



FOI Assist

# **THE ABSURD RESULT PRINCIPLE**

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# ABSURD RESULT

- What is the Absurd Result Principle?
- Application to Freedom of Information
  - Requestor's Own Information
  - Expansion of the Principle
  - The Absurd Result Principle Today
- Final Thoughts

# **WHAT IS THE ABSURD RESULT PRINCIPLE?**

**“ IT IS AN ESTABLISHED PRINCIPLE OF STATUTORY INTERPRETATION THAT AN ABSURD RESULT, OR ONE WHICH CONTRADICTS THE PURPOSES OF THE STATUTE IN WHICH IT IS FOUND, IS NOT A PROPER IMPLEMENTATION OF THE LEGISLATURE'S INTENTION. ”**

John Higgins, Inquiry Officer

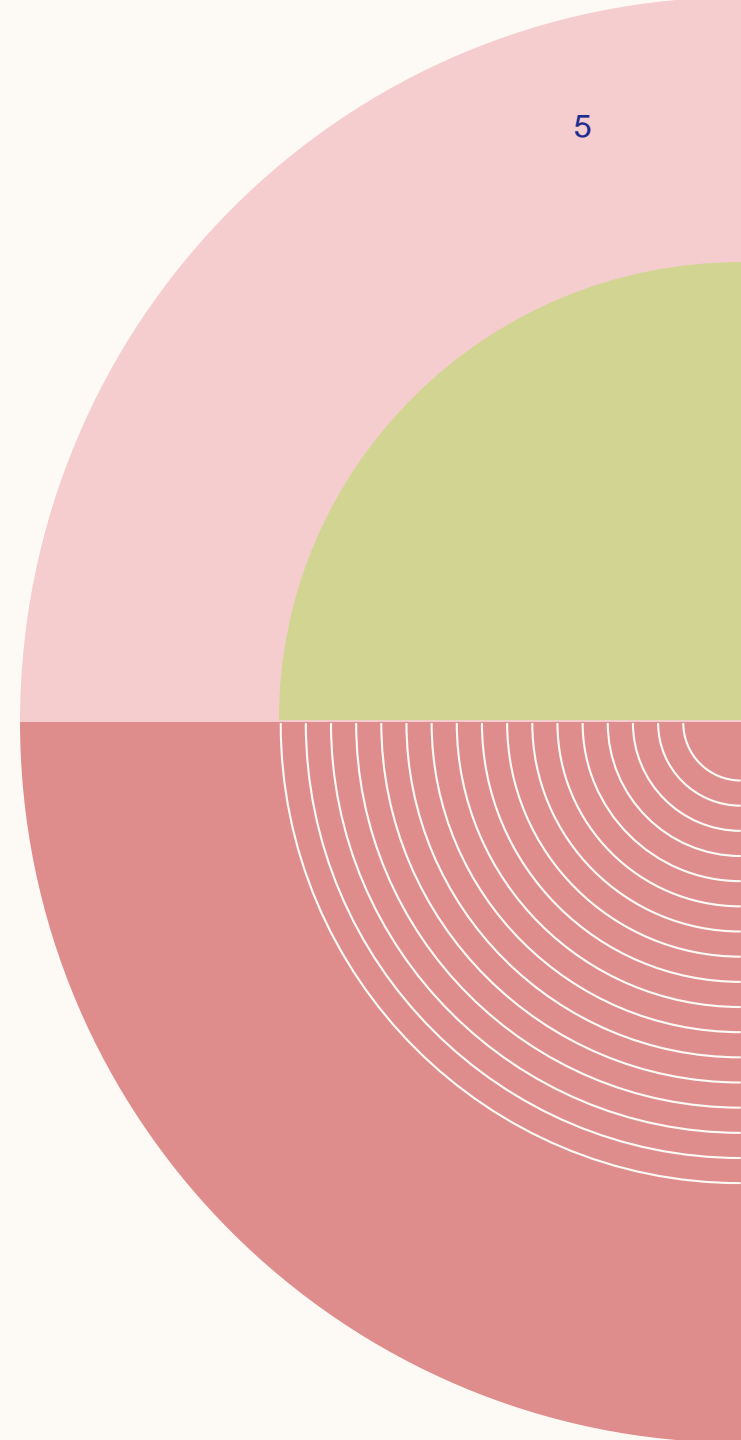
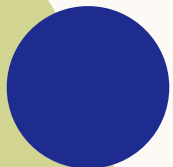
Order M-444 (Metropolitan Toronto Police Services Board)

Decided January 17, 1995

# EARLY EXAMPLE

*R. v. Allen*, (1872) L.R. 8 Q.B. 69.

Henry Allen, who was already married, went through a ceremony of marriage with another woman. He was charged with bigamy under section 57 of the *Offences against the Person Act, 1861* which made it an offence to marry while one's spouse is still alive and not divorced.

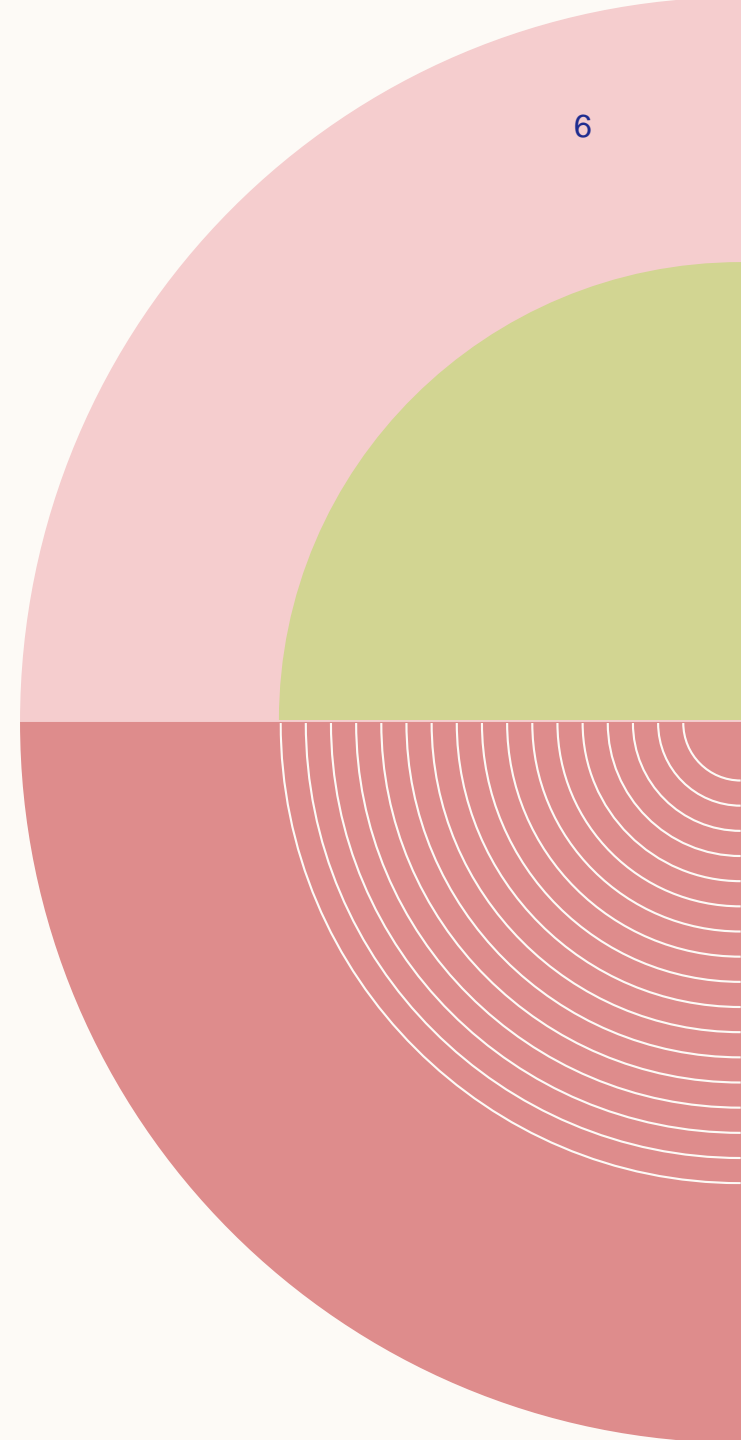
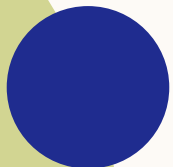


# EARLY EXAMPLE

Allen argued that he could not validly “marry” another person while already being married, and thus could not be guilty of bigamy.

