

Information And Privacy Commissioner/Ontario

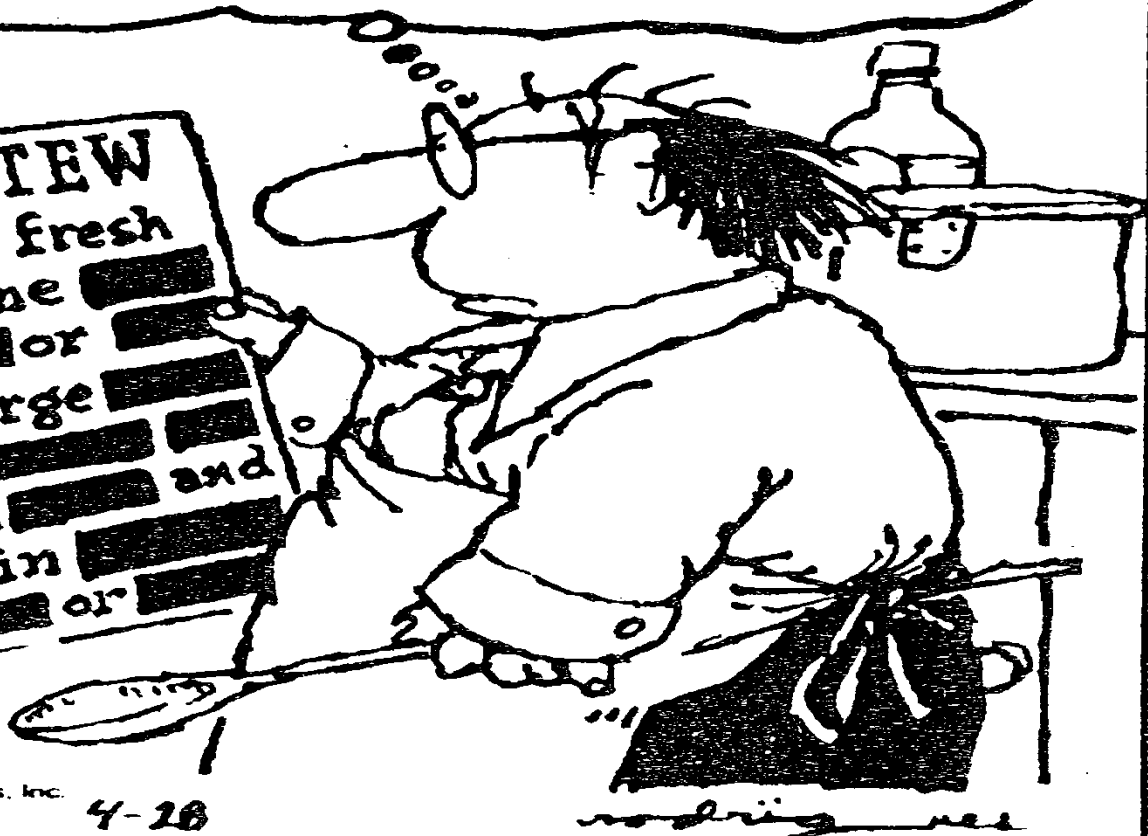
NAVIGATING THE APPEAL PROCESS

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January 12, 2015

THIS IS THE LAST TIME I ASK
FOR A RECIPE UNDER THE
FREEDOM OF INFORMATION ACT!

