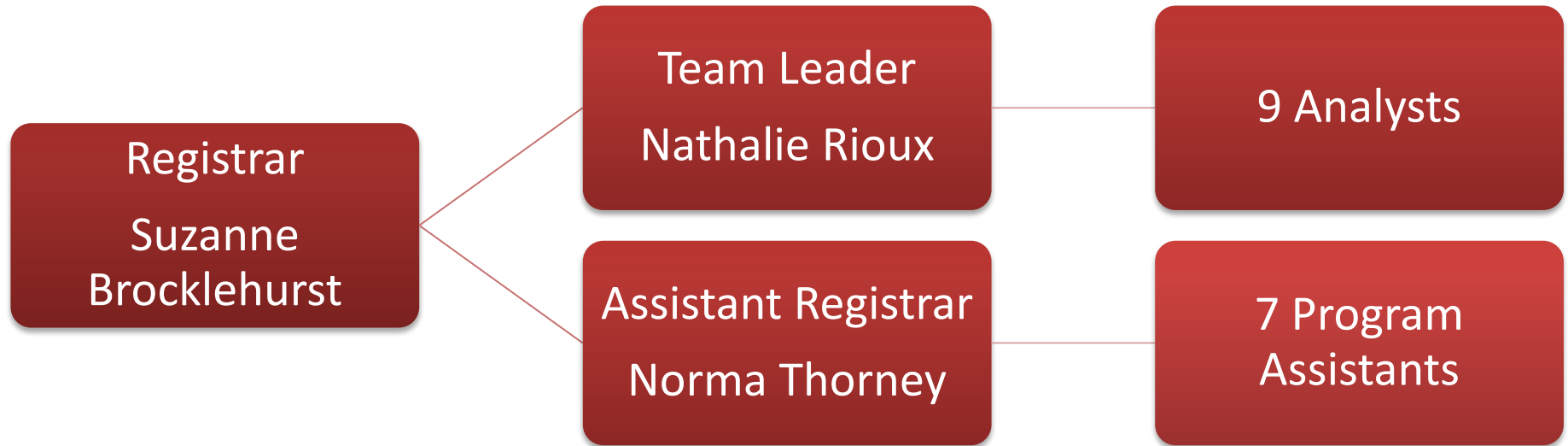


# Topics

- Introductions
- Intake
- Investigation/Mediation
- Adjudication
- Questions



# Intake Group



# Role of Assistant Registrar

- Responsible for coordination and provision of support services to all Tribunal Services Department staff
- Supervises 7 Program Assistants
- Post Decision Contacts – first contact



# Role of the Program Assistant

- Opens files
- Sends “Request for Documentation” asking for the records and
  - detailed index of the records
  - institution’s file number
  - the request
  - the head’s decision letter
  - correspondence including any 3<sup>rd</sup> party notices and responses
- Advises of 3<sup>rd</sup> party appeals and obtains contact information for original requester
- Ask requester for appeal fee, documentation
- Support to Analysts, Mediators and Adjudicators



# Role of the Program Assistant

- Intake - open files, request records and appeal fees, sends notices to parties to the appeal or complaint
- Mediation – Confirmation of Appeal or Complaint
- Adjudication – support on NOIs and Orders, log representations, updates Activity Management System



# Role of Registrar

- Registrar oversees the intake stage of the appeal and complaint processes
- The Registrar has the authority to direct files into different dispute resolution and adjudicative streams
- Appeals :
  - Intake, Mediation and Adjudication streams
- Privacy Complaints:
  - Intake and Investigation streams



# Role of Team Leader

- Assists the Registrar in managing a team of analysts who respond to public contacts and screen out appeals and privacy complaints and issue certain types of orders
- Has statutory responsibilities, delegated from the Commissioner, to screen out appeals and complaints and issue orders, and authority to stream appeals and complaints





# Role of Analyst

- Public Contacts – mail, phone and in-person
- Screen out appeals and privacy complaints
- Issue Order in Deemed Refusal and Failure to Disclose appeals
- Appeals – clarify, interim notice, screen out, resolve
- Privacy – clarify privacy issues, contact institution, consent, Intake Resolution Stream, Screen out
- Prepare memo for Registrar to move file to the investigation stream
- Analyst generally don't narrow or mediate appeals, except in Deemed Refusal and Failure to Disclose appeals



# Intake - Screening

- Registrar, Team Leader and Analysts have delegated authority to screen out files where:
  - (a) The matter, on its face, is not within the IPC's jurisdiction (e.g. records from Royal Bank); or
  - (b) The matter falls within the IPC's jurisdiction, but the matter, on its face, is one that the IPC believes should not proceed through the appeal process (e.g. employment-related, prosecution, decided before, out of time).