The Court held that the word “marry” in the *Offences Against the Person Act* should be interpreted as meaning “to become legally married” or to “go through a ceremony of marriage”.

**To find otherwise would have produced an absurd result.**



# **APPLICATION TO FREEDOM OF INFORMATION**

**“FROM TIME TO TIME, WHEN INTERPRETING AND APPLYING LEGISLATION, ONE CAN END UP WITH A RESULT THAT WILL BE ABSURD. [...] [AN] EXAMPLE IS WHERE AN APPLICANT HAS SUBMITTED SOMETHING LIKE A LETTER TO A PUBLIC BODY.**

Ron Kruzeniski  
Information and Privacy Commissioner of Saskatchewan  
July 27, 2017





**USUALLY THE LETTER INCLUDES COMPLAINTS ABOUT SOMEONE ELSE WHICH IS TECHNICALLY THE OTHER PERSON'S PERSONAL INFORMATION, SO A PUBLIC BODY OFTEN WITHHOLDS THE LETTER AS PERSONAL INFORMATION OF A THIRD PARTY. THE PROBLEM IS THE APPLICANT PROVIDED THE INFORMATION TO THE PUBLIC BODY THUS, IS ALREADY AWARE OF IT.**

Ron Kruzeniski  
Information and Privacy Commissioner of Saskatchewan  
July 27, 2017



**IN THIS INSTANCE, THE PUBLIC BODY SHOULD  
RELEASE THE LETTER TO THE APPLICANT BECAUSE  
THE APPLICANT HAS PREVIOUSLY PROVIDED IT.**

**[THIS ALSO APPLIES WHERE] THE APPLICANT  
PROVIDED INFORMATION TO THE POLICE AND  
PARTICIPATED IN INTERVIEWS WITH THE POLICE.”**

Ron Kruzeniski  
Information and Privacy Commissioner of Saskatchewan  
July 27, 2017





# **REQUESTOR'S OWN INFORMATION**

# ORDER M-444

Metropolitan Toronto Police Services Board

January 17, 1995

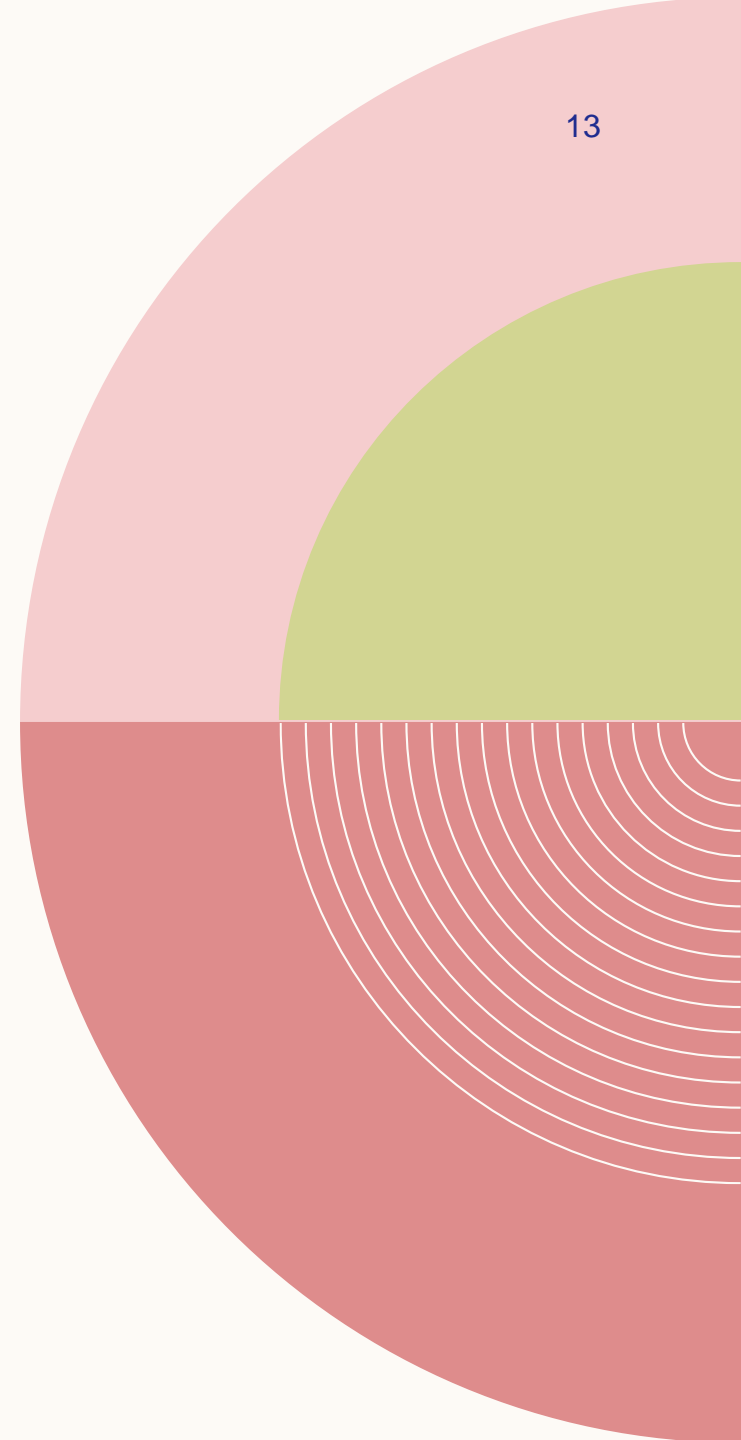
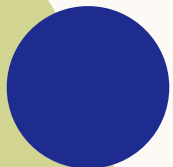
Adjudicator: John Higgins, Inquiry Officer

- Requestor asked for “all information in the Police file under his name”
- Police located three records relating to an interview the requestor had given in connection with a specified investigation.
- The Police relied on s.14(1) of MFIPPA (Personal Privacy) to deny access to the records.

# ORDER M-444

From the decision:

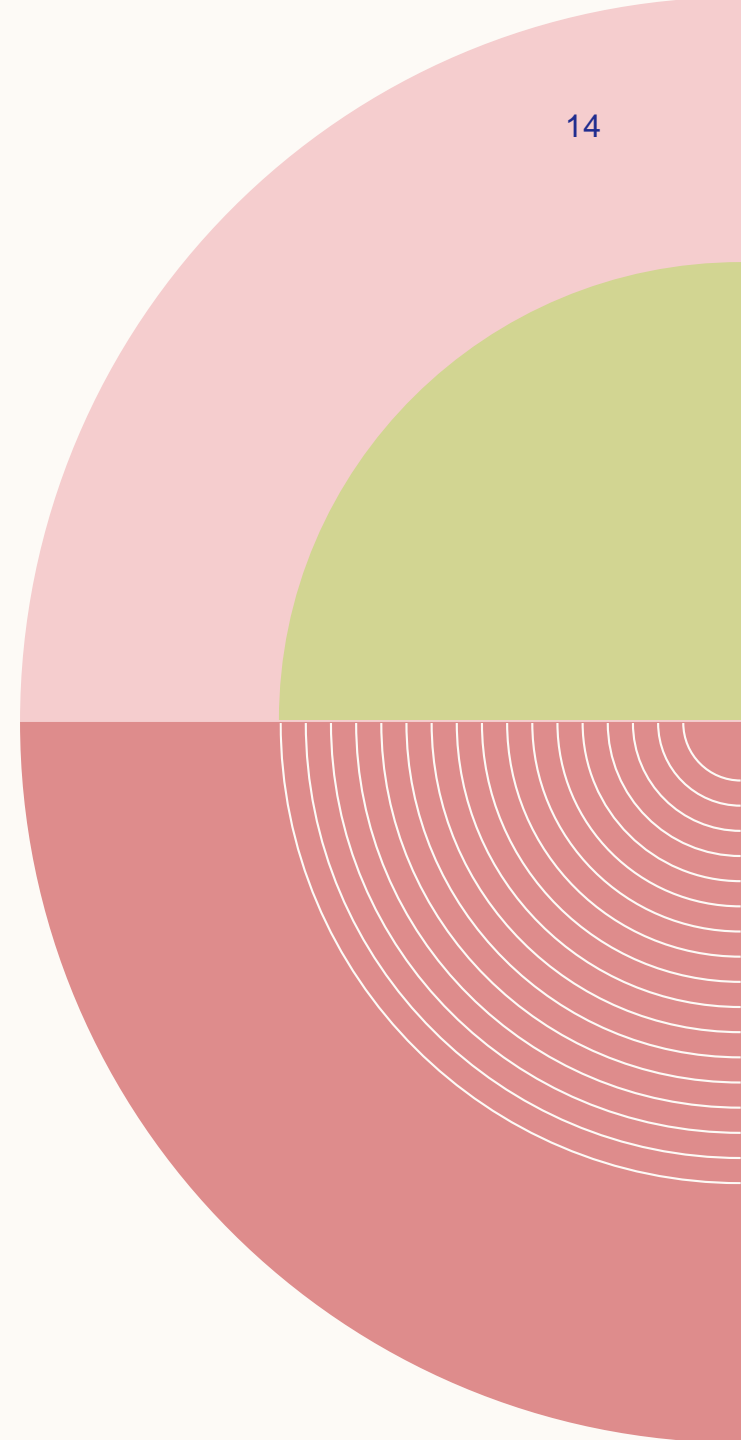
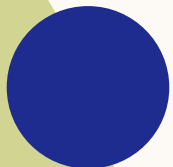
“In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.”



# ORDER M-444

“It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. [...] In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Section 14(1) of the Act is also not available to exempt this information from disclosure, since the records in which the information appears also contain the personal information of the appellant (Order M-352). Therefore, the withheld information in the records should be disclosed to the appellant.”





# **EXPANSION OF THE PRINCIPLE**

# ORDER MO-1868-R

**Durham Regional Police Service**

**November 19, 2004**

**Adjudicator: Tom Mitchinson, Assistant Commissioner**

- Requestor asked for “all driver and witness statements relating to a fatal motor vehicle accident”
- The Police identified 11 driver and witness statements as the records responsive to the request and denied access to them in their entirety, pursuant to section 8(2)(a) (law enforcement) and section 14(1) (invasion of privacy) of the Act.



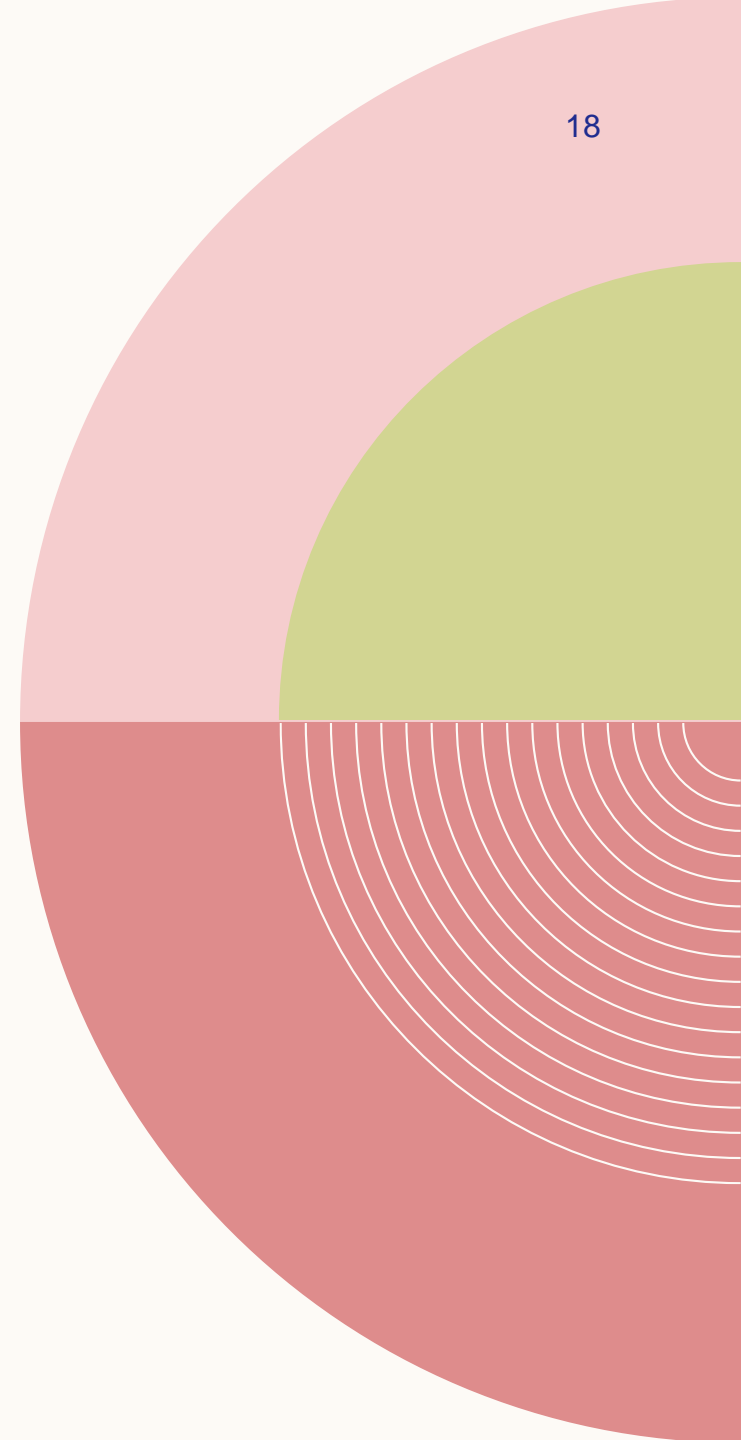
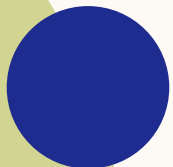
# ORDER MO-1868-R

- The Mediator notified eight of the individuals who had provided the witness or driver statements (the affected parties), in an attempt to seek consent to the disclosure of the records.
- Four of the eight notified affected parties provided consent to the disclosure of their personal information.
- The Police declined to release the statements for which consent had been obtained on the basis that the statements also contained the personal information of other individuals, including the person who died in the accident.

# ORDER MO-1868-R

From the decision:

“This office has applied the ‘absurd result’ principle in situations where the basis for a finding that information qualifies for exemption under section 14(1) would be absurd and inconsistent with the purpose of the exemption.”