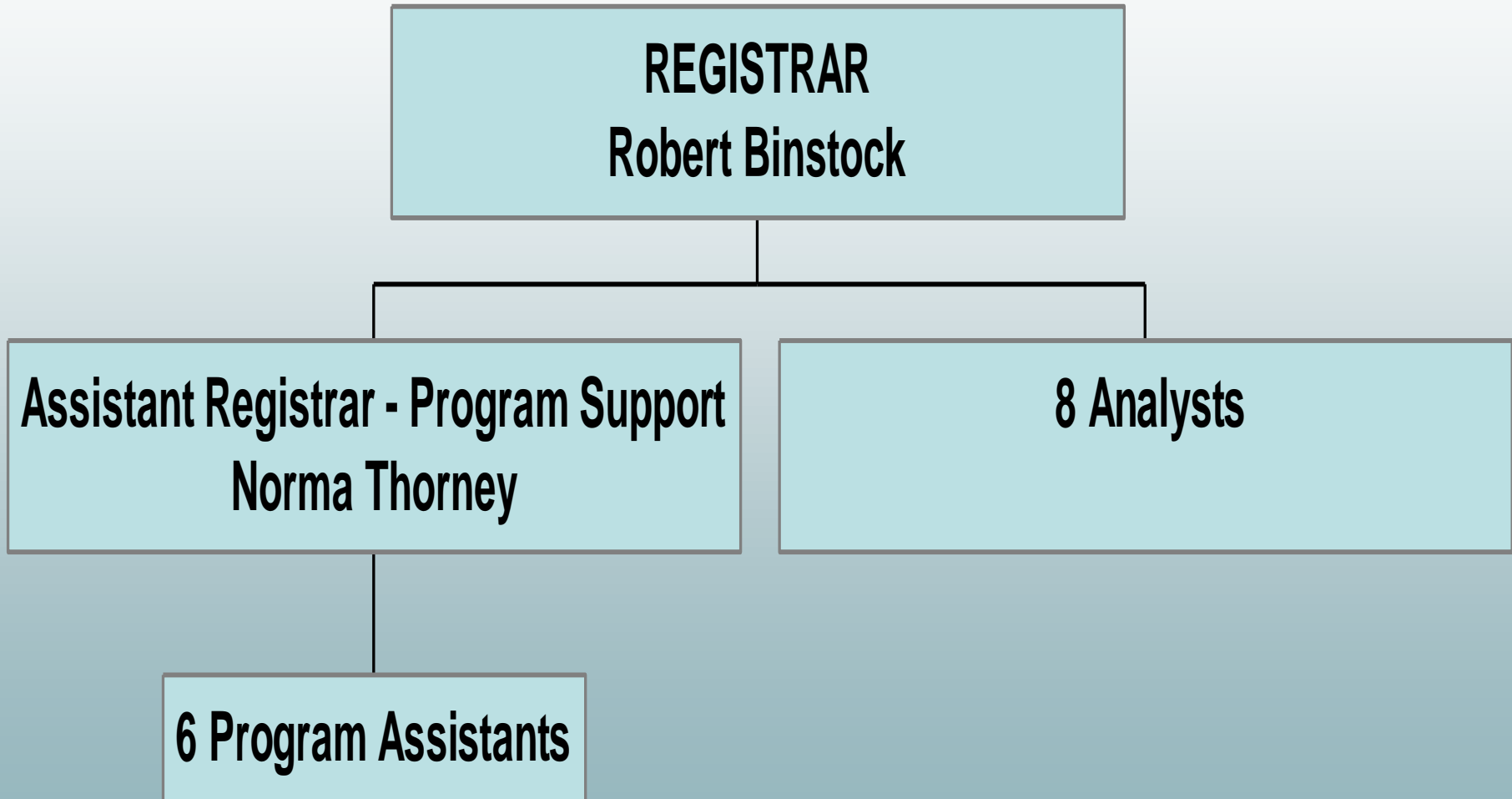
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Topics

- Welcome and Introductions
- Intake
- Mediation
- Adjudication
- Questions
- Wrap up

Intake



Role of Program Assistant

- Intake - open files, request copy of the records, advise of 3rd party appeals, obtain contact information for original requester;
- Ask requester for appeal fee;
- Support to Analysts, Mediators and Adjudicators.

Role of Analyst

- Public Contacts – mail, phone and in-person;
- Screen out appeals from the process;
- Issue Orders e.g. Deemed refusals;
- Other types of duties:
 - Clarify appeals;
 - Explain appeal process;
 - Redirect to other government organizations;
 - Call re: late appeals.

Intake – Streaming

- Registrar streams files into different dispute resolution and adjudicative streams - Intake, Mediation and Adjudication.
- Can also screen out files and issue orders.

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 - Screening

- Registrar 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 or crown brief.