# Intake – Case Example 1

- Deemed Refusal
- Request submitted to institution
- Appeal filed as no written decision received by appellant
- Notice of Inquiry sent to FOIC – 2 weeks to issue decision if not already sent
- Order issued for final decision if no decision by FOIC – no additional time extension allowed

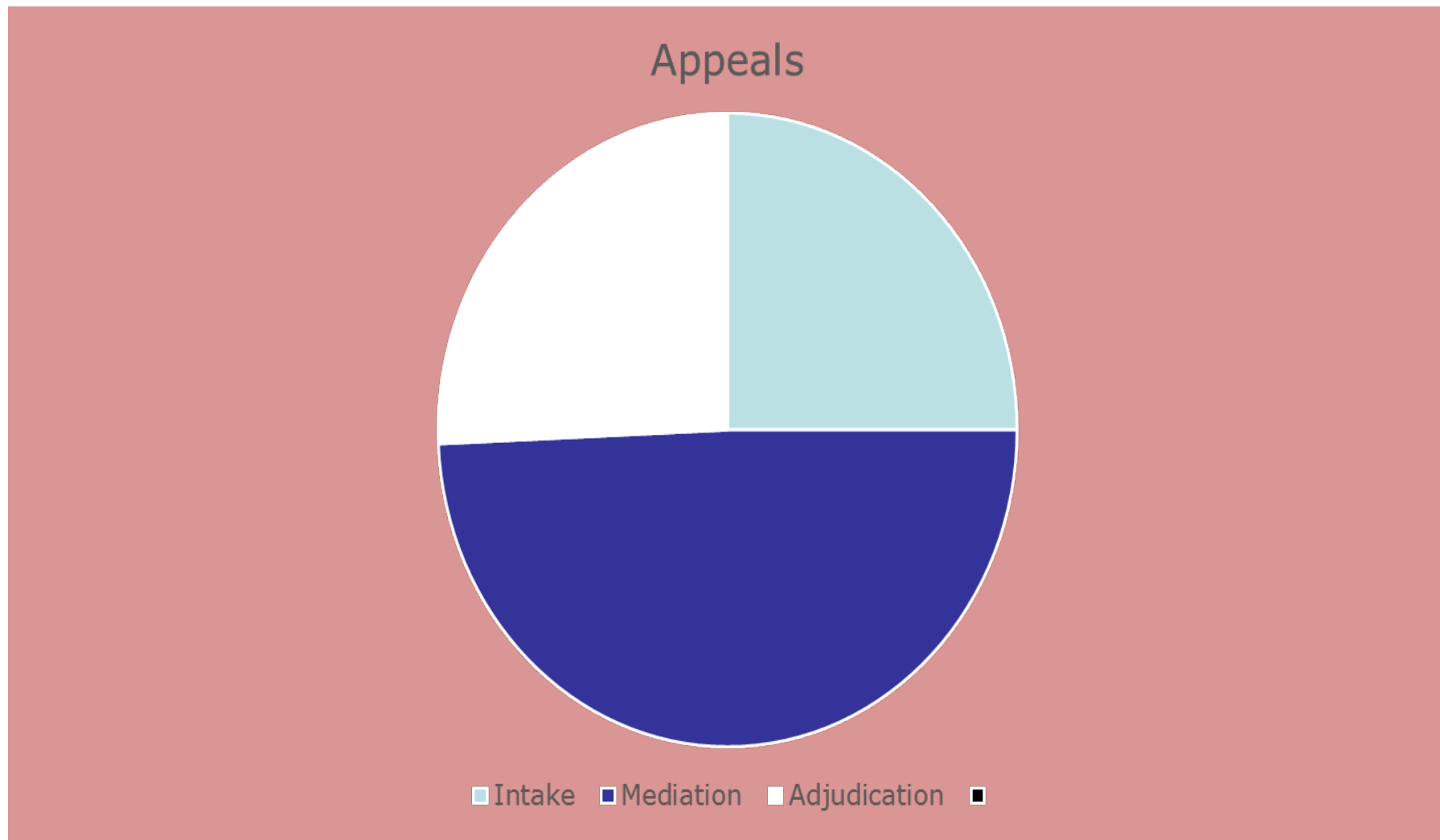


# Intake – Case Example 2

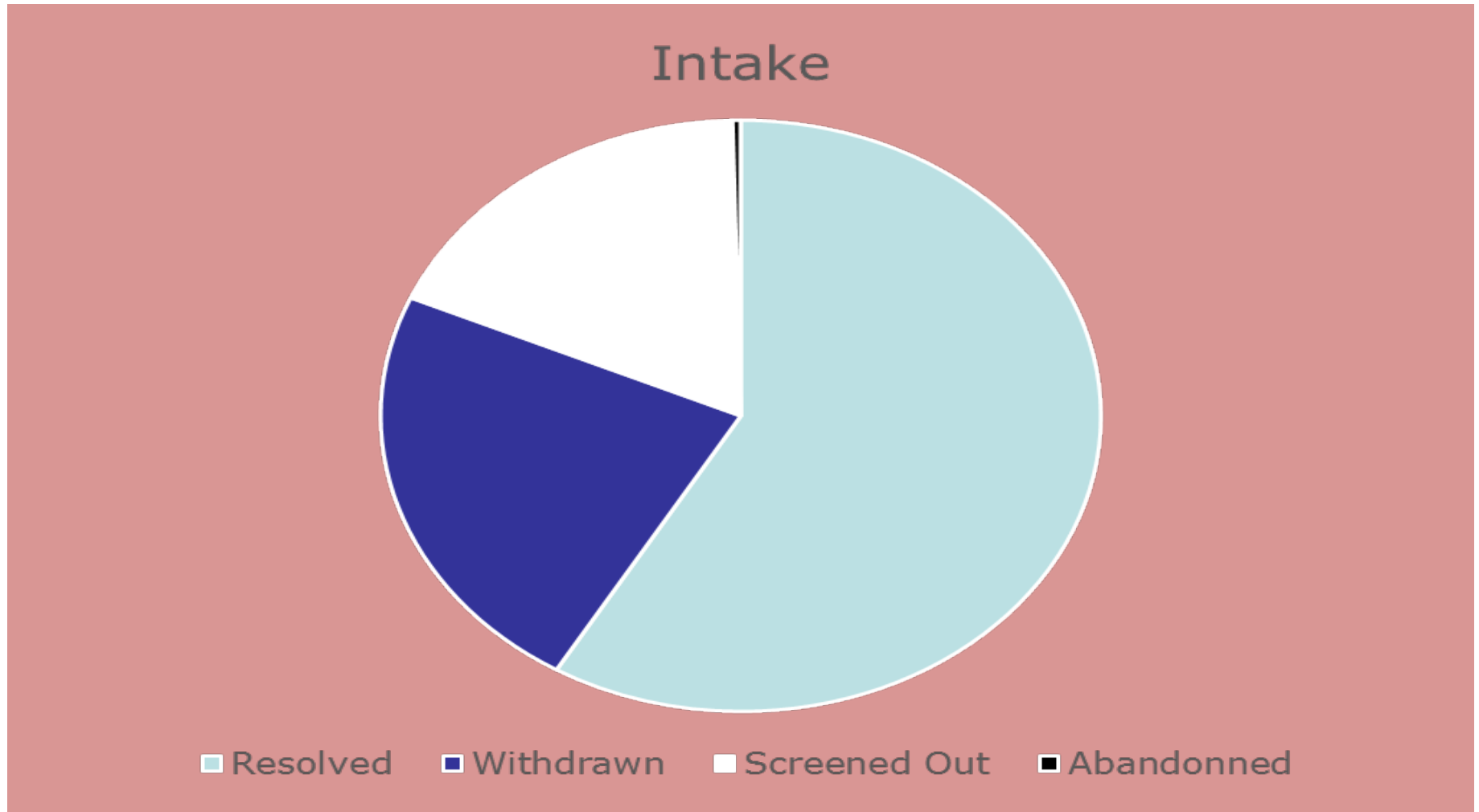
- Reasonable Basis
- Decision issued by institution is that no records exist
- Analyst will speak to FOIC and the appellant to determine if there is a reasonable basis to believe that records exist
- Analyst will provide preliminary view that no reasonable basis has been provided and allow appellant to make written submissions
- Analyst will screen out (close) appeal if not satisfied that there is a reasonable basis
- The appeal will move to the mediation stage if it is determined that there is a reasonable basis



# 1,329 Appeals Closed in 2015



# 332 Appeals Closed at Intake in 2015



# PRIVACY COMPLAINTS

*MFIPPA/FIPPA*



# Privacy Complaints

## *MFIPPA/FIPPA*

- Ontario's *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* (the Acts) help to protect personal information held by provincial and local government organizations. It is the responsibility of the Office of the Information and Privacy Commissioner (IPC) to ensure that government organizations abide by the Acts.