# ORDER MO-1868-R

“The absurd result principle has been applied where, for example:

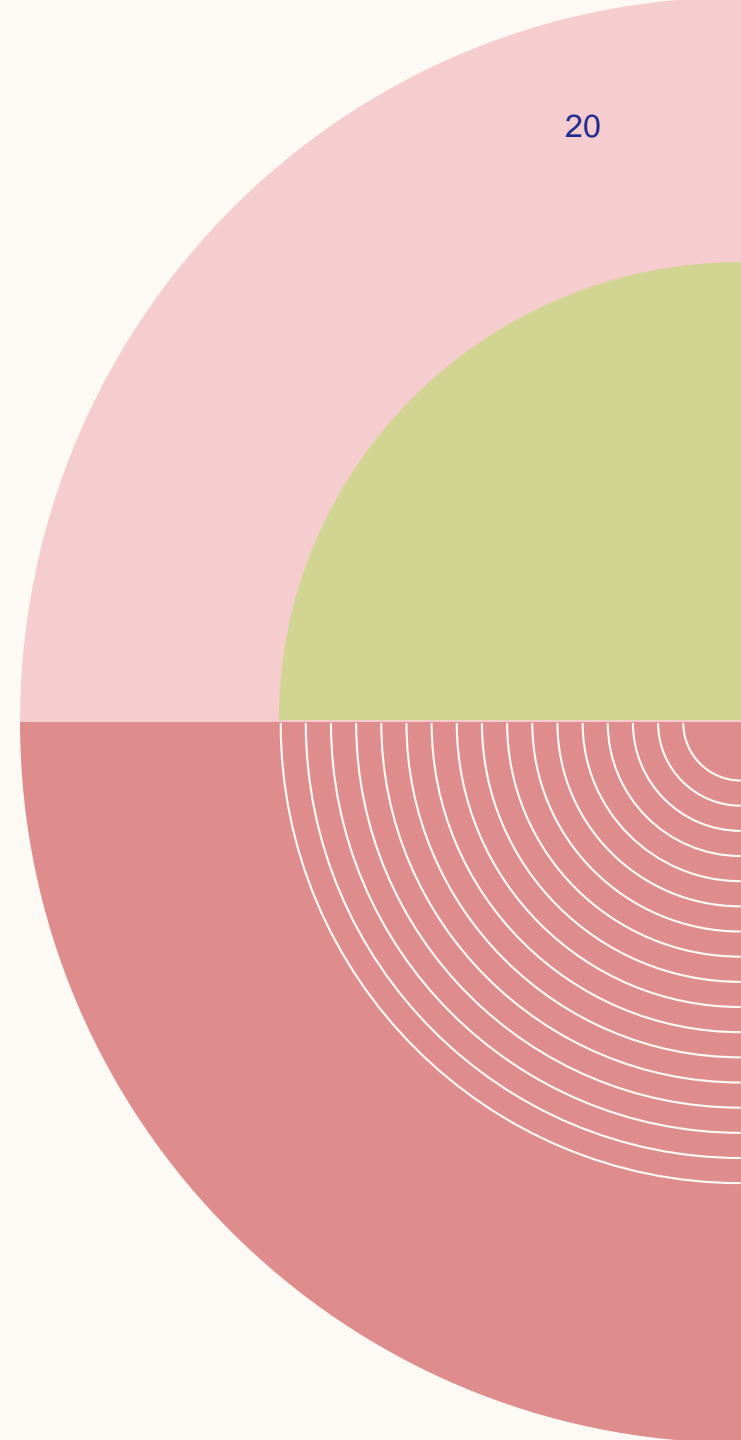
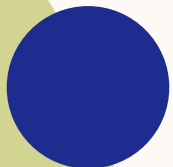
- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Orders P-1414]
- the information is clearly within the requester’s knowledge [Orders MO-1196, PO-1679, MO-1755]”

# ORDER MO-1868-R

“In Order MO-1323, Adjudicator Laurel Cropley elaborated on the rationale for the application of the absurd result principle as follows: ...

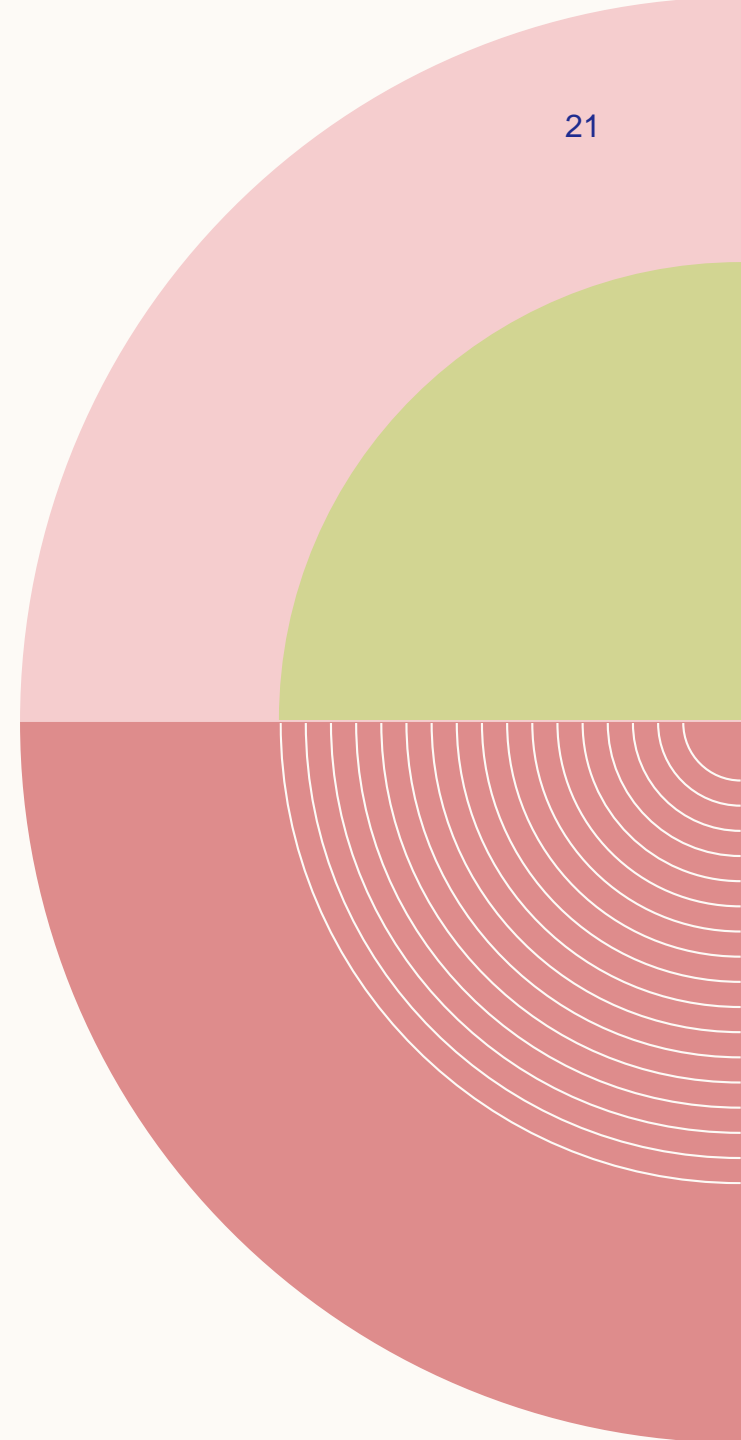
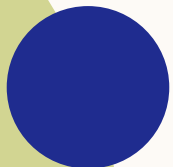
‘In my view, it is the “higher” right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester.

Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would clearly be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708)?