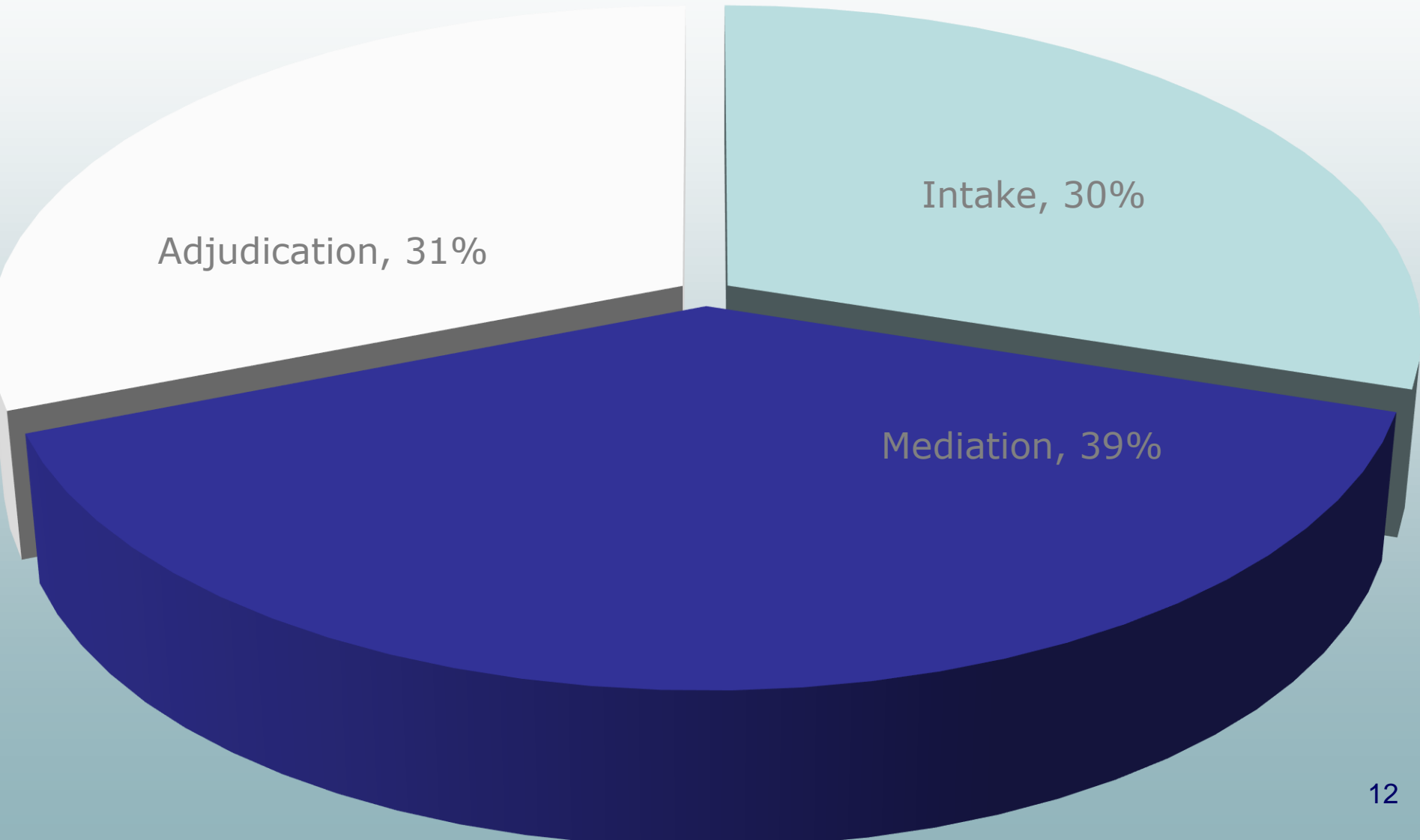
Intake – Case Example 2

- Reasonable Basis;
- Decision issued by institution is that no records exist;
- Analyst will speak to FOIC to get a better understanding of why no 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.

Intake Pointers

- Key points to working with the Analyst:
 - Respond to voice messages, e-mails or letters – even if to just say that there is nothing further to add;
 - Be flexible in accepting late appeals;
 - Provide information that would assist Analyst to screen out the appeal, if appropriate.