# Privacy Breaches

- Privacy breach occurs when personal information is collected, used or disclosed in ways not consistent with the *Acts*
- Among most common breaches is unauthorized disclosure of personal information such as:
  - sending communications to wrong recipient due to human error
  - improper record destruction procedure
  - loss or theft of unsecured assets, such as laptops, digital cameras, portable storage devices (USB sticks)
- IPC may investigate privacy complaints, report publicly on them
  - may order government to cease and destroy a collection of personal information
  - may make recommendations to safeguard privacy



# Privacy Complaints

## Intake

The Registrar and a team of Analysts are responsible for the following Intake functions:

### “Screen Out”

- The Commissioner has delegated authority to the Registrar and Analysts to "screen out" files where the IPC has no jurisdiction or where it has determined that the type of file should not proceed through the privacy complaint process. Privacy complaints may therefore be dismissed at the Intake stage.

### Intake Resolution

- The Registrar will stream a privacy complaint to the Intake Resolution Stream if it appears that a quick informal resolution can be achieved without having to go through a formal investigation.



# Privacy Complaint Stats

## M/FIPPA

- Complaints opened in 2015 – 276
- Complaints closed in 2015 – 271
- Resolved – 216 – 79.7%
- Screened Out – 36 – 13.3%
- Withdrawn – 12 – 4.4%
- Abandoned – 4 – 1.5%
- Report – 3 – 1.1%