# ORDER MO-1868-R

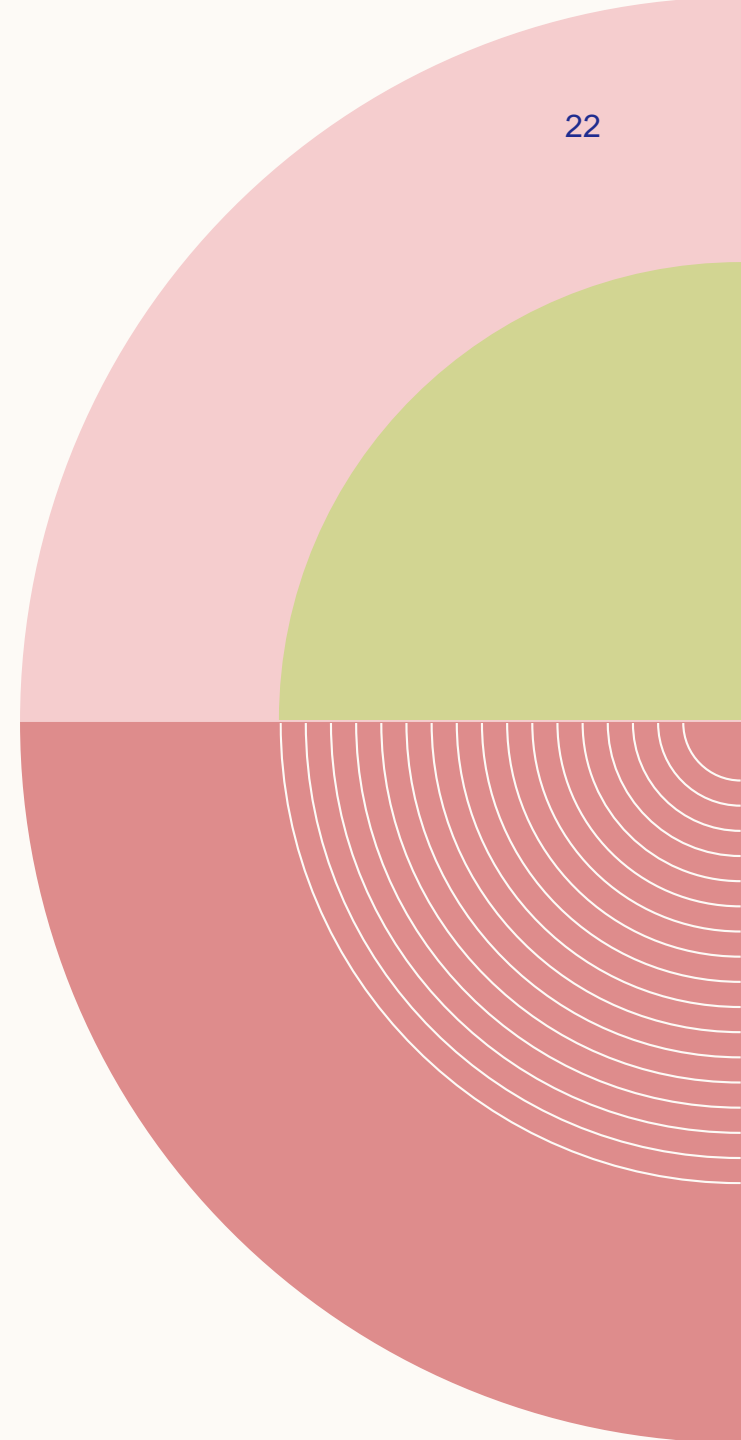
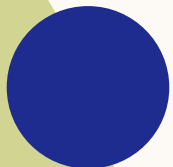
“To date, this office has not applied the absurd result principle to a situation where an individual has consented to disclose his or her witness statement which may contain personal information of individuals other than the witness and the requester. Having carefully considered the various interests at play in this type of situation, I have concluded that the principle should be extended to this type of situation.”



# ORDER MO-1868-R

“In my view, **if a witness consents to disclose his or her statement to a requester**, barring exceptional circumstances, that alone should be sufficient to trigger the absurd result principle. While I acknowledge that this situation differs from the case where the information in the statement originates with a requester, in my view, it is a difference without a meaningful distinction. From a practical perspective, in many cases a consenting witness would have a copy of his or her statement and could simply pass it on to a requester.”

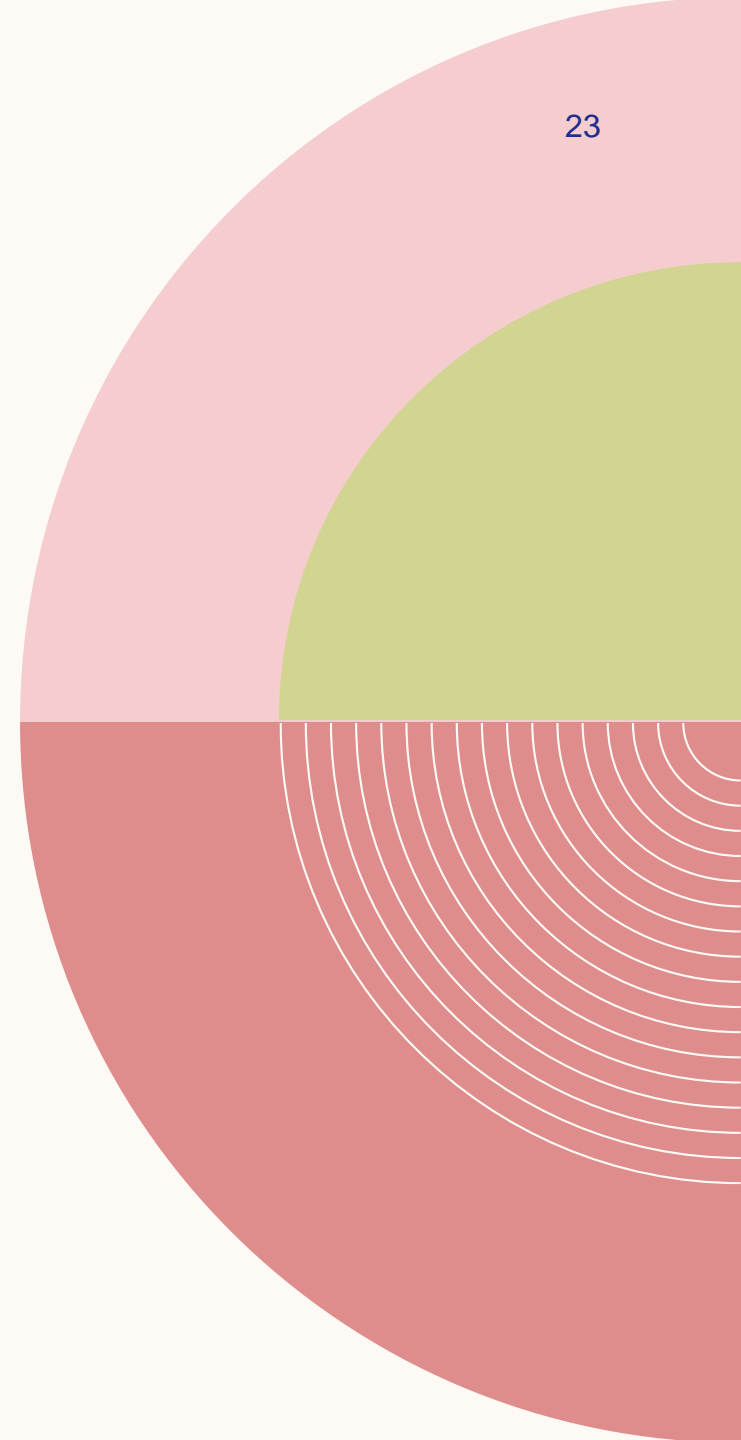
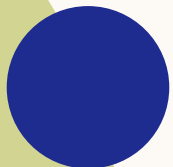
[emphasis added]



# ORDER MO-1868-R

“If no copy is in the possession of a witness, that individual could make a request under the Act for the record, which would be granted, and then simply provide it to the requester, without somehow raising any concerns regarding the privacy protection provisions in Part II of the Act. I can see no useful purpose in creating hurdles to a right of access that are not rooted in a legitimate concern for privacy protection.

“Accordingly, I find that applying the section 14(3)(b) presumption as the sole basis for denying access to witness statements where the witness has consented to disclosure would produce a manifestly absurd result.”





# **THE ABURD RESULT PRINCIPLE TODAY**



# LATEST RESTATEMENT

The Absurd Result Principle is set out below in this excerpt from Order MO-4209 (Barrie Police Services Board) decided June 9, 2022:

“An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.”