1238 Appeals Closed in 2013



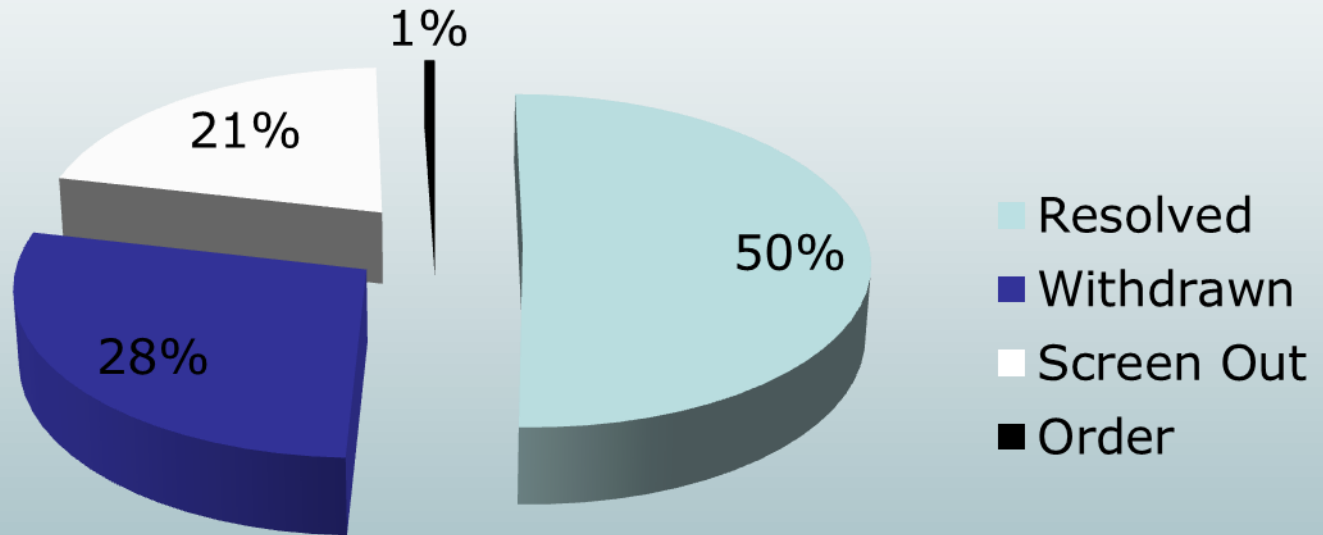
Intake - Statistics

IN 2013 :

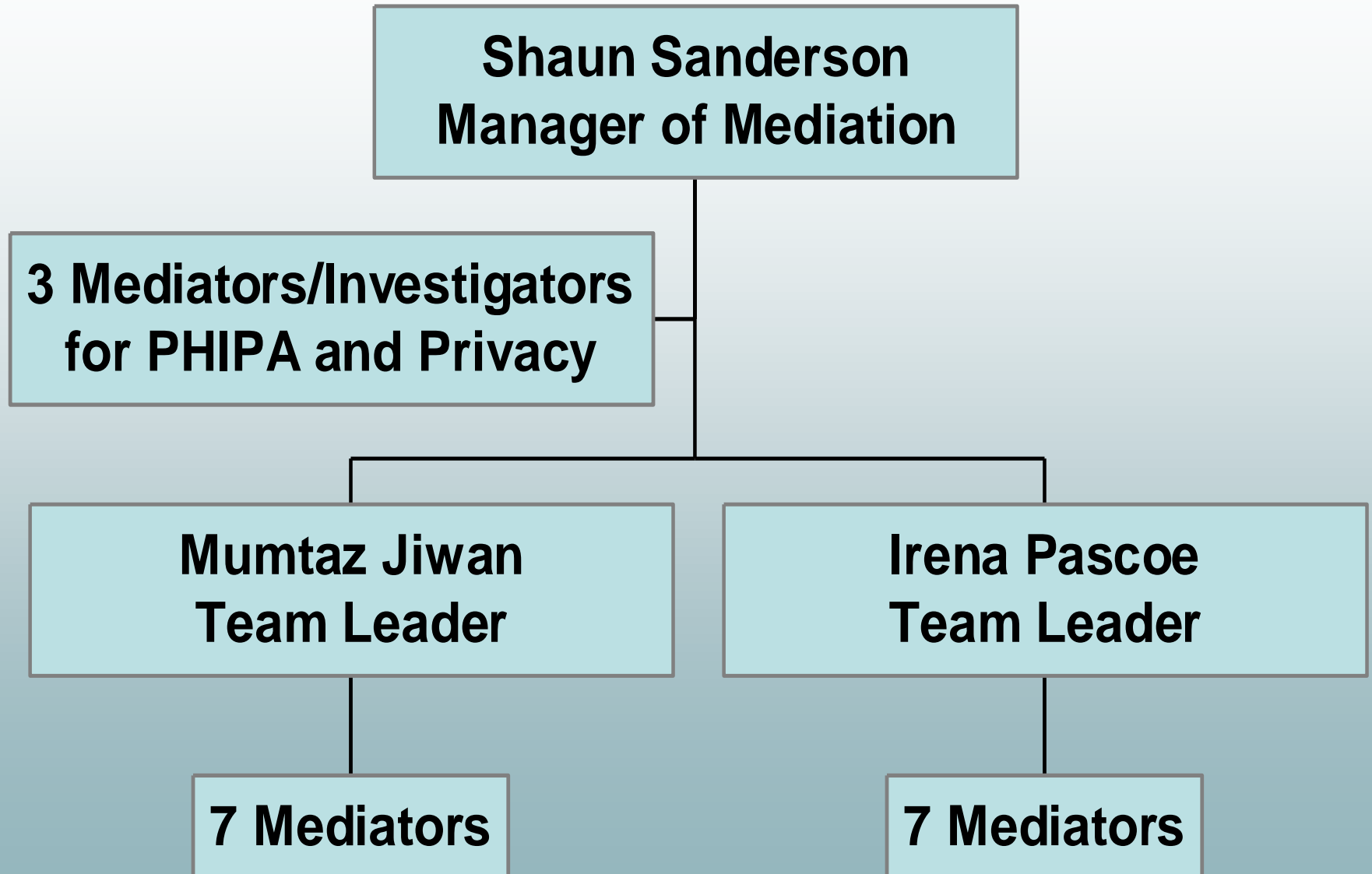
- 30% (366) of all appeals closed (1238) were closed at Intake.