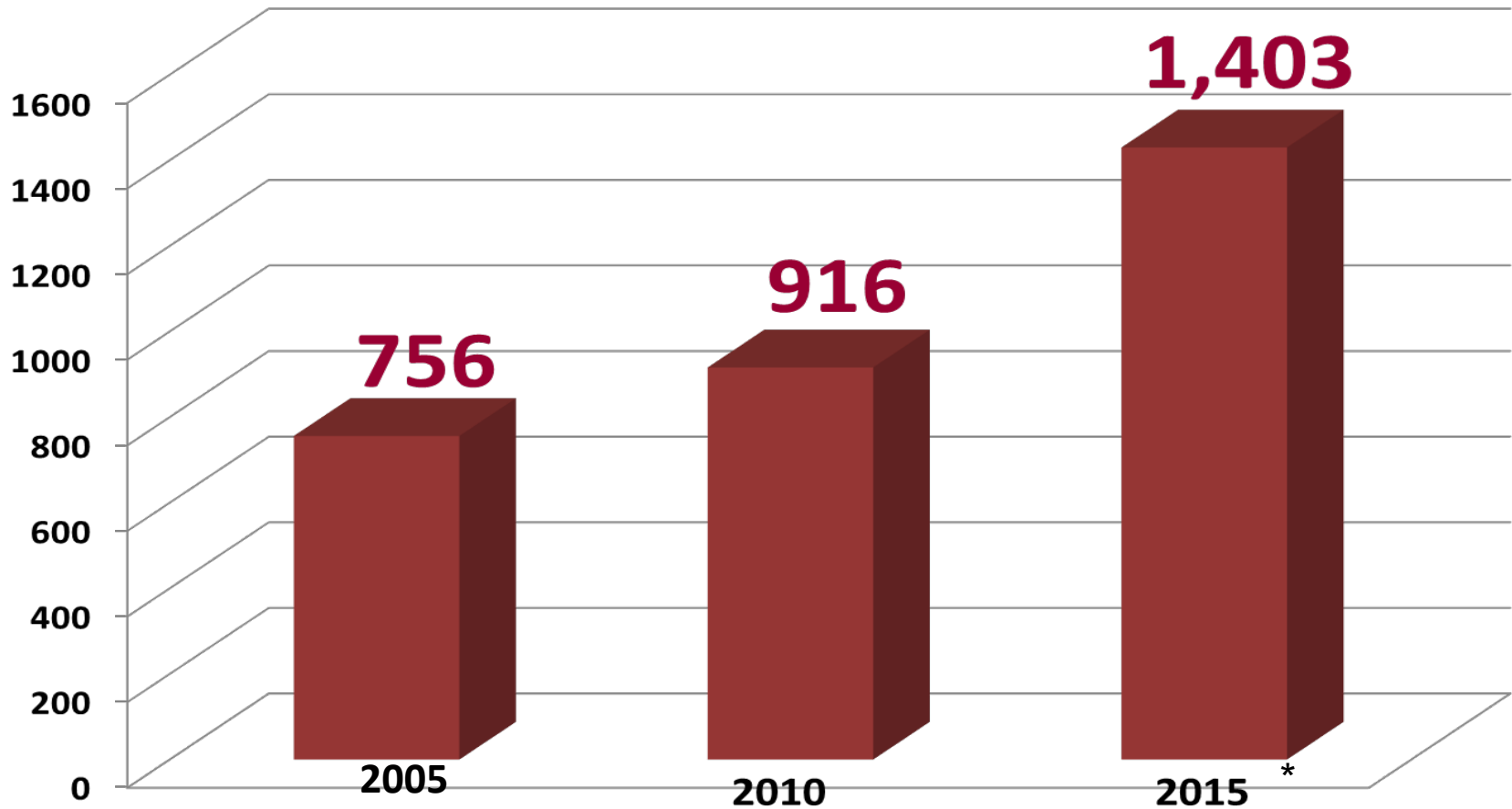


# Privacy Complaints Investigation Stream

- The Registrar will stream all other privacy complaint files to the Investigation Stream.
- An Investigator will be assigned to:
  - Clarify the complaint;
  - Contact the parties, gather information, attempt settlement
- Make findings and issue a Privacy Complaint Report with Orders and/or Recommendations
- Default is a public Report



# Appeals Received Per Year



\* 64.3% of all appeals received in 2015 were resolved at the Intake stage (25%) or through Mediation (49.3%)



# Mediation Team



# Mediation Streams

An appeal that moves to the Mediation stage is assigned to one of the following streams:

- Regular Appeal;
- Time Extension Appeal; or
- Reasonable Search Appeal.



# Mediation - Regular

- The vast majority of appeals are processed in the Regular stream;
- The Mediator contacts the parties, explains the appeal process and the role of the Mediator, investigates the circumstance of the appeal and attempts to:
  - Settle all issues in the appeal; or
  - If not settled, narrow and clarify the issues that proceed to Adjudication.





# Mediation – Time Extension

- An appeal where the sole issue is a *time extension*;
- The Mediator also acts as an Adjudicator;
- If unresolved in a very short time period, the Mediator has the authority to conduct an inquiry and issue an Order;
- The inquiry is conducted in writing.



# Mediation – Reasonable Search

- Appeals where the sole issue is whether the institution has conducted a reasonable search for records responsive to the request;
- One Mediator attempts to settle appeal;
- Another Mediator is designated as an Acting-Adjudicator, who can conduct an oral inquiry and issue an Order, if not settled;
- Oral inquiry is conducted in person or by teleconference.



# Role of Mediator

The goal of the Mediator is to assist the parties:

- To clearly understand the appeal process and the issues in dispute;
- To reach a voluntary, mutually acceptable resolution of some or all issues in dispute;
- To clarify the issues and reduce the number of records and exemptions at issue;
- Notify affected parties;
- Provide advisory opinions based on past orders;
- To explore interest-based and rights-based approaches



# Methods of Mediation

- Shuttle mediation by telephone;
- Conference calls;
- Face-to-Face mediation;
- We strongly encourage the last two methods due to the real benefits they present to parties (enhanced mediation).



# Revised Decisions

- Institutions can disclose additional records and/or remove exemptions by issuing a revised decision at any stage of the appeal process.
- If a revised decision is issued during mediation, the appellant will review the revised decision along with the additional records and advise the Mediator whether or not he or she is satisfied.



# The Mediator's Report

- MR is prepared at the end of the mediation;
- Sets out a description of the records, the issues and exemptions resolved and those remaining in dispute;
- Parties are given 10 days to review the Report for errors or omissions;
- The MR is provided to the parties and, if moving to adjudication, the Adjudicator.



# Advantages of Mediation

- The parties can explain their respective positions;
- Retain control over the outcome;
- Issues are clarified, options generated, common ground discovered and agreements negotiated;
- Quicker and less costly;
- Win-win settlement that might not be possible through Adjudication;
- Builds trust, understanding and communication between parties and thereby improves future interactions.