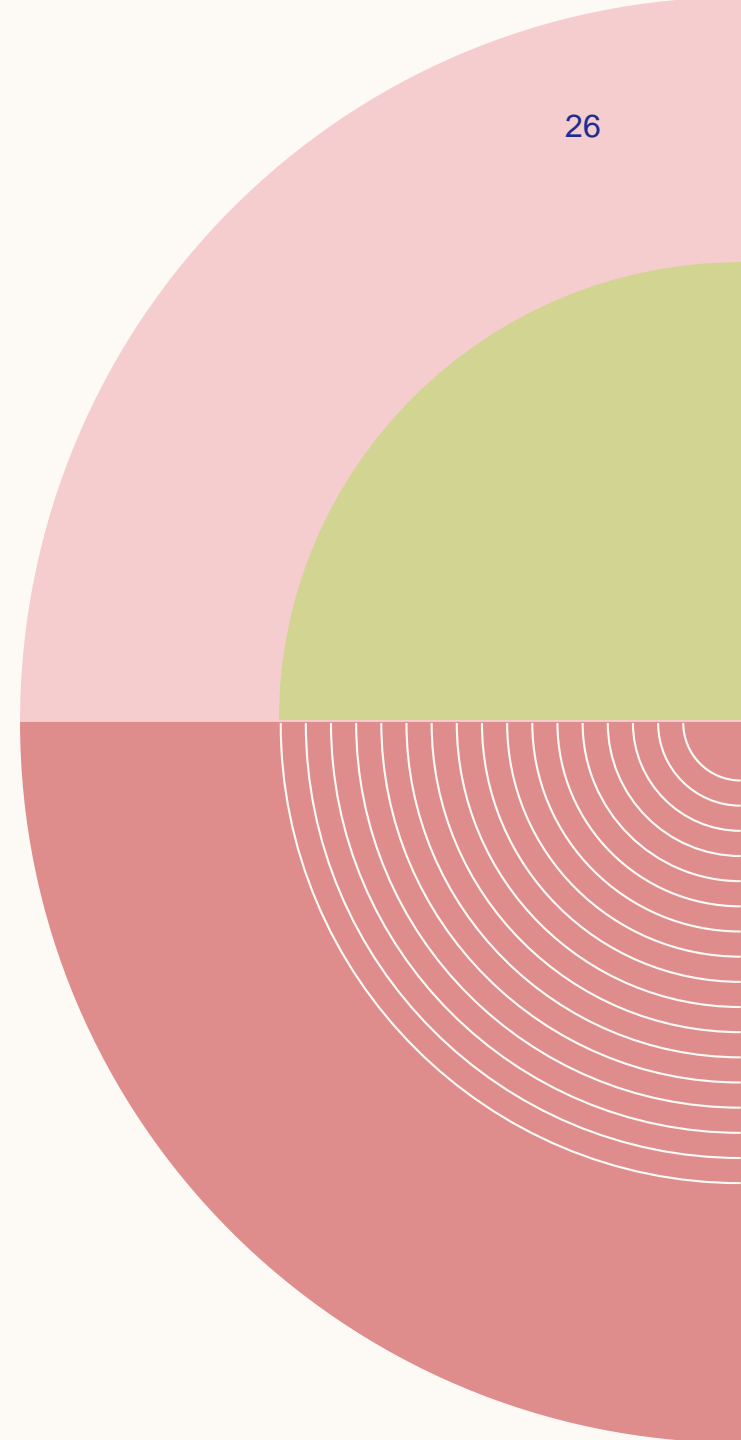
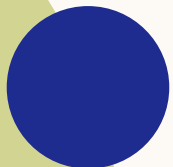
# LATEST RESTATEMENT

“For example, the ‘absurd result’ principle has been applied when:

- the requester sought access to their own witness statement,
- the requester was present when the information was provided to the institution, and
- the information was or is clearly within the requester’s knowledge.

**However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.”**

In the excerpt above, three decisions were cited in support of the “may not apply” statement: Orders MO-1323, PO-2622 and PO-2642.



# ORDER MO-1323

Sault Ste. Marie Police Services Board

Decided July 20, 2000

- The requestor's son had died (potentially of suicide)
- Record was cassette tape from deceased son's answering machine
- Tape did not contain requestor's personal information
- Requestor asserted her friend told her what was on the tape
- **Having had possession of the tape was not sufficient to invoke the "absurd result principle"; the requestor had not heard the tape, and it did not contain her personal information**

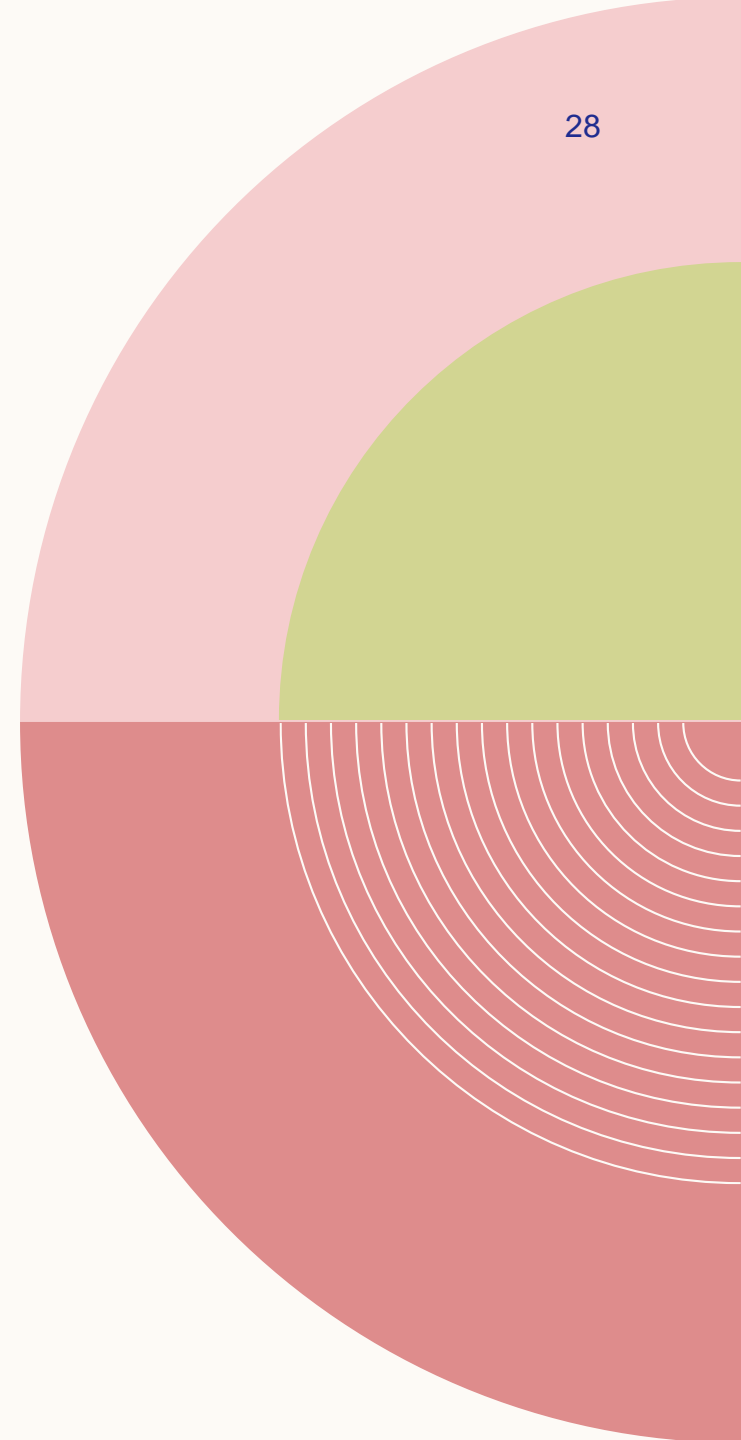
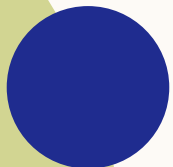
# ORDER PO-2622

Ministry of Community Safety and Correctional Services

Decided November 15, 2007

The records consisted of “the withheld portions of an occurrence summary and general occurrence reports, officers’ notebook entries, and the entire audiotape of the complainant’s interview.”