366 Appeals Closed at Intake in 2013

Intake



Mediation



Mediation Streams

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

- Regular Appeal;
- Straightforward 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 – Straightforward

- An appeal where the sole issue is a *time extension*;
- The assigned Mediator also acts as an Adjudicator;
- A short period is allocated for mediation, if unresolved, 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 inquiry and issue an Order, if not settled;
- Inquiry will be an oral inquiry conducted in person or by teleconference.

Role of Mediator

The goal of the Mediator is to assist the parties:

- To fully and clearly understand the appeal process and the issues in dispute;
- To reach a voluntary, mutually acceptable resolution of some or all of the issues in dispute;
- To clarify the issues and reduce the number of records and/or exemptions at issue; and
- Where possible, provide an opinion based on past orders as to the likely outcome at adjudication.

Methods of Mediation

- Shuttle mediation by telephone i.e. one phone call to one party, then to another party;
- Conference calls;
- Face-to-Face mediation;
- We are increasing our usage of the last two methods due to the real benefits they present to the parties.

Revised Decisions

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

The Mediator's Report

- MR is prepared at the end of the mediation.
- Sets out a description of the records, the issues resolved and those remaining at issue, if not fully resolved during mediation.
- Parties are given 10 days to review the Report for errors or omissions.
- The MR or Revised 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 than formal dispute resolution;
- Win-win settlement that might not be possible through Adjudication;
- Builds trust, understanding and communication between parties and thereby improves future interactions.

Tips for Successful Mediations

- Demonstrate in words and actions a commitment to the process and the search for a solution;
- Respond to the Mediator in a timely fashion;
- Listen to the other party and the Mediator;
- Develop a partnership in the search for solutions;
- Be creative and innovative;
- Give due consideration to the Mediator's advisory opinions;
- Recognize the power imbalance;
- Make an effort to understand the request, the parties' real interests and the proposals.

Key Elements of a Successful Mediation

- Prepare an Index of Records;
- Provide explanations of background, processes, context and reasons – be prepared to discuss the general nature of the records withheld;
- Ensure that the decision makers are available to make decisions at the appropriate time.

Mediation – 2013 Statistics

- 39% (481) of all appeals closed (1238), were closed at Mediation.

Files Processed at Mediation in 2013

- Fully Resolved: 466 (54%)
- Partly Resolved: 225 (26%)
- No Issues Resolved: 153 (18%)
- Withdrawn: 5 (0.6%)
- Abandoned: 6 (1%)
- Orders Issued: 1 (0.4%)

- **Total files processed: 858 (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 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, based upon the confidentiality criteria set out in Practice Direction 7 of the IPC Code of Procedure;
- 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.