# Key Elements of a Successful Mediation

- Prepare an Index of Records;
- Respond to the mediator in a timely fashion and provide realistic deadlines;
- Make an effort to understand the request, the appellant's real interests and the proposals;
- Provide background explanations – be prepared to discuss the general nature of the records and the reasons why they are being withheld;
- When participating in a teleconference, try to include the program area;
- Ensure that decision makers are available to make decisions at the appropriate time;
- Give due consideration to the mediator's advisory opinion.





# Files Processed at Mediation in 2015

- Fully Resolved: 638 (68.8%)
  - Partly Resolved: 160 (17.2%)
  - No Issues Resolved: 113 (12.1%)
  - Withdrawn: 7 (0.8%)
  - Abandoned: 10 (1.1%)
- 
- **Total files processed: 928 (100%)**



# Adjudication

- Appeals may be streamed to the Adjudication stage either directly from Intake or from Mediation;
- At the Adjudication stage, an Adjudicator conducts an inquiry, either orally (by telephone or in person) or in writing, to dispose of the issues in the appeal.



# Overview of Inquiry Process

- Generally, an inquiry involves an Adjudicator soliciting written representations from the parties on the issues in the appeal, one party at a time;
- Representations from one party are shared with other parties to the appeal unless there is an ***overriding confidentiality concern***; and
- Adjudicator issues a binding order disposing of the issues in the appeal.



# Inquiry - Step 1

- 1st party Notice of Inquiry (NOI) sets out the facts and issues in the appeal and seeks representations from the party who bears the onus of proof, usually the institution;
- 1st party has 3 weeks to make submissions;
- Adjudicator decides whether to invite representations from the second party or issue an order if first party has not met its onus.



# Inquiry - Step 2

- Second party (usually the appellant) is also invited to make representations in response to the same or a modified NOI, and is provided with a copy of first party's non-confidential representations;
- Second party has three weeks to submit representations, setting out their position on the issues identified in the NOI.



# Inquiry - Step 3

- In some cases, the Adjudicator may send a further NOI to the first party, along with a copy of the second party's non-confidential representations, seeking their reply submissions;
- First party has 2 weeks to submit reply representations but may not raise any new issues in reply;
- Following this step, the Adjudicator ordinarily issues an order addressing the issues in the appeal.



# Content of Representations

- Effective representations:
  - Address all of the issues identified in the NOI thoroughly and completely;
  - Highlight the confidential portions which are to be severed from the version that is shared with the other party, providing reasons for each severance that connect to the confidentiality criteria in the Code;
  - Provide supporting affidavits sworn by knowledgeable individuals where necessary; and
  - Avoid actual names (use affected person, accused etc).



# Sharing of Representations

- In their representations, parties are required to indicate clearly and in detail those portions of their submissions that they wish to have withheld from the other party;
- Adjudicator will review the content of each parties' representations and their submissions respecting sharing them with the other parties. Based on the confidentiality criteria in Practice Direction 7, the Adjudicator will decide which portions (if any) will be shared with the other party/parties.
- If Adjudicator does not accept the party's request for confidentiality, they will provide advance notice to that party of the decision to disclose some or all of the representations to the other party.





# Confidentiality Criteria

- Adjudicator may withhold information contained in a party's representations where:
  - Disclosure would reveal substance of a record claimed exempt – e.g., quotation from record at issue;
  - The information would be exempt under *Acts*- e.g., personal information;
  - The information is otherwise confidential – e.g., the four criteria for confidential communication described in *Wigmore* (see ss. 5 and 6 of Practice Direction 7).



# Reconsideration of a Decision

- Section 18 of the IPC Code of Procedure sets out the criteria for reconsideration of an order or other IPC decision. The party seeking reconsideration must establish:
  - A fundamental defect in the adjudication process;
  - Some other jurisdictional defect in the decision; or
  - A clerical error, accidental error or omission or other similar error in the decision;
- The IPC will not reconsider simply on the basis of new evidence being provided.



# IPC Resources

- Code of Procedure
- IPC Web site: [www.ipc.on.ca](http://www.ipc.on.ca)



# *Thank You*

**Questions welcome.**



Information and Privacy  
Commissioner of Ontario  
Commissaire à l'information et à la  
protection de la vie privée de l'Ontario