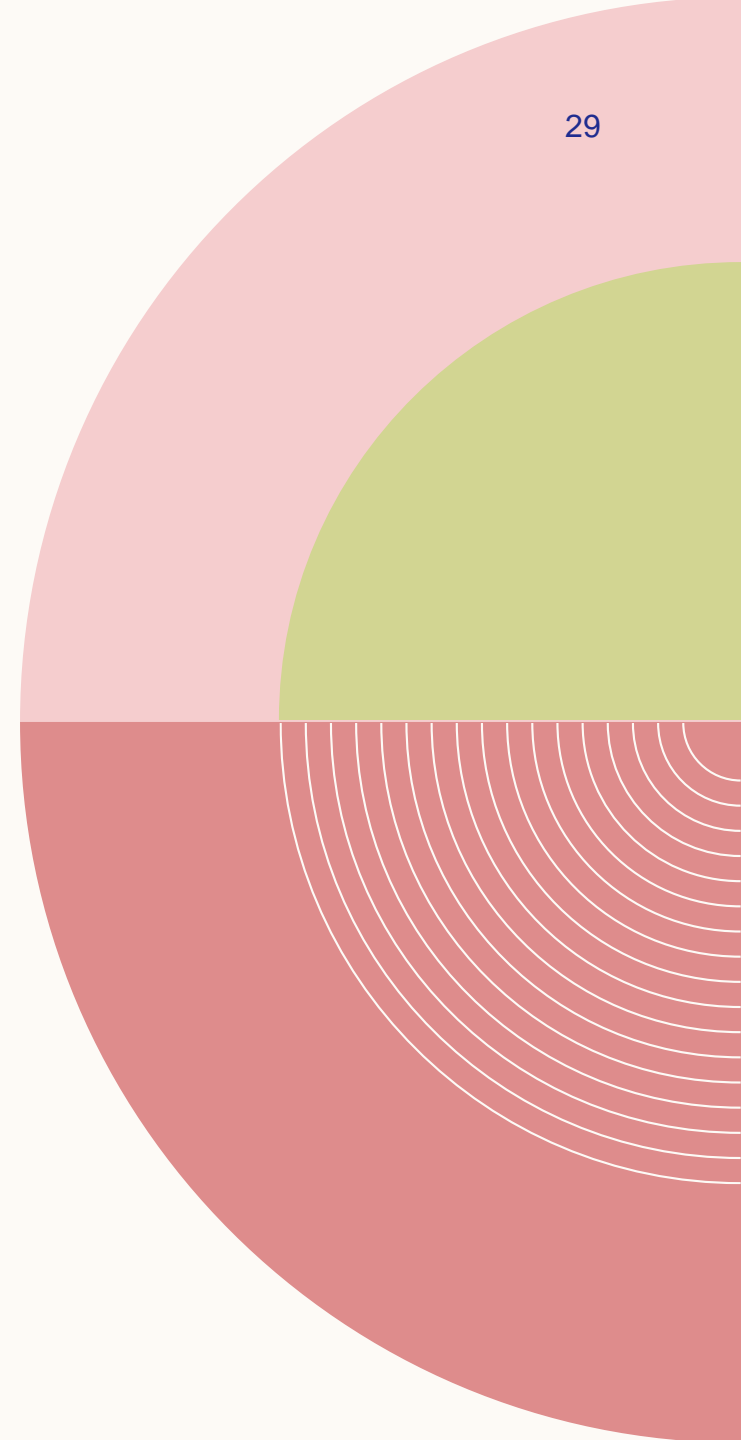
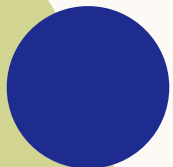
“...[T]he hardcopy records remaining at issue consist of the portions of the officers’ notes and the occurrence reports which directly record the statements made by the complainants and/or the contacts the police had with the complainants, or the names, addresses and identifiers of the complainants and other individuals.”



# ORDER PO-2622

From the Ministry's representations:

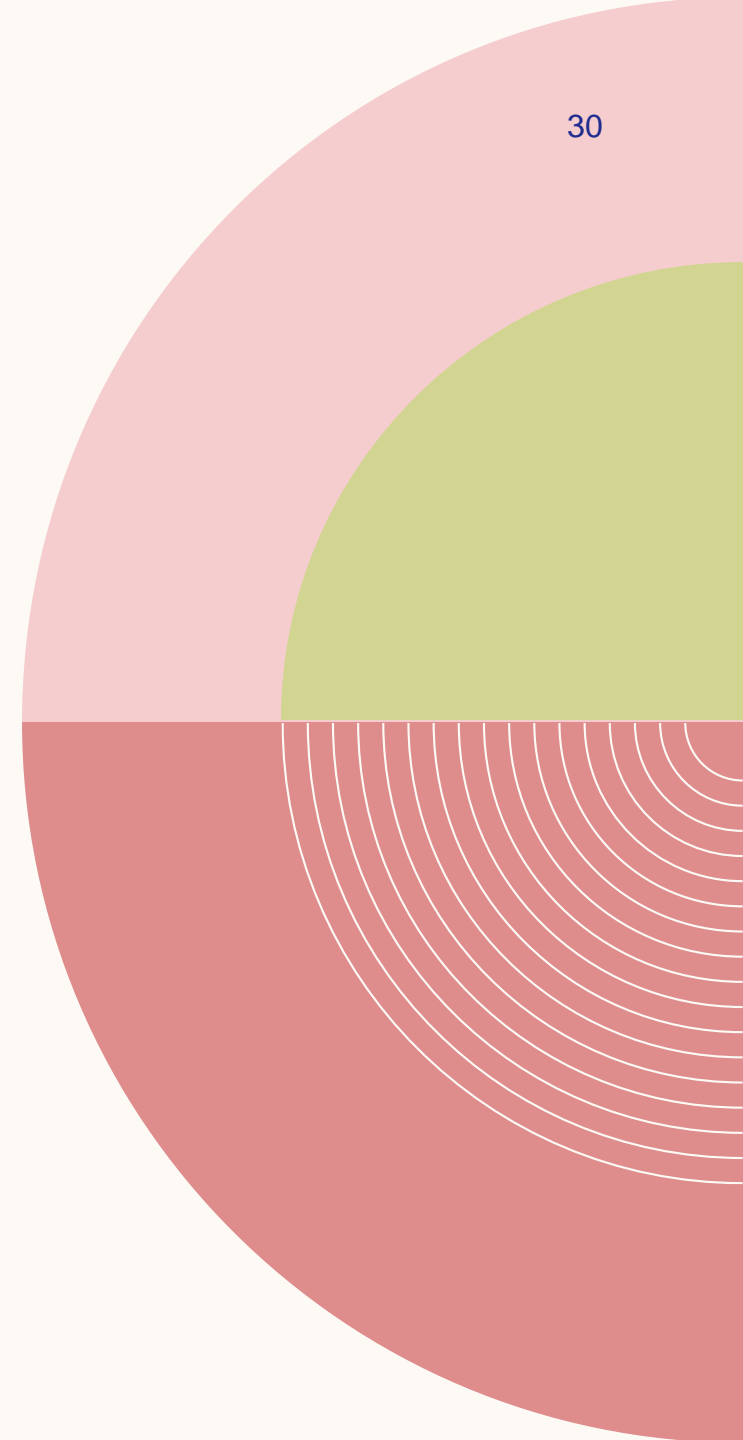
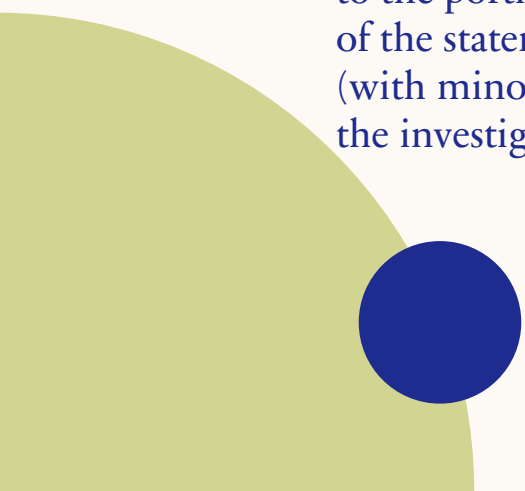
“The Ministry has carefully considered the application of the absurd result principle with respect to the non-disclosure of the personal information at issue. The Ministry submits that in the particular circumstances of the highly sensitive incident that has given rise to the appellant's request for access to information, disclosure of the responsive information would be inconsistent with the application of the discretionary exemption from disclosure contained in section 49(b).”