Sharing of Representations

- Adjudicator will review the content of each parties' representations and their submissions respecting sharing them with the other parties to the appeal. 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.

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).

Adjudication: Case Example

- Order PO-1931;
- Intake: Resolved the deemed refusal appeal;
- Appellant subsequently appealed the access decision;
- Mediation: Narrowed the scope of records and issues in dispute;
- Adjudication: Involved all three steps. At the reply stage, the Ministry was asked to respond to new issues/information raised by the appellant in his second party representations. This had the effect of narrowing further the number of records and issues in dispute .

Reconsideration of a Decision

- Section 18 of the IPC Code of Procedure sets out the criteria for reconsideration of 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.

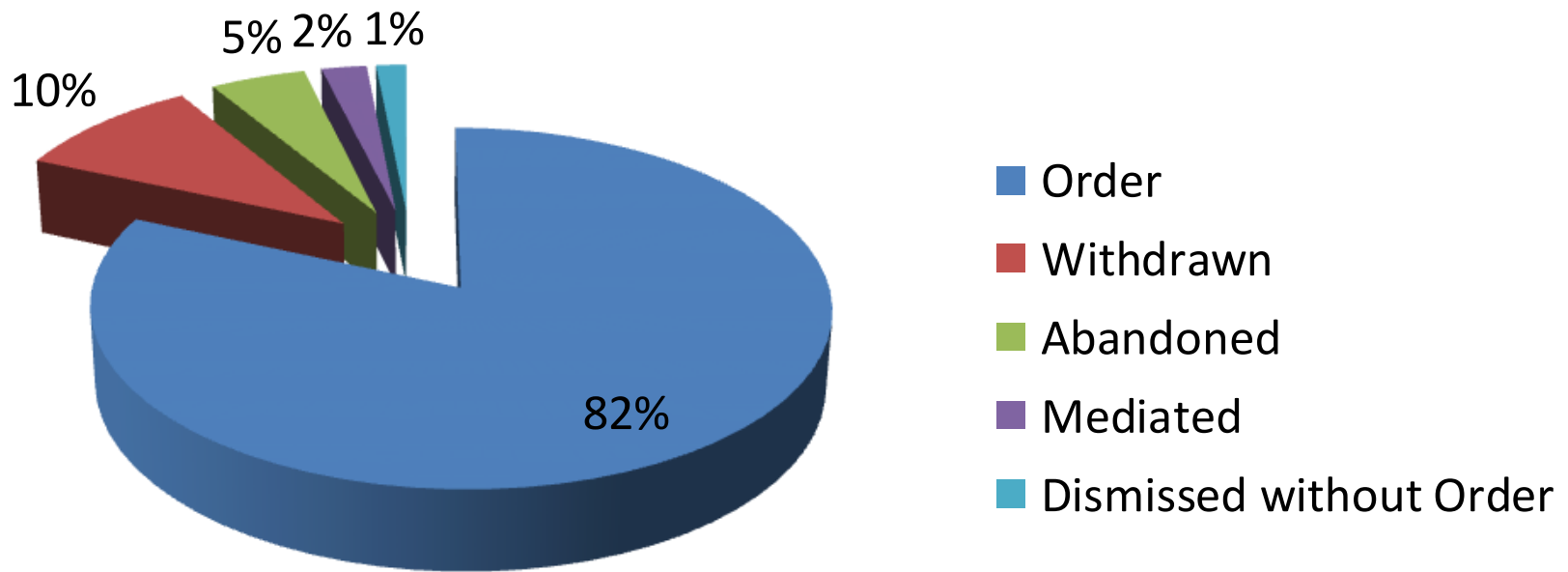
Adjudication - Statistics

IN 2013:

- 31% (391) of all cases closed (1238) were closed during the Adjudication stage.

391 Appeals Closed at Adjudication in 2013

Adjudication



Adjudication - Statistics

- Cases resolved by step:
 - Step 1: 15%
 - Step 2: 49%
 - Step 3: 36%
- Cases resolved after Step 1 – result: one party never had to make representations;
- Some Step 1 cases involved reverse onus – institution never had to make representations;
- **Tip:** Issue more detailed decisions to increase chance of reverse onus.

IPC Resources

- Code of Procedure
- IPC Web site: www.ipc.on.ca

Thank You

Questions welcome.