# ORDER PO-2622

From the decision:

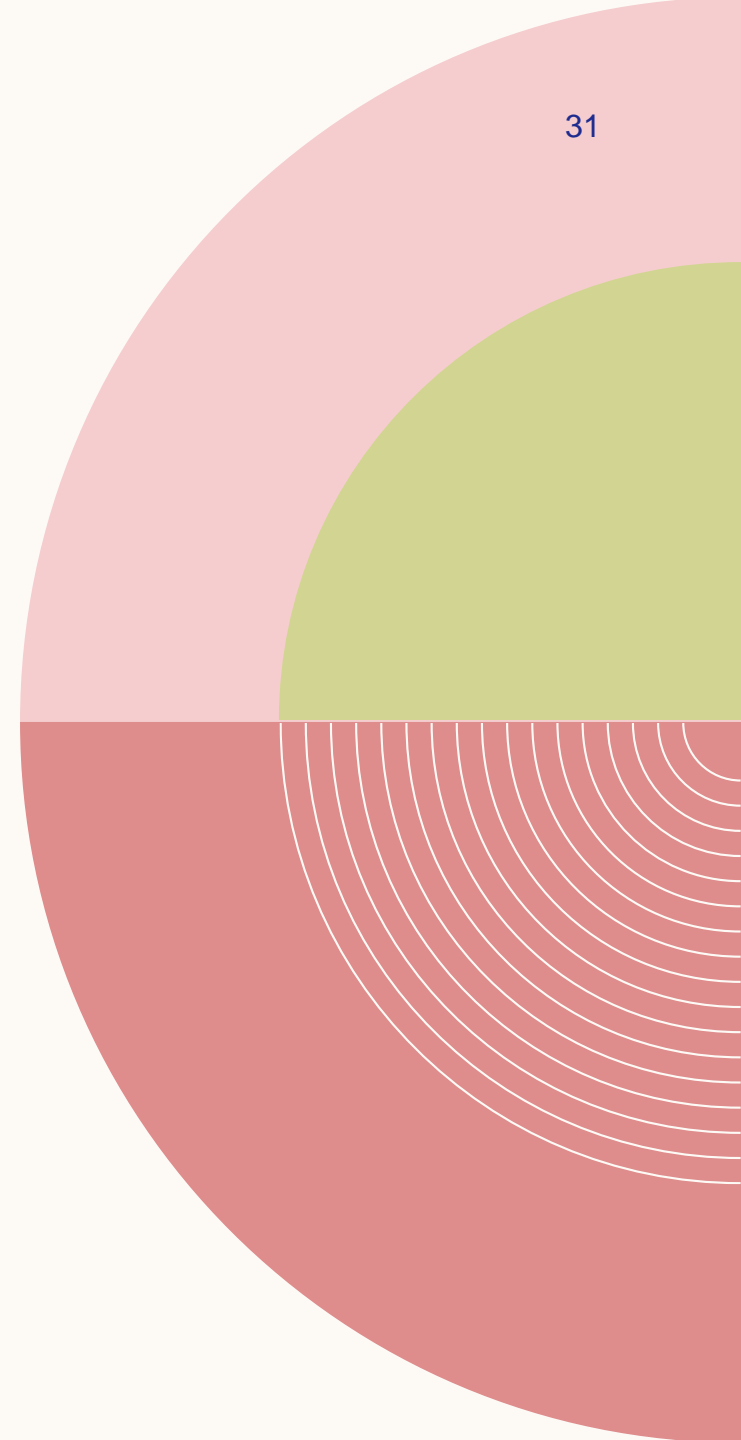
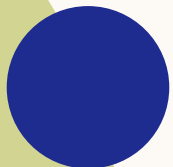
“I have carefully reviewed the circumstances of this appeal, including the specific portions of the records remaining at issue, the background to the creation of the records, and the nature of the investigation undertaken by the OPP. The appellant has been provided with access to the portions of the records which he provided to the OPP, the notes of the statements he made to the OPP in the course of the investigation (with minor severances), and the information relating to the results of the investigation, which addresses a highly sensitive matter.”



# ORDER PO-2622

“I find that, in these circumstances, **there is particular sensitivity inherent in the records remaining at issue in this appeal**, and that disclosure of the remaining information would not be consistent with the fundamental purpose of the Act identified by Senior Adjudicator Goodis (namely, the protection of privacy of individuals). Accordingly, the absurd result principle does not apply in this appeal to the information remaining at issue.”

- **Requestor was refused access to the audiotape of his own interview**
- **“Any reason will do?”**



# ORDER PO-2642

Queen's University

Decided February 14, 2008

- Requestor asked for records relating to the issuance of a Trespass Notice against him
- “appellant has engaged in persistent and harassing behaviour towards the affected parties”
- “none of the information at issue was supplied to the University by the appellant and ... he is not aware of the specific information contained in the records held by the University”
- Access to the requested records was denied



# **FINAL THOUGHTS**

# FINAL THOUGHTS

## KEEPING “ABSURDITY” IN MIND

- It’s about “requestor records”
- Did the institution have a reason for withholding the records? Or was it blindly following the “letter of the law”?
- It might not take a very strong reason to avoid application of the rule – but enough to ensure that the decision to withhold the records is not seen as “absurd”
- Often applied in the context of “institutional discretion”:
  - Consider the “Exercise of Discretion” discussion and “Relevant considerations” set out in Order PO-2498

## ARE S.49 / S.38 “ABSURD”?

- Bigamy case was a pretty clear example – this was a reasonable application of the Absurd Result Principle
- But it is a powerful tool for adjudicators to reinterpret/rewrite legislation
- Slippery slope!
- Does it make sense to apply the principle to FIPPA/MFIPPA?
- s.49 / s.38 grant institutions discretion
- Institutions may not always wish to provide reasons, especially in the law enforcement context
- Might even be a cost-saving measure – is that “absurd”?

# FINAL THOUGHTS

## AT IPCO

- The Absurd Result Principle is now well-accepted and is routinely addressed in cases where requestors are asking for records they themselves created, or statements they provided, or information they would already have reason to know
- Institutions must consider the application of the principle as a matter of course
- Will IPCO continue to expand the principle?
- Will IPCO apply it to other parts of FIPPA/MFIPPA?
- Requestors may try!

## AT DIVISIONAL COURT

- I could find no case affirming the Absurd Result Principle in an FOI appeal before the Divisional Court
- In *Ontario (Attorney General) v. Holly Big Canoe*, 80 OR (3d) 761, the Div. Ct. overturned an IPC finding that it was an “absurd result” not to disclose Crown records to a defendant who’d seen them
- In *James v. Ontario (IPC)*, 2019 ONSC 6995, the Div. Ct. agreed it did not apply
- In *K-Bro Linen Systems Inc. v. Ontario (IPC)*, 2022 ONSC 3572, the Div. Ct. refused to apply the “absurd result” principle (but different context—same records were being treated differently)

# THANK YOU

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